



22 March 2018

## Introduction

This newsletter highlights key aspects of the work of the Senate Scrutiny of Bills Committee and the Senate Regulations and Ordinances Committee. It has a particular focus on information that may be useful while bills are under consideration and legislative instruments are subject to disallowance, and seeks to raise awareness about the committees' scrutiny principles (see Senate Standing Orders 23 and 24).

For more detail and discussion of these matters see the committees' [Scrutiny Digests](#) and [Delegated legislation monitors](#).

## Key scrutiny issues: Bills (*Scrutiny Digest 3 of 2018*)

### Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Bill 2018

- ***Privacy***: the committee is seeking advice on the necessity and appropriateness of allowing the disclosure of a person's entire criminal history for worker screening purposes, including minor offences, offences not relevant to a person's suitability as a disability worker, wrongful convictions for which a person has been pardoned, and quashed convictions.

### Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

- ***Significant penalties***: the committee leaves to the Senate the appropriateness of a number of significant custodial and financial penalties.
- ***Significant matters in delegated legislation***: the committee leaves to the Senate the appropriateness of allowing the minister to determine, by legislative instrument, whether Australian residents who are not citizens are 'allowable donors'.
- ***Presumption of innocence***: the committee leaves to the Senate the appropriateness of allowing an entry in a register of political entities to constitute prima facie evidence of the information it contains (which could effectively reverse the burden of proof).

### Foreign Influence Transparency Scheme Bill 2017

- ***Significant penalties***: the committee leaves to the senate the appropriateness of imposing significant custodial penalties, in the absence of examples of existing Commonwealth offences of similar seriousness that attract similar penalties.
- ***Criminal offences***: the committee leaves to the Senate the appropriateness of reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the defendant's knowledge.

- Significant matters in delegated legislation: the committee leaves to the Senate the appropriateness of allowing additional purposes for which scheme information can be communicated to be prescribed by delegated legislation (rules).
- Broad delegation of administrative powers: the committee welcomes advice that the government considers it would be appropriate to amend the bill to limit the delegation of coercive information-gathering and information-sharing powers.

### **Social Services Legislation Amendment (Drug Testing Trial) Bill 2018**

- Significant matters in delegated legislation: the committee leaves to the Senate the appropriateness of including significant matters, relating to the drug testing of welfare recipients and income management arrangements, in delegated legislation.
- Broad delegation of administrative powers: the committee leaves to the Senate the appropriateness of allowing private contractors to refer persons for income management under the drug testing trial, where there is no legislative process by which an affected person can challenge a positive drug test and the contractor's decision to make the referral does not appear to be subject to merits or judicial review.

### **Key scrutiny issues: Legislative instruments** (*Delegated legislation monitor 3 of 2018*)

#### **Marriage Regulations 2017**

- Classification of legislative instruments: the committee notes the Attorney-General's agreement that it would be appropriate to treat instruments made under the regulations relating to qualifications and professional development required of marriage celebrants as legislative instruments, and therefore subject to parliamentary oversight.

#### **Narcotic Drugs Amendment (Cannabis) Regulations 2018**

- Unclear meaning of 'connections and associations': further to an undertaking given to the committee in December 2016, the committee is seeking advice as to what action has been taken to revise relevant guidance regarding the meaning of 'connections and associations' about whom applicants for cannabis licences must provide information.
- Privacy: the committee is seeking advice as to how personal information collected about licence applicants and their connections and associations will be used and managed, and what safeguards are in place to protect the privacy of that information.

#### **Private Health Insurance (Prostheses) Amendment Rules 17 (No. 6)**

- Parliamentary oversight: the committee notes that an administrative error led to an incorrect version of the instrument being registered and tabled in Parliament, and that this has been corrected. However, the committee remains concerned about the use of an administrative process to make substantive changes to a legislative instrument after its tabling in Parliament, and intends to seek the Attorney-General's advice as to whether this matter may be considered when the Legislation Act is next reviewed.

