

**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.

## **Amending Acts 1990 to 1999 Repeal Bill 2015**

Introduced into the House of Representatives on 12 November 2015

Portfolio: Attorney-General

### **Background**

This bill repeals more than 870 amending and repeal Acts.

*The committee has no comment on this bill.*

## **Australian Institute of Aboriginal and Torres Strait Islander Studies Amendment Bill 2015**

Introduced into the House of Representatives on 12 November 2015

Portfolio: Education and Training

### **Background**

The bill amends the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (AIATSIS Act) to:

- amend the AIATSIS Council appointment process to ensure that an Indigenous majority is maintained; and
- make minor and technical amendments.

*The committee has no comment on this bill.*

## **Automotive Transformation Scheme Amendment (Securing the Automotive Component Industry) Bill 2015**

Introduced into the Senate on 10 November 2015

By: Senators Rice and Simms

### **Background**

The bill amends the *Automotive Transformation Scheme Act 2009* and the *Automotive Transformation Scheme Regulations 2010* to:

- apply new principles to redirect existing funding;;
- broaden the eligibility for the Automotive Transformation Scheme; and
- extend eligibility to new car makers who plan to make electric or alternative fuel vehicles.

*The committee has no comment on this bill.*

# Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

Introduced into the Senate on 12 November 2015

Portfolio: Attorney-General

## Background

The bill amends various legislation in relation to:

- receiving funds for legal assistance;
- extending control orders to children aged 14 or 15 years;
- control orders and tracking devices;
- issuing court for control orders;
- preventative detention orders;
- issuing authorities for preventative detention orders;
- application of amendments of the *Criminal Code*;
- monitoring of compliance with control orders;
- telecommunications interception;
- use of surveillance devices;
- a new offence of advocating genocide;
- security assessments;
- classification of publications;
- delayed notification search warrants;
- protecting national security information in control order proceedings;
- dealing with national security information in proceedings; and
- disclosures by taxation officers.

## Trespass on personal rights and liberties—extension of control orders

### Schedule 2, general comment

Currently Division 104 of Part 5.3 of the *Criminal Code* specifies that control orders can only be made in relation to persons 16 years of age or older. Where control orders are imposed on persons aged 16 or 17 the maximum duration is three months, rather than the 12 month period applicable for adults.

This schedule will allow control orders to be imposed on a person who is 14 years of age or older. The Schedule provides that the maximum duration for children aged 14–17 is three months.

The schedule requires the issuing court to take into account the ‘best interests’ of the person when considering whether to impose each of the proposed obligations and requirements sought by the police in relation to children aged 14–17 years.

The Schedule also requires the issuing court to appoint an ‘advocate’ of the child in relation to any control order matter (proposed section 104.28AA). The court appointed advocate must be a lawyer. The advocate is given a number of functions:

- to ensure, as far as practicable, that the child understands the information provided in the proceedings;
- to form an independent view of what is in the best interests of the child;
- to act in what the advocate believes to be the best interests of the child and make submissions reflecting any course of action required by such a view;
- to ensure that the views expressed by the child are fully put before an issuing court; and
- to minimise any distress to the child associated with the control order matters.

The advocate is not the child’s legal representative. The advocate is under no obligation to disclose to the court information the child communicates to him or her, but may do so if the advocate considers the disclosure to be in the best interests of the child (even if the child objects to such a disclosure of information).

The committee has previously noted that the control order regime established by Division 104 of Part 5.3 of the *Criminal Code* constitutes what is generally acknowledged to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction. That traditional approach involves a number of steps: investigation, arrest, charge, remand in custody or bail, and then sentence upon a conviction.

In contrast, control orders provide for restraint on personal liberty without there being any criminal conviction (or without even a charge being laid) on the basis of a court being satisfied on the balance of probabilities that the threshold requirements for the issue of the orders have been satisfied. Protections of individual liberty built into ordinary criminal processes are necessarily compromised (at least, as a matter of degree). The extraordinary nature of the control order regime is recognised in the current legislation by the inclusion of a sunset period, due to expire on 7 September 2018 (section 104.32 of the *Criminal Code*).

In view of these general scrutiny concerns, any proposal to extend the operation of the control order regime to children aged 14 and 15 must also be subject to close scrutiny.

In this regard, the committee notes that questions in relation to the efficacy and appropriateness of the existing control order regime have been raised by the Independent National Security Legislation Monitor (INSLM) (see chapter II of second annual report, 20 December 2012, pp 6–44). For example, the INSLM noted that:

The effectiveness, appropriateness and necessity of [control orders (COs)] is reduced by the ability of police to detect and prosecute at an early stage of offending. The UK CO regime (on which the Australian regime is modelled) was said to be necessary because of a lack of express terrorism offence provisions under UK criminal law at the time of introduction. This is now largely a historical problem for both the UK and Australia (INSLM, second annual report, p. 29).

In other words, the INSLM suggested that the appropriateness and necessity of control orders is reduced because it is now feasible a person may be charged with a terrorism offence comparatively early in the course of offending. That is, criminal responsibility arises in relation preparatory acts even where an offender has not decided precisely what he or she intends to do. In relation to this point, the INSLM noted that:

Experience with Australia’s terrorism offences shows that courts are prepared to hand down lengthy sentences of imprisonment to those convicted of preparatory terrorism offences even where “the enterprise was interrupted at a relatively early stage of its implementation” (INSLM, second annual report, p. 30).

In supporting a conclusion that the practical possibility of early prosecution for preparatory terrorism offences ‘attenuates the policy justification...for the non-criminal power to make’ control orders, the INSLM noted that:

...the kind and cogency of evidence in support of an application for a CO converges very closely to the kind and cogency of evidence to justify the laying of charges so as to commence a prosecution. In particular, the availability, peculiar to terrorism, of precursor or inchoate offences earlier in the development of violent intentions and actions than ordinary conspiracy offences, renders this convergence practically complete (INSLM, second annual report, pp 30–31).

In addition, the committee notes that the INSLM has also raised questions in relation to the efficacy of control orders as a preventative mechanism (INSLM, second annual report, pp 37–38) and that the INSLM is currently inquiring into ‘safeguards attaching to the control order regime’.

**Noting the questions that have been raised in relation to the efficacy and appropriateness of the control order regime, the committee seeks the Attorney-General’s response to these concerns and, in particular, why it is not appropriate to wait for the INSLM to complete his current inquiry into control order safeguards before extending the regime to 14 and 15 year olds.**

*Pending the Attorney-General’s reply, the committee draws Senators’ attention to the schedule, 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.*

**Trespass on personal rights and liberties—control orders: service of documents on a parent or guardian  
Schedule 2, items 11, 13 and 14**

These items insert notice requirements (requiring that a specified document be served) in relation to control order decisions made in relation to a child aged 14–17 years. The document must be served on the child’s court appointed advocate and ‘reasonable steps’ must be taken to serve the document to at least one parent or guardian of the child. The explanatory memorandum characterises the service requirement on a parent or guardian as a ‘slightly lower’ requirement that ‘reflects the fact that there will be instances where it is not possible to identify and/or locate a parent or guardian’ (at p. 45).

