



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

EIGHTH REPORT
OF
2015

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Senator Cory Bernardi	LP, South Australia
Senator Katy Gallagher	ALP, Australian Capital Territory
Senator the Hon Bill Heffernan	LP, New South Wales
Senator Rachel Siewert	AG, Western Australia

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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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 2015

The committee presents its *Eighth Report of 2015* to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Bills	Page No.
Australian Defence Force Cover Bill 2015	601
Australian Defence Force Superannuation Bill 2015	604

Australian Defence Force Cover Bill 2015

Introduced into the House of Representatives on 25 June 2015

Portfolio: Defence

Introduction

The committee dealt with this bill in *Alert Digest No. 7 of 2015*. The Assistant Minister responded to the committee's comments in a letter dated 17 August 2015. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2015 - extract

Background

This bill is part of a package of three bills to establish new superannuation arrangements for people joining the Australian Defence Force (ADF) on or after 1 July 2016.

The bill establishes the Australian Defence Force Cover Scheme (ADF Cover) to provide ADF members with death and invalidity cover consistent with the benefits provided to members of the current Military Superannuation and Benefits Scheme.

Delegation of legislative power—standing appropriation

Insufficient Parliamentary scrutiny

Clause 60

Clause 60 provides generally for the payment of benefits authorised by the bill from the Consolidated Revenue Fund, without putting a limit on the maximum amount to be spent or defining the period in which payments can be made. This means that the provision is a standing appropriation. In its *Fourteenth Report of 2005*, the committee stated, at page 272, that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

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.

The committee is not questioning generally the ability for payments to be made, only whether the use of a standing appropriation is an appropriate mechanism. In scrutinising standing appropriations, the committee looks to the explanatory memorandum for an explanation of the reason for the proposed approach. In addition, the committee considers whether the bill:

- places a limitation on the amount of funds that may be so appropriated; and
- includes a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

In this instance the explanatory memorandum simply repeats the effect of the provision and does not address the matters outlined above. **The committee therefore seeks the Minister's advice as to the justification for including a standing appropriation in the bill and the exclusion of that appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations processes.**

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

Assistant Minister's response - extract

In relation to the *ADF Cover Bill*, the Committee has asked for further information about the standing appropriation in clause 60. Benefits under the ADF Cover scheme provided for by the *ADF Cover Bill* are only available to serving Australian Defence Force (ADF) members who are invalided or killed during their service. Therefore, expenditure from the Consolidated Revenue Fund (CRF) under clause 60 is limited by the Average Funded Strength (AFS) of the ADF. The total AFS is provided by the Department of Defence's annual portfolio budget with the appropriate oversight of Parliament.

The spend from the CRF is further limited by the small proportion of ADF members who are invalided or killed during their ADF service. Expenditure is further reduced by the cessation of the ADF Cover top-up pension once invalidity pensioners are eligible to access their accumulated superannuation under ADF Super. However, the ADF Cover invalidity base pension continues for the life of the member and reverts to the member's dependants upon the member's death.

The standing appropriation in the *ADF Cover Bill* is consistent with standing appropriations in the other Commonwealth defined benefit superannuation schemes. These include the Commonwealth Superannuation Scheme, the Public Sector Superannuation scheme, the Military Superannuation and Benefits Scheme, the Defence Force Retirement and Death Benefits scheme and the Defence Forces Retirement Benefits scheme. As with the current military superannuation schemes, Parliament will remain appropriately informed of the cost of ADF Cover through the annual Defence Portfolio Budget Statement, the Commonwealth Superannuation Corporation Annual Report and the Australian Government Actuary's periodic Military Superannuation Long Term Cost Report.

Committee Response

The committee thanks the Assistant Minister for this response, and notes the information provided about the practical limits on the amount that could be expended under the standing appropriation. **The committee notes that this information would be useful to Senators and others in understanding the operation of this provision and therefore requests that the key information be included in the explanatory memorandum.** The committee retains a general concern about the use of standing appropriations because they remove the opportunity for future Parliamentary scrutiny of spending proposals and can amount to an inappropriate delegation of legislative power. **However, in light of the information provided by the Assistant Minister, on this occasion the committee leaves the question of whether the approach proposed in this bill is appropriate to the consideration of the Senate as a whole.**

Australian Defence Force Superannuation Bill 2015

Introduced into the House of Representatives on 25 June 2015

Portfolio: Defence

Background

This bill is part of a package of three bills to establish new superannuation arrangements for people joining the Australian Defence Force (ADF) on or after 1 July 2016.

The bill will:

- establish the Australian Defence Force Superannuation Scheme (ADF Super) as an accumulation (or defined contribution) scheme available to either permanent ADF members or reservists on continuous full-time service; and
- enable ADF members to choose which superannuation scheme they belong to and give those members the ability to transfer their accumulated ADF Super benefits to a fund of their choice when they leave the ADF.

Inappropriate delegation of legislative power—Henry VIII clause Subclause 29(2)

Subclause 29(1) provides that rules (that is, delegated legislation) may make any provision that is necessary to enable ADF Super to satisfy any condition or requirements of the following laws:

- i. the *Corporations Act 2001*;
- ii. the *Family Law Act 1975*;
- iii. the *Financial Institutions Supervisory Levies Collection Act 1998*;
- iv. the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997*;
- v. the *Superannuation Industry (Supervision) Act 1993*;
- vi. the *Superannuation (Resolution of Complaint) Act 1993*; and
- vii. the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

Subclause 29(2) provides that if rules are inconsistent with a provision of the Act, the rules prevail and the provision, to the extent of the inconsistency, is of no effect. The effect is thus that the rules may override the primary legislation.