### Other bills commented on (*Scrutiny Digest 3 of 2018*)

- **Australian Passports Amendment (Identity-matching Services) Bill 2018:** the committee leaves to the Senate the appropriateness of leaving to delegated legislation the details of what information relating to the identity of a person may be disclosed.
- **Bankruptcy Amendment (Debt Agreement Reform) Bill 2018:** the committee is seeking advice as to the appropriateness of leaving eligibility requirements for entering debt agreements to delegated legislation, and of a three-month custodial penalty.
- **Broadcasting Legislation Amendment (Digital Radio) Bill 2017:** the committee received advice concerning the removal of specific consultation requirements on ACMA.
- **Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017:** the committee leaves to the Senate the appropriateness of a broad delegation of administrative powers to any ACMA staff member, and the granting of immunity from civil liability to ACMA and the Commonwealth.
- **Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017:** the committee leaves to the Senate the appropriateness of a broad delegation of administrative powers to any ACMA staff member; a grant of power to ACMA to determine which of its decisions are reviewable; and a broad power for ACMA to exempt entities from the rules.
- **Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017:** the committee leaves to the Senate the appropriateness of leaving grant criteria to be set out in non-statutory guidelines.
- **Competition and Consumer Amendment (Misleading Representations About Broadband Speeds) Bill 2018:** the committee leaves to the Senate the appropriateness of applying strict liability to an offence subject to a maximum penalty of \$220,000 for individuals.
- **Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017:** the committee leaves to the Senate the appropriateness of a reversal of the evidential burden of proof.
- **Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017:** the committee leaves to the Senate the appropriateness of a broad delegation of administrative power to any ACMA staff member, and of not providing for merits review of decisions by the eSafety Commissioner to refuse to give a removal notice.
- **Export Control Bill 2017:** the committee considers it may be appropriate for the bill to be amended to limit the broad delegation and sub-delegation of administrative powers; remove significant matters from non-statutory determinations; and apply training or qualification requirements to the use of force. The committee leaves the appropriateness of a number of other matters to the Senate.
- **Family Law Amendment (Parenting Management Hearings) Bill 2017:** the committee leaves to the Senate the appropriateness of no-invalidity clauses in relation to parenting determinations, and the reversal of the evidential burden of proof for defences to offences relating to the publication of parenting management hearings.

- **Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017:** the committee welcomes advice that the government is open to considering amending the bill to set a maximum charge amount, but if this does not occur, leaves to the Senate the appropriateness of allowing regulations to determine the amount of a charge.
- **Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018:** the committee is seeking advice as to the appropriateness of a broad delegation of administrative powers to ASD employees, and a broad discretion as to the purposes for which information can be communicated to foreign intelligence agencies.
- **Marine Safety (Domestic Commercial Vessel) Levy Collection Bill 2018:** the committee leaves to the Senate the appropriateness of a broad delegation of administrative powers to any member of AMSA staff.
- **National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018:** the committee leaves to the Senate the appropriateness of leaving significant elements of offences and civil penalty provisions to delegated legislation, applying strict liability to offences attracting a penalty of 100 penalty units, and allowing delegated legislation to amend the operation of primary legislation.
- **National Housing Finance and Investment Corporation Bill 2018:** the committee is seeking advice as to the appropriateness of delegating to the executive the Parliament's power under section 96 of the Constitution to determine terms and conditions on grants to the States, and of a broad delegation of administrative power to NHFIC staff.
- **Road Vehicle Standards Bill 2018:** the committee leaves to the Senate the appropriateness of a broad discretionary power; the incorporation of external material into the law; the reversal of the evidential burden of proof; a broad delegation of administrative powers; and a limitation on judicial review.
- **Road Vehicle Standards Charges (Imposition—Customs) Bill 2018; Road Vehicle Standards Charges (Imposition—Excise) Bill 2018; and Road Vehicle Standards Charges (Imposition—General) Bill 2018:** the committee leaves to the Senate the appropriateness of allowing the rate of charges to be determined by legislative instrument.
- **Security of Critical Infrastructure Bill 2017:** the committee leaves to the Senate the appropriateness of allowing the rules to amend the operation of primary legislation and of a reversal of the evidential burden of proof in relation to the use of protected information.
- **Treasury Laws Amendment (2018 Measures No. 1) Bill 2018:** the committee received advice as to why it is proposed to allow a legislative instrument to amend the operation of primary legislation.
- **Treasury Laws Amendment (2018 Measures No. 2) Bill 2018:** the committee received advice about the conferral of broad powers on ASIC in relation to exemptions, and that the retrospective application of an amendment would not cause detriment to any individual.

- **Treasury Laws Amendment (2018 Measures No. 3) Bill 2018:** the committee is seeking advice as to the appropriateness of reversing the evidential burden of proof, and leaves to the senate the appropriateness of increasing penalties for strict liability offences.
- **Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018:** the committee leaves to the Senate the appropriateness of applying strict liability to offences subject to significant penalties.
- **Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017:** the committee leaves to the Senate the appropriateness of allowing a legislative instrument to amend the operation of primary legislation.
- **Treasury Laws Amendment (Illicit Tobacco Offences) Bill 2018:** the committee is seeking advice as to the appropriateness of several absolute liability offences and the reversal of the evidential burden of proof in relation to a number of offences.
- **Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 1) Bill 2018:** the committee draws the expansion of a standing appropriation to the attention of the Senate.

### **Other legislative instruments commented on** *(Delegated legislation monitor 3 of 2018)*

- The Regulations and Ordinances committee commented on seven legislative instruments registered on the Federal Register of Legislation between 31 January and 28 February 2018. The committee sought further advice in relation to one instrument, and concluded its interest in 27 instruments, on which the committee had previously commented.
- All legislative instruments subject to a notice of motion for disallowance in either House of Parliament are listed in the [Disallowance Alert](#).

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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) and the Senate Regulations and Ordinances Committee (Chair: Senator John Williams and Deputy Chair: Senator Gavin Marshall).

For any comments or questions, please contact:

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