**While the committee notes this explanation, the committee seeks further information from the Attorney-General as to the options considered to deal with this potential problem with a view to ensuring that documents are served on a parent or guardian in all but the most exceptional circumstances. For example, the committee is interested whether consideration was given to including a provision in the bill that would have the effect of requiring that *all* reasonable steps are taken to notify a parent or guardian.**

*Pending the Attorney-General'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—control orders:  
independence of court appointed advocate  
Schedule 2, item 46, proposed subsection 104.28AA(1)**

Under proposed subsection 104.28AA(1) the issuing court must make an order appointing a lawyer to be the court appointed advocate in relation to a child aged 14 to 17 years as soon as practicable after it has made an interim control order. Paragraph 104.28AA(1)(b) provides that the court may make other orders as appropriate to secure independent advocacy for the person in relation to the control order matter.

The independence of the court appointed advocate is considered to be an important safeguard in the application of the control order regime to children. However, the legislation is silent as to how that independence is to be achieved.

The explanatory memorandum does not explain what sort of orders may be made pursuant to paragraph 104.28AA(1)(b) nor how, in practical terms, independence is to be assured. The only requirement in the legislation is that the advocate be a lawyer, but the advocate once appointed is not the child's legal representative so it may be unclear what professional obligations, if any, are applicable in this context.

**The committee therefore seeks the Attorney-General's advice as to:**

- **how the independence of the court appointed advocate is to be secured in practice;**

- **more detail about the intended professional obligations applying to advocates; and**
- **the justification for not providing more guidance about the qualifications of advocates and mechanisms designed to ensure their independence in the legislation.**

*Pending the Attorney-General'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.*

**Trespass on personal rights and liberties—control orders: disclosure of information provided to a court appointed advocate**  
**Schedule 2, item 46, proposed subsections 104.28AA(4)–(6)**

Proposed subsection 104.28AA(4) provides that a court appointed advocate is under no obligation to disclose information given to them by the child. However, proposed subsections 104.28AA(5) and (6) provide that the advocate may disclose such information to the issuing court even if the disclosure is made against the wishes of the child. Disclosure can only be made 'if the advocate considers the disclosure to be in the best interests of the person' [i.e. the child]. However, in practice the advocate will have a large area of discretion in making this judgment.

The explanatory memorandum states that the lack of any obligation to disclose information that the child communicates to the advocate is 'designed to facilitate a relationship of trust and open communication' (at p. 55). Given this purpose, the discretion given to the advocate to disclose information may inhibit a relationship of trust developing. The explanatory memorandum suggests that authority to disclose information is required as it may be in the best interest of the child, for example because the child is in danger (p. 55).

However, it appears that this approach undermines what is otherwise intended to be a mechanism designed to protect the interests of children. The provision for an advocate to disclose information could even place children at a disadvantage relative to the provisions for adults. This is particularly the case given the proposed extension of the control order regime to younger children than is currently allowed. In an individual case it is possible that a relationship of trust could develop between the child and a court appointed advocate and that information divulged in that context is later disclosed even though the

child reasonably believes disclosure would not be in their best interests. Such a possibility does not arise in the application of the scheme to adults. Whether or not an advocate will be well placed to make accurate judgments about the child's best interest in relation to disclosure of information is likely to vary from case to case.

**The committee therefore seeks a more detailed justification from the Attorney-General for the proposed approach, including specific examples of situations in which it is envisaged that a court appointed advocate would be likely to disclose information against the wishes of the child. The committee also seeks advice as to whether consideration has been given to including:**

- **a requirement that clear advice be given to the child that information given to their advocate may be disclosed to the issuing court against their wishes; and**
- **a default requirement to at least consult with a parent, guardian and/or lawyer (if such a person is available) before information is disclosed against the wishes of the child unless exceptional circumstances exist.**

*Pending the Attorney-General'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.*

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

### **Schedule 5**

Schedule 5 contains amendments to the Preventative Detention Order (PDO) regime set out in Division 105 of the *Criminal Code*.

Proposed replacement subsection 105.4(5) introduces a new definition of 'imminent terrorist act'. Under current subsection 105.4(5), in order to obtain a PDO to prevent a terrorist act, a terrorist act must be one that is 'imminent' and must be one that is 'expected to occur, in any event, at some time in the next 14 days'. The new definition of 'imminent terrorist act' is a terrorist act that 'is capable of being carried out, and could occur, within the next 14 days'. The new approach focuses on the question of capability and possibility rather than requiring any expectation that an event will occur in within the specified

timeframe. In this way, the circumstances which may enable a PDO to be made are expanded.

The explanatory memorandum states that this approach is justified on the basis of the evolving terrorist threat. It is stated that ‘radicalisation occurs with increasing speed and terrorists may seek to commit terrorist acts quickly to evade the attention of law enforcement’. It is also noted that law enforcement ‘may be aware that a person has the intention, motivation and necessary tools to commit a terrorist act’, but lacks evidence about the issue of timing. Further, the explanation suggests that the planned timing of an attack may be changed in response to surveillance being detected (see p. 61).

Although the explanatory memorandum thus justifies the expansion of circumstances in which a PDO may be sought, it may be noted that a significant change is being made to the basis for preventative detention: from an expectation that an attack will occur to a conclusion about the capability for an attack to be carried out.

The statement of compatibility rejects the notion that this change diminishes the right to freedom from arbitrary detention and arrest. The argument for this conclusion (at p. 22) is that:

The right to freedom from arbitrary detention is safeguarded by the existing provisions in the PDO regime. These provisions continue to operate in conjunction with the amendments contained in Schedule 5. In particular, the basis for applying for a PDO and the proportionality requirements contained in subsection 105.4(4) mitigates the inappropriate imposition of a PDO. The application for a PDO requires that an AFP member must suspect on reasonable grounds that the suspect will engage in a terrorist act, possess a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act or has done an act in preparation for, or planning, a terrorist act (subparagraphs 105.4(4)(a)(i)-(iii)). The issuing authority must similarly be satisfied that there are “reasonable grounds to suspect” the same matters (subparagraphs 105.4(4)(b)(i)-(iii)).

Having satisfied this threshold, the AFP member and issuing authority must also satisfy the proportionality tests contained in paragraphs 105.4(4)(c) and 105.4(4)(d). That is, they must demonstrate that a PDO will “substantially assist” in preventing an imminent terrorist act occurring (paragraph 105.4(4)(c)) and that detention for the period specified is “reasonably necessary” for the purpose of preventing the imminent terrorist act (paragraph 105.4(4)(d)). This highlights the clearly preventative nature of the PDO power and creates a high threshold for its imposition. The combined operation of

these criteria require that law enforcement agencies must make out a case for why the limitations imposed by the PDO are justified in each circumstance.

Although it may be accepted that existing elements of the PDO regime will continue to apply, and the committee notes the justification in the explanatory memorandum, the focus on the capability to mount a terrorist attack constitutes a broadening of the power to limit a person's liberty. **In this context the committee therefore:**

- **seeks the Attorney-General's more detailed explanation as to why the power to issue a PDO should be broadened in this way; and**
- **requests the Attorney-General's advice as to any alternative powers at the disposal of law enforcement to respond to knowledge that a person has the necessary tools to commit a terrorist act in circumstances where no evidence is available about when an attack may occur.**

*Pending the Attorney-General's reply, the committee draws Senators' attention to the schedule, 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.*

### **Trespass on personal rights and liberties—new 'monitoring warrant' regime**

#### **Schedule 8, general comment and proposed sections 3ZZKF and 3ZZLC**

Schedule 8 seeks to create a 'monitoring warrant' regime in a new Part IAAB of the *Crimes Act 1914* to confer powers on law enforcement agencies to monitor compliance with control orders. Unlike the existing search warrant regime, the new regime will not require the issuing authority to be satisfied that an offence has already occurred or is going to be committed. Rather, this regime will be targeted at monitoring compliance with the conditions of a control order for the purpose of preventing a person from engaging in terrorist act planning or preparatory acts.