The explanatory memorandum provides the following justification (at paragraph 83):

This provision is necessary because the conditions or requirements of the above laws are usually promulgated by regulations or other instruments made under those laws. Allowing rules to be made under this Bill would allow those conditions or requirements to be met more quickly than if Act amendments were required. It is

intended that should it be necessary to make rules under this section, legislation would be introduced as soon as possible to give effect to the relevant provisions.

This justification is quite brief and may not be easily comprehended by a generalist reader. **As such, the committee seeks the Minister's more detailed explanation for the proposed approach. In particular, the committee is interested in information that addresses with more specificity the nature of the circumstances that may require that rules be enacted that operate to override the primary legislation.**

Further, given the apparent intention for any rules to then be addressed by the introduction of amending legislation as soon as possible, the committee seeks the Minister's advice as to whether consideration has been given to including a provision which would limit the operation of rules made under this provision to a specified period of time. This would allow any immediate issues to be addressed without leaving this broad authority to override primary legislation in place indefinitely.

Pending the Minister's advice, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Assistant Minister's response - extract

In relation to the *ADF Super Bill*, the Committee has asked for further information regarding the intended purpose of clause 29. Clause 29 is necessary to ensure the ADF Super scheme is a complying regulated superannuation scheme. This clause allows the ADF Super scheme to quickly comply with relevant superannuation regulations where there is insufficient time between the promulgation and commencement of those regulations to amend the *Australian Defence Force Super Act*.

The Committee has asked for information on the exact nature of circumstances in which clause 29 would be used. The following hypothetical example demonstrates the appropriate use of the clause:

On 1 July 2015, the Tax and Superannuation Laws Amendment (Terminal Medical Conditions) Regulation 2015 came into effect. This regulation governs how superannuation benefits are released to persons with a terminal medical condition. If this regulation came into effect on 1 July 2017—after the enactment of the ADF Super Bill—and there was anything in the ADF Super Act that prevented the ADF Super scheme from complying with that regulation, section 29 of the ADF Super Act would allow a rule to be made to give effect to the regulation before introducing amending legislation into Parliament.

Note, in the *ADF Super Bill*, nothing prevents the effective operation of the *Tax and Superannuation Laws Amendment (Terminal Medical Conditions) Regulation 2015*.

The Committee has asked if consideration was given to limiting the operation of rules made under clause 29 to a specific time period. Clause 29 of the ADF Super Bill is consistent with previous legislation governing public sector superannuation schemes, none of which contain a time limiting provision. Similar provisions to clause 29 of the ADF Super Bill are contained in section 46 of the *Superannuation Act 2005* (the Act that governs the Public Sector Superannuation Accumulation Plan scheme), section 49 of the *Superannuation Act 1990* (the Act that governs the Public Sector Superannuation scheme) and section 155C of the *Superannuation Act 1976* (the Act that governs the Commonwealth Superannuation Scheme).

However, I do understand the Committee's concern regarding the operation of any rules that could be made under clause 29. As such, I can assure the Committee that rules under clause 29 will be disallowable instruments for purposes of the *Legislative Instruments Act 2003* and therefore subject to the usual 15 Parliamentary sitting day period for disallowance. This will ensure that Parliament retains the appropriate oversight of any such rules.

Committee Response

The committee thanks the Assistant Minister for this response and notes the information provided about the intended appropriate use of the clause and its consistency with provisions in similar legislation. **The committee notes that this information would be useful to Senators and others in understanding the operation of this provision and therefore requests that the key information be included in the explanatory memorandum.** While the committee is interested in examples of similar provisions, it does not consider that they are, of themselves, persuasive. However, in light of the information provided, including that the instruments will be disallowable, **on this occasion the committee leaves the question of whether the proposed approach in this bill is appropriate to the consideration of the Senate as a whole.**

Senator Helen Polley
Chair



**The Hon Stuart Robert MP
Assistant Minister for Defence**

MA15-002460

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

17 AUG 2015

Dear Senator  Polley

I refer to the letter from Toni Dawes, Committee Secretary of the Senate Scrutiny of Bills Committee (the Committee), of 13 August 2015 in relation to the *Australian Defence Force Cover Bill 2015* (the *ADF Cover Bill*) and the *Australian Defence Force Superannuation Bill 2015* (the *ADF Super Bill*). Thank you for the opportunity to respond to the Committee.

In relation to the *ADF Cover Bill*, the Committee has asked for further information about the standing appropriation in clause 60. Benefits under the ADF Cover scheme provided for by the *ADF Cover Bill* are only available to serving Australian Defence Force (ADF) members who are invalided or killed during their service. Therefore, expenditure from the Consolidated Revenue Fund (CRF) under clause 60 is limited by the Average Funded Strength (AFS) of the ADF. The total AFS is provided by the Department of Defence's annual portfolio budget with the appropriate oversight of Parliament.

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I trust that the information in this letter satisfies the Committee's concerns in relation to the *ADF Cover Bill* and the *ADF Super Bill*.

Yours sincerely



Stuart Robert