



Department of the Senate

## Senate Scrutiny of Bills Committee

# NEWS

9 February 2017 (drawing on material in the committee's [Scrutiny Digest No. 1 of 2017](#))

### 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 more detail and discussion of these matters and comments on additional bills look to the committee's *Scrutiny Digests*. An index to all committee comments is available [here](#).

### New developments

- The committee is now publishing its scrutiny comments on recently introduced bills (including responses received on matters previously considered by the committee) in a single report, the [Scrutiny Digest](#).

### Key scrutiny issues ([Scrutiny Digest No. 1 of 2017](#))

#### • Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

- ❖ *Limits on merits review*: The bill remakes existing provisions which raise scrutiny concerns regarding the availability and effectiveness of merits review for refugee applicants:
  - It contains a definition of a 'reviewable refugee decision' which excludes a number of decisions from the possibility of merits review by the Administrative Appeals Tribunal (AAT). The committee has sought the Minister's comprehensive justification for limiting the availability of merits review.
  - It requires the AAT to draw an adverse inference against a protection visa applicant who relies on a claim or evidence that was not placed before the original decision-maker. The committee has reiterated its original scrutiny concerns about the AAT being *required* to draw an unfavourable inference and leaves the appropriateness of the measure to the Senate.
- ❖ *Procedural concerns*: The bill also contains a number of provisions that raise some procedural concerns, for which the committee has sought the Minister's advice, including: removing an applicant's entitlement to access written material before the AAT; providing that the AAT's failure to comply with notification and reason-giving requirements does not invalidate the decision; mechanisms for providing written statements to applicants; and the exclusion of judicial review for certain decisions of the AAT.

#### • Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

- ❖ *Retrospective application*: The bill seeks to prevent adult unauthorised maritime arrivals and transitory persons who were taken to a regional processing country after 19 July 2013 from making a valid application for any Australian visa, which has a retrospective application. The Minister advised that the retrospective application gives effect to the government's policy intentions. The committee has consistently highlighted that it is a basic value of the rule of law that, in general, laws should only operate prospectively, as people should be able to guide their actions on the basis of fair notice of the law applicable to them. The committee leaves the appropriateness of the retrospective application to the Senate as a whole.

## ● Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016

- ❖ *Significant matters in delegated legislation*: The bill provides a broad regulation-making power that allows significant matters (regarding processes for the safety and performance of medical devices) to be dealt with in delegated legislation; which is not subject to the same level of parliamentary scrutiny as primary legislation. The committee has requested the Minister's justification for this approach;
- ❖ *Broad delegation of administrative powers*: The bill contains provisions that ensure that the regulations can allow any or all of the Secretary's powers and functions in relation to specified matters to be delegated. The committee has sought the Minister's explanation as to why this is necessary.
- ❖ *Consultation requirements*: The bill removes a requirement for the Minister to consult a therapeutic goods committee when making standards for medicines and other therapeutic goods, for which the committee has sought the Minister's advice.
- ❖ *Criminal offence provisions*: The bill also contains provisions which impose strict liability, reverse the evidential burden of proof and abrogate the privilege against self-incrimination, which are not addressed in the explanatory memorandum and for which the committee has sought the Minister's advice.

## Other bills commented on ([Scrutiny Digest No. 1 of 2017](#))

- **Agriculture and Water Resources Legislation Amendment Bill 2016**: The committee is seeking advice as to why the bill proposes removing requirements for the Minister to table certain documents in Parliament.
- **Air Services Amendment Bill 2016**: The committee is seeking advice as to why the establishment of the proposed Aircraft Noise Ombudsman scheme is being left to delegated legislation.
- **Commonwealth Electoral Amendment (Donation Reform and Transparency) Bill 2016**: The committee is seeking advice as to the reasons for imposing vicarious liability and reversing the evidential burden of proof.
- **Corporations Amendment (Crowd-sourced Funding) Bill 2016**: The Treasurer provided advice to the committee on the necessity of a regulation-making power.
- **Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016**: Following the Minister's advice on a range of matters the committee retains scrutiny concerns regarding the availability of judicial review for decisions of the standards body; the appropriateness of a no-invalidity clause for failure to comply with consultation requirements; and the reversal of an evidential burden of proof.
- **Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016**: The Minister provided advice on a number of matters and the committee leaves to the Senate as a whole the appropriateness of the presumption against bail for suspects awaiting extradition and of allowing the Attorney-General to delegate his functions regarding certification to *any* APS employee. The committee is also seeking further advice as to whether the bill can be amended to include a requirement that drug and alcohol testing standards be made available to AFP officers.
- **Customs and Other Legislation Amendment Bill 2016**: The committee is seeking advice as to why the bill enables penalties to be prescribed by regulation.
- **Customs Tariff Amendment Bill 2016**: The committee is seeking advice as to why content in existing primary legislation is being moved to delegated legislation and what effect this will have on parliamentary scrutiny.
- **Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016**: The Minister provided advice as to how fees may be set in regulations and why powers are being delegated to EL2 employees.
- **Transport Security Legislation Amendment Bill 2016**: The committee is seeking advice as to why most of the Secretary's powers, including significant powers and functions, can be delegated to any APS employee.

- **Treasury Laws Amendment (2016 Measures No. 1) Bill 2016:** The committee is seeking advice as to why any failure on ASIC's part to appropriately consult prior to making rules (delegated legislation) will not invalidate the rules.
- **Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016:** The Minister advised that it is intended that rules (delegated legislation) be made limiting the circumstances in which the Secretary can decide to disclose personal information. The committee considers that the disclosure power should be appropriately defined or limited in primary legislation.

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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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