



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS

26 February 2016 (drawing on material in the committee's *Alert Digest No. 2 of 2016* and *Second Report of 2016*)

Introduction

This newsletter highlights key aspects of the Senate Scrutiny of Bills Committee's work, with a particular focus on information that may be useful when bills are debated and to raise awareness about scrutiny principles (see Senate Standing Order 24). For further detail and comments on additional bills see the complete [Alert Digests](#) and [Reports](#). An index to all committee comments is available [here](#).

Key scrutiny issues

- **Aged Care Legislation Amendment (Increasing Consumer Choice) Bill 2016** ([Alert Digest No. 2 of 2016](#))
 - ❖ *Merits review*: The committee has sought further advice about the exclusion of merits review for decisions as to whether a person is a 'prioritised home care recipient'.
- **Appropriation Bill (No. 3) 2015-2016** ([Alert Digest No. 2 of 2016](#))
 - ❖ *Insufficient parliamentary scrutiny of legislative power*: Various provisions of this bill seek to appropriate money for the 'ordinary annual services of the government', but include appropriations for items which appear to be new policies or projects. This incorrect classification undermines the Senate's constitutional right to amend proposed laws appropriating money on all matters not involving the ordinary annual services of the government. The committee is seeking the Minister's advice as to whether the government considers that the expenditure in relation to the new 'Cities and the Built Environment Taskforce' may have been inappropriately classified as 'ordinary annual services of the government' and therefore incorrectly included in this bill (which is not amendable by the Senate).
- **Appropriation Bill (No. 4) 2015-2016** ([Alert Digest No. 2 of 2016](#))
 - ❖ *Delegation of legislative power and parliamentary scrutiny (scrutiny of payments to the States and Territories)*: The committee thanks the Minister for including some additional information in the explanatory memorandum in relation to grants of financial assistance to the States. However, the committee noted that the particular purposes to which the money for State grants will be directed remains unclear. Noting the role of Senators in representing the people of their State and the terms of section 96 of the Constitution, the committee is requesting the Minister's advice in relation to: (a) the particular purposes to which the money will be directed (including a breakdown by State/Territory), and (b) information about the specific statutory provisions which detail how the terms and conditions for these payments to the States will be determined.
- **Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]** ([Alert Digest No. 2 of 2016](#))

As this bill is in identical terms to that considered by the committee in 2013–14, the committee has taken the approach of reproducing its previous comments and the responses received from the Minister at the time:

 - ❖ *Judicial review*: Decisions under the bill will be excluded from the application of the *Administrative Decisions (Judicial Review) Act 1977*. The committee draws this matter to the attention of senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

- **Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]** ([Alert Digest No. 2 of 2016](#))

As this bill is in identical terms to that considered by the committee in 2013–14, the committee has taken the approach of reproducing its previous comments and the responses received from the Minister at the time, including in relation to:

- ❖ *Coercive powers—entry without warrant*: The committee wrote to the Minister seeking information about the accountability measures considered for these powers, such as a requirement for senior executive authorisation, reporting requirements and the need for guidelines for the use of the powers. The detailed response from the Minister included useful information, but without the additional safeguards described above, the committee retains its scrutiny concerns about the power to enter premises without a warrant.
- ❖ *Delegation of important matters*: The bill includes several instances in which it is proposed that ‘rules’ (delegated legislation) will determine some important matters. The committee sought and received additional information in relation to the justification for the use of ‘rules’. The committee leaves the question of whether the approach in relation to these delegations of legislative power is appropriate to the Senate as a whole.
- ❖ *Additional matters*: The committee also received additional information about some other scrutiny matters raised by the provisions of the bill, including the privilege against self-incrimination, reversal of the onus of proof, penalties, and merits review.

- **Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2016** ([Alert Digest No. 2 of 2016](#))

- ❖ *Trespass on personal rights and liberties*: The key change made by this bill is to make legal advice prior to electing to opt into the BSWAT payment scheme (and thus forgo the right to pursue legal action) optional, not compulsory. While the explanatory memorandum indicates reasons for the proposed approach, the removal of the existing requirement for compulsory legal advice (freely provided by the Commonwealth) gives rise to scrutiny concern, especially as at least some persons affected suffer from a variety of disability. The committee has sought further advice from the Minister.

- **Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016** ([Alert Digest No. 2 of 2016](#))

- ❖ While this bill is described as making technical and consequential amendments to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, it potentially extends the reach of existing provisions about which the committee had raised scrutiny concerns. In light of the amendments proposed in the current bill, the committee has sought the Minister’s advice in relation to the effect of the current provisions in light of the previous scrutiny concerns. The previous issues of scrutiny concern included issues relating to merits review, procedural fairness and insufficiently defined administrative powers.
- ❖ *Retrospectivity*: The committee expects a detailed justification for the retrospective application of all provisions that could give rise to a detriment to any person, particularly coercive powers. The committee has therefore sought the Minister’s further advice in relation to the current bill, including addressing the fairness of attaching legal consequences to an administrative decision (here the liability to removal) after that decision has already been made.