The powers conferred by this schedule relate to:

- entering premises by consent or under a warrant (proposed section 3ZZKA);

- general monitoring powers in relation to premises, including the power to search premises and any thing on the premises, the power to search for and record fingerprints, the power to make any still or moving image or any recording of the premises or any thing on the premises, and the power to take extracts from, or make copies of, documents (proposed section 3ZZKB);
- operating and securing electronic equipment (proposed sections 3ZZKC and 3ZZKD);
- asking questions and seeking production of documents (proposed section 3ZZKE);
- seizing things found during the exercise of monitoring powers on a premises (proposed section 3ZZKF);
- the availability of assistance and use of force in executing a warrant (proposed sections 3ZZKG and 3ZZLD);
- searching a person by consent or under a warrant (proposed section 3ZZLA);
- monitoring powers in relation to persons, including the power to search things found in the possession of person, the power to search any recently used conveyance, and the power to record fingerprints and take samples from things (proposed section 3ZZLB); and
- seizing things located during the search of a person or a recently used conveyance (proposed section 3ZZLC).

The committee consistently expects that the expansion of circumstances in which coercive and intrusive powers can be utilised should be comprehensively justified.

As an example, proposed sections 3ZZKF and 3ZZLC will provide automatic authority to a constable to seize evidential material located during a search authorised under a monitoring warrant.

However, in its general consideration of monitoring warrant schemes, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) indicates (at p. 87) that these schemes typically confer power on an authorised officer to only secure evidence pending an application for a search/seizure warrant where he or she ‘has reasonable grounds to believe that evidence of an offence would be lost,

destroyed or tampered with by the time a search warrant is obtained' (p. 88). This is the approach taken in Part IAA of the Crimes Act.

In this respect the powers conferred by the monitoring powers in the bill appear to be in potential conflict with the Guide. The explanatory memorandum merely repeats the effect of the provision, without providing a justification for the proposed approach. **The committee therefore seeks the Attorney-General's justification for the approach taken and seeks advice as to whether the principles in the Guide have been considered.**

**The committee also seeks advice as to whether each of the monitoring powers under the proposed 'monitoring warrant' regime established by this schedule are consistent with the principles in the Guide and the approach taken in Part IAA of the *Crimes Act 1914* (and if they are not, the rationale for taking an alternative approach in this instance).**

*Pending the Attorney-General'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—use of things seized, information obtained or a document produced where an interim control order is subsequently declared void**

**Schedule 8, item 1, proposed section 3ZZTC of the *Crimes Act 1914***

**Schedule 9, item 53, proposed section 299 of the *Telecommunications (Interception and Access) Act 1979***

**Schedule 10, item 39, proposed section 65B of the *Surveillance Devices Act 2004***

Proposed section 3ZZTC of the *Crimes Act 1914* (as outlined in item 1 of schedule 8), specifies certain purposes for which things seized, information obtained or a document produced pursuant to a monitoring warrant can be communicated or adduced as evidence where a court has subsequently declared the interim control order to be void. The explanatory memorandum (at p. 81) describes the effect of the provision, but does not expand on its rationale or circumstances in which it might apply.

The same issue arises in relation to information obtained under the provisions of *Telecommunications (Interception and Access) Act 1979* (see Schedule 9,

item 53, proposed section 299) and to information obtained under the provisions of the *Surveillance Devices Act 2004* (see Schedule 10, item 39, proposed section 65B) where the control order is subsequently declared to be void.

The statement of compatibility (at p. 34) justifies the approach in these proposed provisions as follows:

The amendments [allow] lawfully intercepted information to be dealt with in relation to state and territory PDOs, and allow lawfully intercepted information obtained under a warrant relating to a control order that is declared void to be used, communicated, recorded or given in evidence in a proceeding when it is necessary to assist in preventing or reducing the risk of the commission of a terrorist act, serious harm to a person, serious damage to property or a purpose connected with a Commonwealth, state or territory PDO regime. This will assist national security and law enforcement agencies to identify terrorism risks early, investigate potential terrorist threats, and thereby prevent an act of terrorism from occurring. Similarly, it will enable agencies to act to prevent individuals from involvement in hostile activity overseas.

The use of information obtained in these circumstances may have serious implications for personal rights and liberties. **As such, the committee seeks the Attorney-General's advice as to whether similar provisions appear in other Commonwealth legislation and requests a more detailed justification for the use of material obtained in circumstances in which the relevant control order has been declared void.**

*Pending the Attorney-General'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—extension of telecommunications interception warrants and surveillance device warrants to control order regime**  
**Schedules 9 and 10, general comment**

The amendments in schedules 9 and 10 will allow agencies to obtain telecommunications interception warrants and surveillance device warrants to monitor a person who is subject to a control order so as to detect breaches of the order. The information obtained will be able to be used in any proceedings

associated with the control order. The power to use telecommunications interception and surveillance devices will remain a covert power.

More specifically, the amendments will:

- introduce new ‘deferred reporting’ arrangements which would permit the chief officer of an agency to defer public reporting of the use of a warrant in certain circumstances (schedule 9, item 44 and schedule 10, items 35 and 36);
- permit the issue of ‘B party’ warrants (these warrants would target the telecommunications service of a person who ‘is likely to communicate with’ the person who is actually subject to the control order) (schedule 9, item 19, proposed subparagraph 46(4)(d)(ii)); and
- extend the circumstances in which agencies may use specified surveillance devices without a warrant (schedule 10, items 19–25 amend sections 37–40 of the *Surveillance Devices Act 2004* relating to ‘use of optical surveillance devices without warrant’, ‘use of surveillance devices without warrant for listening to or recording words’, ‘use and retrieval of tracking devices without warrant’, and ‘record of tracking device authorisations to be kept’).

**Noting the significant impact that these intrusive powers may have on personal rights and liberties, the committee draws this extension of the telecommunications interception warrant and surveillance device warrant regimes to the attention of Senators and leaves the general question of whether the proposed approach 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.*

### **Trespass on personal rights and liberties—authorisation of intrusive powers**

#### **Schedules 9, 10 and 14, general comment**

As noted above, schedules 9 and 10 seek to extend telecommunications interception warrants and surveillance device warrants to the control order regime. The statement of compatibility (at p. 28) states that:

Judicial oversight prior to the use of a privacy-intrusive surveillance device requires law enforcement agencies to demonstrate the necessity and proportionality of surveillance to an independent party. This is an important safeguard.

The committee agrees that judicial oversight of intrusive powers is an important safeguard in ensuring that these powers are appropriately utilised. In this regard, the committee's consistent preference is that the power to issue warrants authorising coercive or intrusive powers should only be conferred upon judicial officers (rather than non-judicial officers such as members of the AAT). The committee notes that current provisions allow 'nominated AAT members' to issue warrants under the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*.

This issue also applies to schedule 14, which seeks to clarify the threshold requirements for the issue of a delayed notification search warrant ('eligible issuing officers' for the purposes of issuing delayed notification warrants are a judge of the Federal Court of Australia or of a state or territory Supreme Court or a nominated AAT member).

The committee generally does not regard factors such as 'administrative convenience' as being sufficient justification for conferring such power on non-judicial officers.

