

The Senate

Standing
Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament as to whether the bills, 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.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

Chapter 1

Commentary on Bills

1.1 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Services) Bill 2018

Purpose	This bill seeks to amend the <i>Intelligence Service Act 2001</i> to extend parliamentary scrutiny over the activities of Australia's national security and intelligence agencies, including scrutiny and reviews of intelligence operations
Sponsor	Senator Rex Patrick
Introduced	Senate on 14 August 2018

Exclusion of judicial review¹

1.2 Proposed subsection 29A(1) provides that if the Parliamentary Joint Committee on Intelligence and Security (PJCIS) undertakes a review of activity by Australia's national security or intelligence agencies, and the relevant responsible minister is of the opinion that the activity is an ongoing operation, or the review would interfere with the proper performance by the agency of its functions or otherwise prejudice Australia's national security or foreign relations, the minister may give the PJCIS a certificate stating the minister's opinion and reasons. Proposed subsection 29A(4) provides that the PJCIS must cease or suspend a review if the minister gives such a certificate and proposed subsection 29A(3) provides that a decision of the minister to issue a certificate must not be questioned in any court or tribunal.

1.3 The committee notes that the intention behind proposed subsection 29A(3) would be to exclude judicial review in relation to the minister's decision. The explanatory memorandum does not explain why it is considered necessary to exclude judicial review of such decisions. In addition, the committee notes that section 75(v) of the Commonwealth Constitution confers jurisdiction on the High

1 Schedule 1, item 3, proposed subsection 29A(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

Court for judicial review of decisions made by officers of the Commonwealth. As such, the committee considers that proposed subsection 29A(3), in seeking to exclude judicial review of a ministerial decision, appears inconsistent with this constitutional source of judicial review jurisdiction.

1.4 In the event that this bill progresses further through the Parliament, the committee may request further information on the proposed exclusion of judicial review from the legislation proponent.

Bills with no committee comment

1.5 The committee has no comment in relation to the following bills which were introduced into the Parliament between 13 – 16 August 2018:

- Customs Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Bill 2018;
- Customs Tariff Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Bill 2018;
- Farm Household Support Amendment (Temporary Measures) Bill 2018;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Reporting of Gas Reserves) Bill 2018;
- Plebiscite (Future Migration Level) Bill 2018;
- Social Services Legislation Amendment (Student Reform) Bill 2018; and
- Tobacco Plain Packaging Amendment Bill 2018.

Commentary on amendments and explanatory materials

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 *[Digests 1 & 3/18]*

1.6 On 13 August 2018 the Minister for Education and Training (Senator Birmingham) tabled an addendum to the explanatory memorandum in the Senate.

1.7 The committee thanks the minister for providing this addendum to the explanatory memorandum, which includes key information previously requested by the committee.²

Primary Industries Levies and charges Collection Amendment Bill 2018 *[Digests 5 & 6/18]*

1.8 On 14 August 2018 the Assistant Minister for Finance (Mr Coleman) presented a replacement explanatory memorandum in the House of Representatives.

1.9 The committee thanks the minister for including additional key information in the replacement explanatory memorandum as previously requested by the committee.³

Underwater Cultural Heritage Bill 2018 *[Digests 5, 6 & 8/18]*

1.10 On 16 August 2018 the Assistant Minister for Agriculture and Water Resources (Senator Ruston) tabled an addendum to the explanatory memorandum and the bill was read a third time.

1.11 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.⁴

2 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, pp. 93-100.

3 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, 20 June 2018, pp. 111-117.

1.12 The committee has no comments on amendments made or explanatory material relating to the following bills:

- Australian Institute of Health and Welfare Amendment Bill 2018;⁵
- Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Bill 2018;⁶
- Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018;⁷
- Social Services Legislation amendment (Drug Testing Trial) Bill 2018.⁸

4 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, 20 June 2018, pp. 157-182. As set out in *Scrutiny Digest 8 of 2018*, pp. 58-60, the committee retains scrutiny concerns in relation to the level of protection for innocent third-parties in a forfeiture provision in the bill and notes that the addendum to the explanatory memorandum discussed above does not contain additional information relating to this provision.

5 On 14 August 2018 the Minister for Indigenous Affairs (Senator Scullion) tabled an addendum to the explanatory memorandum in the Senate.

6 On 16 August 2018 the House of Representatives agreed to one Government amendment and the Minister representing the Minister for Communications (Mr Fletcher) presented a supplementary explanatory memorandum and the bill was read a third time.

7 On 13 August 2018 the Senate agreed to 12 Government and two Australian Conservatives amendments, the Minister for Education and Training (Senator Birmingham) tabled a supplementary explanatory memorandum. On 14 August 2018 the House of Representatives agreed to the Senate amendments and the bill was passed.

8 On 13 August 2018 the Assistant Minister for Trade, Tourism and Investment (Mr Coulton) presented an addendum to the explanatory memorandum in the House of Representatives and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

2.1 No responses received.

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 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 on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.¹ 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.²

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Helen Polley
Chair

- 1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.
- 2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