- **Corporations Amendment (Crowd-sourced Funding) Bill 2015** ([Second Report of 2016](#))

- ❖ *Delegation of legislative power and reversal of the burden of proof*: The Minister provided further advice in relation to these matters, and the committee has requested that key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

- **Criminal Code Amendment (Firearms Trafficking) Bill 2015** ([Second Report of 2016](#))

- ❖ *Penalties*: In relation to the proposal to increase the **maximum penalties** for firearms trafficking offences, the Minister provided useful information including examples in relation to comparable offences and context. In relation to the proposed new **mandatory minimum sentences**, the Minister emphasised that the provisions do not impose a mandatory non-parole period and the actual time a person will be incarcerated will remain at the discretion of the sentencing judge. The provisions also do not apply to children. The committee has requested that key information be included in the explanatory memorandum and leaves these matters to the Senate.

- **Narcotic Drugs Amendment Bill 2016** ([Alert Digest No. 2 of 2016](#))

Although this bill was passed before the committee could consider it, the committee is interested in the Minister's advice as to whether the issues it has raised can be considered for future amendments, including:

- ❖ *Entry and search powers without consent*: The committee has sought advice as to what executive or other authorisation will be needed before entry without consent or a warrant can take place, what reporting requirements will apply and whether there is a requirement for guidelines for the use of the powers to be made.
- ❖ *Breadth of administrative power*: Given the extensive monitoring powers that may be exercised, the committee seeks the Minister's advice as to safeguards that will apply to the exercise of these powers and whether consideration has been given to including a legislative requirement for appointed officers to hold appropriate qualifications and experience.
- ❖ *Privacy*: The bill will authorise collecting, using, storing and disclosing personal information and other provisions that could affect a person's privacy, but a detailed justification is provided. The committee leaves this matter generally to the Senate, but has sought advice as to whether there is an offence for any unauthorised disclosures.
- ❖ *Merits review*: The committee has sought advice as to whether any decisions able to be made under the Act will not be reviewable and, if so, the justification for this.
- ❖ *Incorporating material by reference*: The committee has sought advice about whether incorporated material will be readily and freely available, and how those affected by the law will be notified of any changes to it.
- ❖ *Further matters*: The bill includes strict liability provisions, a limitation on the privilege against self-incrimination and a Henry VIII clause. These are accompanied by useful explanatory material and the committee left these matters to the Senate.

- **Offshore Petroleum and Greenhouse Gas Storage Amendment Bill 2016** ([Alert Digest No. 2 of 2016](#))

- ❖ *Retrospectivity*: The committee has sought advice as to whether the 'administrative oversight' and resulting retrospective remedial action proposed in this bill could have detrimental legal consequences for any person (substantive or procedural).

Other bills commented on in the Alert Digest ([Alert Digest No. 2 of 2016](#))

- **Omnibus Repeal Day (Spring 2015) Bill 2015**: The committee thanks the Assistant Minister for providing an addendum to the explanatory memorandum which will assist Parliamentary scrutiny by enabling Senators and others to quickly determine which measures in the bill have not yet been considered by the Parliament.
- **Renewable Fuel Bill 2016 [non-government bill]**: The committee is seeking advice in relation to reversal of the burden of proof and strict liability offences.
- **Transport Security Amendment (Serious or Organised Crime) Bill 2016**: The committee noted the proposal to allow penalties of up to 200 units to be prescribed by delegated legislation (in excess of the 50 penalty unit maximum in the *Guide to Framing Commonwealth Offences*), but in light of the detailed explanation left the matter to the Senate.

Other responses received ([Second Report of 2016](#))

- **Communications Legislation Amendment (Deregulation and Other Measures) Bill 2016:** The committee thanks the Minister for his reply, but remains concerned about lowering consultation requirements and noted that a complaints process is not equivalent to a system for merits review.
- **Courts Administration Legislation Amendment Bill 2016:** The Attorney-General provided a detailed explanation for allowing matters to be prescribed as 'corporate services' by delegated legislation, including that it is expected that the provision would be used only at the request of the courts.
- **Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015**
- **Insolvency Law Reform Bill 2015**

This document contains a very brief summary of some recent comments made by the Senate Scrutiny of Bills Committee (Chair: Senator Helen Polley and Deputy Chair: Senator John Williams).

For any comments or questions, please contact:

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