**Noting the legal complexity of the relevant provisions, and given that this bill seeks to extend the circumstances in which telecommunications interception warrants and surveillance device warrants can be issued (schedules 9 and 10) and change the threshold requirements for the issue of a delayed notification search warrant (schedule 14), the committee seeks the Attorney-General's advice as to why the categories of eligible issuing officers should not limited to persons who hold judicial office.**

*Pending the Attorney-General's reply, 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.*

## **Retrospective validation Schedule 9, item 54**

This amendment seeks to retrospectively validate dealing with information relating to preventative detention orders in certain circumstances. The explanatory memorandum explains this item as follows (p. 94):

This amendment is to ensure that an officer or staff member of a state or territory agency who previously communicated, made use of, or made a record of lawfully intercepted information for a purpose subsequently covered by the amended definition to “permitted purpose” (see item 3) would be taken not to have contravened the prohibition on communicating lawfully intercepted information under section 63 of the Act.

This validation provision is to ensure that any officers who have in good faith used or communicated lawfully intercepted information for a purpose connected with state and territory PDO legislation are not liable for a breach of the Act. This provision is consistent with item 14 of the *Telecommunications (Interception and Access) Amendment Act 2010*, which similarly validated past dealing in lawfully intercepted information in relation to the Commonwealth PDO regime.

While the explanatory memorandum refers to a requirement that information had been used or communicated in good faith, to the extent that the provision itself only requires that it would now be authorised by the extended definition of a ‘permitted purpose’ this does not specifically incorporate an element of dealing with the information in good faith. In addition, if the use of the information was not previously permitted then it seems appropriate that the reasons for retrospectively authorising the use of such information need to be explained in some detail. The committee consistently expects that the validation of the use of powers which may interfere with a person’s privacy should be comprehensively justified. **The committee therefore requests a more detailed explanation from the Attorney-General in relation to the rationale for, and necessity of, this provision.**

*Pending the Attorney-General’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.*

## **Trespass on personal rights and liberties—freedom of expression Schedule 11**

This schedule seeks to create a new offence of publicly advocating genocide. The explanatory memorandum (at p. 108) states that:

The offence applies to advocacy of genocide of people who are outside Australia or the genocide of national, ethnic, racial or religious groups within Australia. It only applies to advocacy done publicly.

Proposed new subsection 80.2D(3) defines ‘advocate’ for the purpose of the offence as counselling, promoting, encouraging or urging the commission of a genocide offence. These expressions will have their ordinary meaning.

The explanatory memorandum (at p. 109) suggests that it is important that the relevant expressions are interpreted broadly to ensure that a person who advocates genocide does not escape punishment by relying on a narrow construction of one of the terms. Some examples of the ordinary meaning of each of the expressions are included in the explanatory memorandum (at p. 109):

...to “counsel” the doing of an act (when used as a verb) is to urge the doing or adoption of the action or to recommend doing the action; to “encourage” means to inspire or stimulate by assistance of approval; to “promote” means to advance, further or launch; and “urge” covers pressing by persuasion or recommendation, insisting on, pushing along and exerting a driving or impelling force.

The explanatory memorandum (at p. 110) also states that these questions will ultimately be determined by a judicial officer:

Whether specific conduct, such as making or commenting on a particular post on the internet or the expression of support for committing genocide, is captured by the offence will depend on all the facts and circumstances. Whether a person has actually “advocated” the commission of a genocide offence will ultimately be a consideration for judicial authority based on all the facts and circumstances of the case.

While this may be accepted, the breadth of the definition may amount to an undue trespass on personal rights and liberties as it is not sufficiently clear what the law prohibits. This is particularly important given the substantial custodial penalty (7 years imprisonment). It is also possible that the provision may have a chilling effect on the exercise of the right of free expression.

**However, in light of the explanation for the provision, the committee leaves the general question of whether it is appropriate to broadly define ‘advocate’ for the purpose of the offence of advocating genocide to the Senate as a whole.**

The explanatory memorandum (at p. 108) notes that ‘publicly’ is not defined in the bill although it would include, but not be limited to:

- causing words, sounds, images of writing to be communicated to the public, a section of the public, or a member of members of the public;
- conduct undertaken in a public place; or
- conduct undertaken in the sight or hearing of people who are in a public place.

While, as noted above, a definition of ‘advocate’ is included in proposed new subsection 80.2D(3), there is no guidance as to the meaning of ‘publicly’ on the face of the legislation. **The committee therefore seeks the Attorney-General’s advice as to:**

- **whether it would be possible to include some guidance in the legislation itself in relation to the meaning of ‘publicly’ for the purpose of this proposed offence; and**
- **specific examples of the conduct intended to be covered by the ‘public’ component of the offence.**

The committee also notes that there are already a number of offences in the *Criminal Code* which may already cover conduct intended to be captured by this proposed offence. For example, section 80.2A (urging violence against groups) and section 80.2B (urging violence against members of groups) (these groups are distinguished by race, religion, nationality, national or ethnic origin or political opinion). **The committee therefore seeks the Attorney-General’s advice as to what conduct is intended to be captured by this proposed offence that is not already captured by current offences.**

*Pending the Attorney-General’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.*

## **Trespass on personal rights and liberties—requirements for obtaining a delayed notification search warrant**

### **Schedule 14, general comment**

The delayed notification search warrant scheme was established by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*. The explanatory memorandum to that Act outlined the rationale for the scheme as follows:

Under current Commonwealth search warrant provisions in the Crimes Act, the occupier of searched premises or their representative must be given a copy of the warrant if they are present (section 3H), which ensures that a search cannot occur without the occupier being made aware that the search is taking place. A delayed notification search warrant scheme will allow AFP officers to covertly enter and search premises for the purposes of preventing or investigating Commonwealth terrorism offences, without the knowledge of the occupier of the premises, with the occupier to be given notice at a later time. (p. 95 of the explanatory memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*)

The statement of compatibility in relation to the current bill notes that:

When the delayed notification search warrant regime was inserted into the Crimes Act in 2014, the threshold for issue required, not only the applicant (eligible officer), but also the police officer approving the application (chief officer) and the person considering whether to approve the warrant (eligible issuing officer) to suspect and believe certain things on reasonable grounds. (p. 3)

Current section 3ZZBA of the *Crimes Act 1914* provides that the threshold for issue of a delayed notification search warrant is met in respect of particular premises if the relevant person:

- suspects, on reasonable grounds, that one or more eligible offences have been, are being, are about to be or are likely to be committed; and
- suspects, on reasonable grounds, that entry and search of the premises will substantially assist in the prevention or investigation of one or more of those offences; and
- believes, on reasonable grounds, that it is necessary for the entry and search of the premises to be conducted without the knowledge of the occupier of the premises or any other person present at the premises.

The amendments in this schedule will amend the delayed notification search warrant regime ‘to clarify that while the eligible [AFP] officer must suspect

and believe [the above matters] on reasonable grounds, the chief officer [the AFP Commissioner] and eligible issuing officer [a judge of the Federal Court of Australia or of a state or territory Supreme Court or a nominated AAT member] are not required to personally hold the relevant suspicions and belief. Rather, they must be satisfied that there are reasonable grounds for the eligible [AFP] officer to hold those suspicions and belief' (statement of compatibility, p. 3).

**Given the potential for the delayed notification search warrant scheme to trespass on personal rights and liberties (by allowing AFP officers to covertly enter and search premises, without the knowledge of the occupier of the premises), the committee considers that the lowering of the threshold for issuing a delayed notification search warrant should be comprehensively justified. The committee therefore seeks the Attorney-General's detailed advice as to the rationale for this proposed change.**

*Pending the Attorney-General'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.*

### **Trespass on personal rights and liberties—fair hearing Schedule 15, item 19, proposed new section 38J**

The broad purpose of the *National Security Information (Criminal and Civil Proceedings) Act 2004* is to prevent the disclosure of information in federal criminal and civil proceedings where disclosure is likely to prejudice national security. This Schedule proposes some significant amendments to that Act by enabling a court to make three new types of orders in control order proceedings. The effect of the proposed amendments can generally be described as allowing the court to determine that it can rely, in control order proceedings, on secret evidence in particular circumstances. The three new orders a court may make are:

- that the subject of the control order and their legal representative may only be provided with a redacted or summarised form of national security information. Despite this, however, the court may consider the information in its entirety (proposed new subsection 38J(2));
- that the subject of the control order and their legal representative may not be provided with any information in an original source document.

Despite this, however, the court may consider all of that information (proposed new subsection 38J(3)); and

- when a hearing is required under subsection 38H(6) the subject of the control order and their legal representative can be prevented from calling the relevant witness, and if the witness is otherwise called, the information provided by the witness need not be disclosed to the subject of the control order or their legal representative. Despite this, however, the court may consider all of the information provided by the witness (proposed new subsection 38J(4)).

Notably, proposed section 38I provides that a court may determine whether one of the new orders should be made in a closed hearing, that is, a hearing at which the parties to the control order proceeding and their legal representatives are not present.

These proposals clearly undermine the fundamental principle of natural justice which includes a fair hearing. In judicial proceedings a fair hearing traditionally includes the right to contest any charges against them but also to test any evidence upon which any allegations are based. In many instances it may not be possible in practice to contest the case for the imposition of control orders without access to the evidence on which the case is built. Evidence is susceptible to being misleading if it is insulated from challenge. Given that the burden of proof in civil cases is lower than criminal proceedings, that risk is magnified.

The explanatory materials point to the increasing ‘speed of counter-terrorism investigations’ as the reason why these powers are necessary (p. 119). At the general level, the explanatory memorandum suggests that ‘for control orders to be effective, law enforcement needs to be able to act quickly, and be able to present sensitive information...to a court as part of a control order proceeding without risking the integrity, safety or security of the information or its source’ (p. 119). (See also the statement of compatibility at pp 23–24)

On the other hand, the explanatory memorandum also recognises that it is important that a court, in the context of control order proceedings, continue to be able to ‘ensure procedural fairness and the administration of justice’. Given the extent to which the non-disclosure of evidence compromises a fair hearing it is, however, doubtful whether the amendments in this provision adequately preserve procedural fairness to the subject of a control order.

The statement of compatibility suggests that ‘the inherent capacity of the court to act fairly and impartially as well as the safeguards built into the NSI Act provide several mechanisms through which a fair hearing is guaranteed’ (pp 24–25). More particularly, the following features of the statutory scheme are thought to justify the abrogation of the fair hearing rules which section 38J orders necessarily entail:

- Paragraph 38J(1)(c) provides that before issuing a ‘special court order’ under section 38J, the court must be ‘satisfied that the relevant person has been given notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations)’.
- Prior to making a special order under section 38J, the court must (see proposed subsection 38J(5)) have regard to (a) the risk posed to national security, (b) ‘whether any such order would have a substantial adverse effect on the substantive hearing in the proceeding’, and (c) any other matter the court considers relevant.
- It is suggested that requiring a court to consider whether making an order would have an adverse impact on the substantive hearing ‘ensures that the court expressly contemplates the effect of any potential order...on a party’s ability to receive a fair hearing’ and that this provides ‘the court with the discretion to adequately assess the impact of an order under revised section 38J on each subject (or proposed subject) of the control order’ (pp 24–25).
- The NSI Act, it is suggested, ‘guarantees procedural fairness by preserving the discretion of the court’ not to make an order (or the nature of the order to make) under section 38J. It is also noted that the court has the discretion under proposed subsection 38I(3A) to refuse to exclude specified parties and their legal representatives from the closed hearing proceedings (p. 25).
- The right of the court to stay a control order proceeding where an order would have a substantial adverse effect on the substantive control order proceeding has been preserved in this context. Relatedly, the point is made that the court has a general power (under existing subsection 19(3)) to control the conduct of civil proceedings, ‘in particular with respect to abuse of process unless the NSI Act expressly or impliedly provides otherwise’ (p. 25).

A number of objections can be raised in response to this justification of the proposed amendments.

First, notice of allegations in the absence of notice of the information supporting those allegations, may well deprive a person of the practical means by which he or she is able to make their case. In many contexts, a case against a person cannot be tested unless the basis of that case is disclosed. Allegations can be denied, but without details it may not be possible to disprove them or even to cast doubt on them.

Secondly, the requirement to consider the effect an order may have on the ‘substantive hearing’ does not require the court to place a particular weight upon this factor. In this context, it can be noted that courts are not well placed to second-guess law enforcement evaluations of national security risk which means that it may be particularly challenging to protect an individual’s interest in a fair hearing. Furthermore, the language of ‘substantive hearing’ does not clearly identify procedural fairness as a fundamental relevant consideration to the decision-making exercise. When it comes to the consideration of a risk to national security, the court is not expressly limited to making orders where that risk is considered to reach a threshold degree of seriousness.

Thirdly, the fact that the court has discretion as to how to draw the balance between national security and any adverse effect on the ‘substantive hearing’ (in relation to whether a special order be made, or in the exercise of any general powers to stay or control its proceedings) cannot be said to ‘guarantee’ procedural fairness. In considering the extent to which judges will be able, in the exercise of their discretionary powers under the proposed regime, to resist the claims of a law enforcement agency that an order should be made, it should be noted that judges routinely accept that the courts are ‘are ill-equipped to evaluate intelligence’ [*Leghaei v Director-General of Security* (2007) 241 ALR 141; (2007) 97 ALD 516] and the possibility that law enforcement agencies may be wrong in their national security assessments. For this reason, the fact that security information is read by judges in the context of the legislative regime proposed in this schedule does not mean that they will be well placed to draw a different balance between security risk and fairness than is drawn by law enforcement agencies.

**For the above reasons, it is suggested that the assertion that the proposed approach upholds the right to a fair hearing is significantly overstated. In this context the committee therefore seeks a more detailed justification from**

**the Attorney-General for the proposed approach. In particular, the committee is seeks advice as to whether further safeguards for fairness have been considered, and if so why they have not been included in the legislation, for example, whether the court could be expressly limited to making these special orders where a risk to national security is considered to reach a threshold degree of seriousness.**

The committee also notes the UK system of special advocates and recommendations in the 2013 ‘Council of Australian Governments Review of Counter-Terrorism Legislation’.

*Pending the Attorney-General’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.*

### **Retrospective application Schedule 15, item 27**

Item 27 of schedule 15 states that the new special orders in relation to secret evidence that may be made under proposed section 38J apply to civil proceedings that begin before or after the commencement of this section.

The explanatory materials do not explain why the amendments should apply to proceedings which have already begun, especially given that (as explained above) the amendments appear to be in conflict with the fair hearing principle. **The committee therefore seeks the Attorney-General’s advice as to the rationale for the proposed retrospective application of the amendments to proceedings already commenced and as to how many current proceedings or potential proceedings are, or are likely to be, affected by this provision.**

*Pending the Attorney-General’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.*

## **Trespass on personal rights and liberties—protected taxation information and privacy**

### **Schedule 17, general comment**

This schedule enables disclosure of protected information by taxation officers for the purposes of preventing, detecting, disrupting or investigating conduct that relates to a matter of security as defined by the ASIO Act.

Clearly there are implications for personal privacy in relation to the amendment. The explanatory materials suggest that the importance of the public purposes of enabling government agencies to use information where so doing could prevent, detect, disrupt or investigate conduct that relates to a matter of security outweigh this adverse consequence (statement of compatibility, p. 31).

From a scrutiny perspective it is, however, a matter of concern that disclosure is authorised to ‘any’ Australian government agency. The statement of compatibility suggests that this is justified because ‘as with bodies that have a role in preventing or reducing a serious threat to an individual’s life, health or safety or the public’s health or safety, bodies that have a role in preventing, disrupting or investigating a threat related to security vary from time to time’ (p. 31). The statement of compatibility notes that bodies such as the National Disruption Group are multi-jurisdictional and the composition may change at short notice.

Although the committee accepts that some breadth in the authorisation to disclose may be appropriate, it is not persuaded that it is necessary to authorise disclosure to ‘any’ Australian government agency for the purposes of this provision. **The committee therefore seeks the Attorney-General's advice about more targeted alternative authorisation options and why they were rejected. The committee notes that flexibility with some parliamentary oversight could be maintained through the use of a disallowable legislative instrument to extend authorisation to additional agencies.**

*Pending the Attorney-General’s reply, the committee draws Senators’ attention to the schedule, 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.*

## Export Control Amendment (Quotas) Bill 2015

Introduced into the House of Representatives on 12 November 2015

Portfolio: Agriculture and Water Resources

### Background

This bill amends various Acts relating to export quotas to:

- amend the *Export Control Act 1982* to provide the Secretary with powers to make orders providing for, or in relation to, the establishment and administration of a system or systems of tariff rate quotas;
- enable the Secretary to make directions in relation to matters covered by an order, and to override the order;
- introduce new powers, such as use of registers and computer systems to make decisions in relation to tariff rate quotas; and
- repeal existing regulation of quotas under the *Australian Meat and Live-stock (Quotas) Act 1990*, the *Australian Meat and Live-stock Industry Act 1997* and the *Dairy Produce Act 1986*.

*The committee has no comment on this bill.*

## **Migration Legislation Amendment (Cessation of Visa Labels) Bill 2015**

Introduced into the House of Representatives on 11 November 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill repeals the *Migration (Visa Evidence) Charge Act 2012* and amends the *Migration Act 1958* to repeal provisions relating to visa labels which no longer have any practical effect.

*The committee has no comment on this bill.*

## **Omnibus Repeal Day (Spring 2015) Bill 2015**

Introduced into the House of Representatives on 12 November 2015

Portfolio: Prime Minister

### **Background**

This bill amends or repeals legislation across 14 portfolios.

The bill also includes measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements the measures included in the Statute Law Revision Bill (No. 3) 2015 and the Amending Acts 1990 to 1999 Repeal Bill 2015.

### **Parliamentary scrutiny—guidelines for ‘omnibus repeal day’ bills**

#### **General comment**

This bill is the fourth ‘omnibus repeal day’ bill to be considered by the Parliament.

The committee concurs with the Clerk of the Senate’s view that ‘periodic repeal of spent legislation ensures that the statute book is effective as a statement of the current law, and the rights, obligations and duties applicable to those within the jurisdiction of the Commonwealth’. However, the Clerk also indicated that omnibus and statute law revision bills which propose amendments across a large number of portfolios have been of concern to Senators, who have queried the scope of amendments contained in them.

When the Omnibus Repeal Day (Autumn 2014) Bill 2014 (the Autumn 2014 bill) was being considered by the Finance and Public Administration Legislation Committee in April 2014, the Clerk noted that as ‘omnibus repeal day’ bills were to be introduced twice per year:

...it may be useful from the point of view of parliamentary scrutiny for there to be some known legislative policy parameters for the exercise...A statement from the executive government about what it expects such bills to cover and – perhaps more importantly – not cover would be a useful adjunct to parliamentary scrutiny and would assist in optimising the limited resources of both Houses. (Submission 2 to the Finance and Public Administration Legislation Committee, p. 4)

In its report on the Autumn 2014 bill the Finance and Public Administration Legislation Committee stated that it ‘is supportive of the suggestion by the Clerk of the Senate that guidelines to assist parliamentary scrutiny be developed by government’ (p. 11).

**As it now appears that ‘omnibus repeal day’ bills will be brought before the Parliament on a regular basis, in order to assist parliamentary scrutiny of these bills the committee requests the Assistant Minister’s advice as to whether the government has given consideration to developing guidelines in relation to what may be included in (and what types of matters will be excluded from) such bills.**

*Pending the Assistant Minister’s reply, the committee draws Senators’ attention to the bill, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee’s terms of reference.*

## **Parliamentary scrutiny—new and previously introduced measures**

### **General comment**

This bill includes some measures contained in the Omnibus Repeal Day (Spring 2014) Bill 2014 (the Spring 2014 bill), as well as new measures. The Spring 2014 bill is currently before the House of Representatives following amendments made to that bill by the Senate.

In the committee’s *Alert Digest No. 15 of 2014* (pp 43–49) and *First Report of 2015* (pp 91–98) the committee commented on three measures in the Spring 2014 bill. These related to:

- the proposed repeal of specific consultation provisions in various Acts within the Communications portfolio;
- a proposed amendment to the *Social Security (Administration) Act 1999* which would allow a person to disclose certain protected information for research or policy development purposes; and
- the impact on Parliamentary scrutiny of the removal of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* as a Schedule to the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

While the first two measures are included in the current bill, it appears that the third measure is not. The committee has restated its comments in relation to the first two measures below.

As this bill is an omnibus bill which proposes amendments across a large number of portfolios, the committee considers that it would assist Parliamentary scrutiny if the explanatory memorandum to the bill identified whether measures are new or whether they reflect items previously introduced. This would enable Senators and others to quickly determine which measures have not yet been considered by the Parliament. **The committee therefore seeks the Assistant Minister's advice as to whether the explanatory memorandum to the bill can be amended to specify whether items are new or previously introduced measures.**

*Pending the Assistant Minister's reply, the committee draws Senators' attention to the bill, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

### **Inappropriate delegation of legislative power Part 2 of Schedule 3**

This Part seeks to repeal various provisions in Communications and the Arts portfolio legislation that requires rule-makers to consult before making certain legislative instruments (such as industry standards, including disability standards for telecommunications related customer equipment).

This Part is identical to Part 2 of Schedule 2 to the Omnibus Repeal Day (Spring 2014) Bill 2014. In the committee's *Alert Digest No. 15 of 2014* and *First Report of 2015* the committee made comments in relation to these measures and sought the then Parliamentary Secretary's advice. **The committee draws Senators' attention to the edited extract of the committee's comments (with updated item and other references) and the Parliamentary Secretary's response outlined below.**

*The committee draws Senators' attention to these comments, as these identical provisions may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

**Edited extract from the committee's *First Report of 2015***

**Inappropriate delegation of legislative power**

**Schedule 3, item 5, subsection 87A(9) of the *Broadcasting Services Act 1992***

**Schedule 3, item 6, section 126 of the *Broadcasting Services Act 1992***

**Schedule 3, item 10, clause 32 of schedule 6 of the *Broadcasting Services Act 1992***

**Schedule 3, item 17, subsection 378(1) and 378(5) of the *Telecommunications Act 1997***

**Schedule 3, item 18, section 379 of the *Telecommunications Act 1997***

**Schedule 3, item 19, subsections 382(1), 382(5), 386(1), 386(5), 405(1), 405(5), 422(1) and 422(5) of the *Telecommunications Act 1997***

**Schedule 3, item 20, sections 460 and 464 of the *Telecommunications Act 1997***

**Schedule 3, item 21, subsection 572E(8) of the *Telecommunications Act 1997***

Item 5 of schedule 3 seeks to repeal subsection 87A(9) of the *Broadcasting Services Act 1992* which provides that the 'ACMA must, before imposing, varying or revoking a condition [on a community television licence] under this section, seek public comment on the proposed condition or the proposed variation or revocation'. The explanatory memorandum states that the 'current consultation provision is considered unnecessary in light of the consultation requirements in section 17 of the [*Legislative Instruments Act 2003* (LI Act)]' (p. 16).

The consultation requirements under the LI Act do not coincide with the requirement to 'seek public comment' under subsection 87A(9). The committee therefore [sought] the Parliamentary Secretary's advice as to the justification for the repeal of subsection 87A(9) that [addressed] the differences between this requirement and those under section 17 of the LI Act. In particular, the committee [was] interested as to whether there may be situations under the LI Act requirements that mean that public comment need not be sought.

Section 19 of the LI Act provides that the 'fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument'. It does not appear that a similar 'no-invalidity clause' is applicable to the consultation requirement under subsection 87A(9). In these circumstances it may be that compliance with the requirement is a condition of a valid exercise of power under section 87A. The committee therefore [sought] the Parliamentary Secretary's advice as to why compliance with consultation requirements in this context is not sufficiently important that breach should result in an invalid decision.

The committee [noted] that similar issues arise in relation to items 6, 10 and 17–21 and also [sought] the Parliamentary Secretary's similar advice in relation to each of these proposed amendments.

**Inappropriate delegation of legislative power**

**Procedural fairness**

**Schedule 3, item 7, subsections 130R(3), 130T(4), 130U(4), 130ZCA(5), 130ZCA(6) and 130ZD(2) of the *Broadcasting Services Act 1992***

**Schedule 3, item 8, subclauses 68(3), 70(4) and 71(4) of schedule 5 of the *Broadcasting Services Act 1992***

**Schedule 3, item 9, clause 77 of schedule 5 of the *Broadcasting Services Act 1992***

**Schedule 3, item 11, subclauses 91(3), 93(4) and 94(4) of schedule 7 of the *Broadcasting Services Act 1992***

**Schedule 3, item 12, clauses 99 and 100 of schedule 7 of the *Broadcasting Services Act 1992***

**Schedule 3, item 13, subsections 44(3), 46(4) and 47(4) of the *Interactive Gambling Act 2001***

**Schedule 3, item 14, subsections 44A(5) and 44A(7) of the *Radiocommunications Act 1992***

**Schedule 3, item 15, subsections 123(3), 125(4), 125AA(3), 125A(3) and 125B(3) of the *Telecommunications Act 1997***

Item 7 seeks to repeal subsections 130R(3), 130T(4), and 130U(4) of the *Broadcasting Services Act 1992*. Each of these subsections set out consultation requirements for the ACMA in determining certain industry standards. The explanatory memorandum indicates that these consultation requirements are directed to a relevant industry body or association. The explanatory memorandum states that these consultation provisions are ‘considered unnecessary in light of the consultation requirements in section 17 of the LI Act’ (p. 17). No justification is given for this conclusion in the explanatory memorandum.

In each case, as the consultation requirement concerns an industry body or association that will have a direct interest in the standard, the consultation requirements are analogous to procedural fairness requirements: that is, the provisions require an appropriate representative of affected interests to be consulted prior to a decision being made.

In light of the role that sections 130R(3), 130T(4), and 130U(4) may be considered to play in ensuring affected interests are afforded a fair hearing, compliance with consultation requirements could be considered necessary to ensure a fair hearing. It may be noted that, in general, fair hearing requirements (at common law and under statute) are a mandatory element of making a valid decision. The committee therefore [sought] further information from the Parliamentary Secretary in relation the adequacy of section 17 of the LI Act as a replacement for these specific consultation obligations given that section 19 of that Act provides that the fact ‘that consultation does not occur does not affect the validity or enforceability of a legislative instrument’.

Item 7 also repeals subsections 130ZCA(5), 130ZCA(6) and 130ZD(2), provisions which set out consultation requirements for the ACMA in formulating conditional access schemes. In particular, subsections 130ZCA(5) and 130ZCA(6) require the

ACMA, before registering a conditional access scheme, to publish a draft of the scheme on its website, invite written submissions within a period not shorter than 14 days and have due regard to submissions received. Again, the explanatory memorandum states that these consultation provisions are ‘considered unnecessary in light of the consultation requirements in section 17 of the LI Act’ (p. 18).

The committee [noted] that similar issues to those set out above arise in relation to this proposed amendment (in item 7) and in relation to items 8–9 and 11–15. The committee therefore [sought] the Parliamentary Secretary’s similar advice in relation to each of these proposed amendments.

**Inappropriate delegation of legislative power**  
**Schedule 2, item 16, sections 132 and 135 of the *Telecommunications Act 1997***

This item repeals sections 132 and 135 of the *Telecommunications Act 1997*, which set out consultation requirements for determining and varying industry standards.

Section 132 requires the ACMA to conduct public consultation, including making copies of the draft standard or variation available for inspection and to cause a notice to be published in newspapers inviting written comments. Significantly the ACMA must have due regard to comments received. Section 135 requires the ACMA to consult at least one body or association that represents the interests of consumers before determining, varying or revoking an industry standard.

The explanatory memorandum states that these sections are ‘considered unnecessary in light of the consultation requirements in section 17 of the Legislative Instruments Act’ (at p. 2). No justification is given for this conclusion in the explanatory memorandum.

The consultation requirements under the LI Act do not coincide with the requirements under these sections. The committee therefore [sought] the Parliamentary Secretary’s advice as to the rationale for the repeal of sections 132 and 135 which [addressed] the differences between the requirements in these sections and those under section 17 of the LI Act.

As previously noted, section 19 of the LI Act provides that the ‘fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument’. It does not appear that a similar ‘no-invalidity clause’ is applicable to the consultation requirement under sections 132 and 135. In these circumstances it may be that compliance with the requirement is a condition of a valid standard. The committee therefore [sought] the Parliamentary Secretary’s advice as to why compliance with consultation requirements in this context is not considered to be a mandatory element of making a valid standard.

*Parliamentary Secretary's response - extract*

*The Committee seeks advice on the proposed repeal of specific consultation provisions in the Broadcasting Services Act 1992, the Interactive Gambling Act 2001, the Radiocommunications Act 1992 and the Telecommunications Act 1997. In particular, the Committee has sought advice on differences between the consultation requirements being repealed and the consultation provisions that exist for all legislative instruments under section 17 of the Legislative Instruments Act 2003 (LI Act).*

The proposed removal of the consultation requirements in the Acts mentioned above is considered justified on the basis that the requirements unnecessarily duplicate consultation requirements in section 17 of the LI Act which sets the standard consultation requirements for all Commonwealth legislative instruments.

It is the case that nearly all of the individual consultation provisions proposed for repeal date from a time before the enactment of the LI Act. These provisions served a strong independent purpose prior to the LI Act but now, while not identical, largely duplicate the effect of the LI Act. The proposed repeal of these provisions would simplify, shorten and harmonise the law.

One significant advantage of Part 3 of the LI Act is that it does not purport to prescribe in detail exactly how consultation should occur. It simply requires a rule-maker to be satisfied that all appropriate and reasonably practicable consultation has been undertaken and allows for flexibility. The various provisions proposed to be repealed, by contrast, are prescriptive rules. The consultation periods in question range from 14 days to 60 days. Some of the consultation provisions require publication on a website; some require publication in multiple newspapers. The maintenance of such provisions would provide for inconsistency, inflexibility and cost without corresponding benefits above those supplied by the standard consultation arrangements in Part 3 of the LI Act.

The Committee has also raised concerns about reliance on the LI Act, on the basis that section 19 of that Act provides that failure to consult does not affect the validity or enforceability of a legislative instrument. On this point, it should be noted that Part 5 of the LI Act also sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments.

The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if Parliament is dissatisfied with that consultation, the instrument may be disallowed.

***Committee Response***

The committee [thanked] the Parliamentary Secretary for this response.

**The committee notes that while repealing the current consultation requirements in favour of the general consultation requirements in the LI Act may allow for increased flexibility, the LI Act requirements are not identical to the current consultation requirements. Furthermore, the committee notes that the ‘no invalidity’ clause in section 19 of the LI Act will now apply to consultation undertaken in relation to these provisions and therefore failure to consult will not affect the validity or enforceability of the legislative instruments.**

**The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

**The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.**

**Trespass on personal rights and liberties—use or disclosure of personal information  
Part 1 of Schedule 12**

This Part is identical to Part 3 of Schedule 7 to the Omnibus Repeal Day (Spring 2014) Bill 2014.

Item 1 of Schedule 12 seeks to make an addition to paragraph 202(2)(e) of the *Social Security (Administration) Act 1999* to allow a person to disclose (or further use or record) protected information that has been disclosed to them under subsection 202(2C) of the Act for the purpose of research, statistical analysis or policy development, where it is consistent with the purpose of the initial disclosure.

The proposal is justified in the explanatory memorandum on the basis that it would eliminate ‘the burden on researchers having to seek permission’ and that it ‘enhances the social and economic value of public sector information’ (p. 56). The statement of compatibility (at pp 95–97) also provides a detailed explanation for the proposed approach. The statement suggests that safeguards are in place which will ensure that disclosures under this provision will not constitute arbitrary interferences with a person’s privacy. For example, the

Privacy Act will apply in relation to the management of protected information in cases where a person's identity could be ascertained from the information.

**Noting the detailed explanation provided for the approach, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*The committee draws Senators' attention to this part, 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.*

## **Statute Law Revision Bill (No. 3) 2015**

Introduced into the House of Representatives on 12 November 2015

Portfolio: Attorney-General

### **Background**

This bill proposes to:

- correct technical errors that have occurred in laws as a result of drafting and clerical mistakes; and
- clarify on the face of an Act that the Crown in right of the Australian Capital Territory and of the Northern Territory is bound and to modernise the form of its provision about whether the Crown is liable to be prosecuted for an offence;
- replace references to ‘guilty of an offence’ with references to ‘commits an offence’ and references to ‘reference base’ with ‘index reference period’; and
- repeal spent and obsolete provisions.

*The committee has no comment on this bill.*

## **Tax Laws Amendment (Gifts) Bill 2015**

Introduced into the House of Representatives on 12 November 2015

Portfolio: Treasury

### **Background**

This bill amends the *Income Tax Assessment Act 1997* to add the National Apology Foundation Limited and the International Jewish Relief Limited to the list of specifically listed deductible gift recipients from 1 January 2015.

*The committee has no comment on this bill.*

## **Treasury Legislation Amendment (Repeal Day 2015) Bill 2015**

Introduced into the House of Representatives on 12 November 2015

Portfolio: Treasury

### **Background**

This bill amends various Acts relating to corporations, superannuation and taxation.

Schedule 1 amends the *Superannuation Guarantee (Administration) Act 1992*, the *Taxation Administration Act 1953*, the *Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Act 2015* and the *Crimes (Taxation Offences) Act 1980* to simplify the superannuation guarantee (SG) charge for employers and make the SG charge and penalty more proportionate to the non-compliance.

Schedule 2 amends the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, and other superannuation laws to enable the Commissioner of Taxation to pay certain superannuation amounts directly to individuals with a terminal medical condition and to remove the requirement for superannuation funds to lodge a separate biannual lost members statement with the Commissioner.

Schedule 3 amends the *Corporations Act 2001* to modify the notification and reporting obligations applying to certain corporations that have property in receivership or property in respect of which a controller is acting.

Schedule 4 repeals several inoperative acts and amends the taxation law to remove a number of inoperative or spent provisions.

*The committee has no comment on this bill.*

## **Veterans' Entitlements Amendment (Expanded Gold Card Access) Bill 2015**

Introduced into the Senate on 11 November 2015

By: Senator Lambie

### **Background**

This bill amends the *Veterans' Entitlements Act 1986* to provide all veterans, including peacekeepers and peacemakers or former members of Australia's Defence Force, who have served in war or war-like operations (and for related purposes), with appropriate medical and other treatments as required.

*The committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Migration Amendment (Charging for a Migration Outcome) Bill 2015**

*[Digest 11/15 – Report 12/15]*

On 12 November 2015 the Minister for Defence (Senator Payne) tabled a correction to the explanatory memorandum in the Senate.

#### **Correction to the explanatory memorandum**

The committee commented on measures in this bill which would abrogate the privilege against self-incrimination in the committee's *Twelfth Report of 2015* (pp 712–715). In a response to the committee in relation to these measures, the Minister advised that:

...the explanation for item 14 in the explanatory memorandum to this Bill is incorrect ... as it states that information or a document required to be given by a person under section 487B may be used in criminal proceedings against the person in relation to a sponsorship-related offence. This is incorrect, as the only criminal proceedings for which the information or document may be used is in criminal proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to Subdivision C or D of Division 12 of Part 2 of the Act.

The Minister advised the committee that parliamentary procedures were being pursued to amend the explanatory memorandum in this regard. **The committee thanks the Minister for tabling this correction, which ensures that the explanation for item 14 is accurate.**

### **Migration and Maritime Powers and Amendment Bill (No. 1) 2015**

*[Digest 11/15 – Report 12/15]*

On 12 November 2015 the Minister for Defence (Senator Payne) tabled an addendum to the explanatory memorandum in the Senate.

#### **Addendum to the explanatory memorandum**

The committee commented on the retrospective application of various measures in the bill in the committee's *Twelfth Report of 2015* (pp 720–726). **The committee welcomes the tabling of this addendum, which includes additional explanatory material in relation to these measures.**

**Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015**

*[Digest 11/15 – no response required]*

On 10 November 2015 the Senate agreed to one Independent (Senator Xenophon) amendment.

On 11 November 2015 the Senate agreed to two Australian Greens amendments and the bill was read a third time.

On 12 November 2015 the House of Representatives disagreed to the Senate amendments.

**The committee has no comment on 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*.

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

Nil

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

Nil