

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

Initial scrutiny

1.1 The committee comments on the following bills and, in some instances, seeks a response or further information from the relevant minister.

Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021

| | |
|-------------------|--|
| Purpose | This bill seeks to extend for a further three years the declared areas provisions in sections 119.2 and 119.3 of the <i>Criminal Code Act 1995</i> (Criminal Code) that are scheduled to sunset on 7 September 2021. This Bill will also amend the <i>Intelligence Services Act 2001</i> to provide that the Parliamentary Joint Committee on Intelligence and Security may review the operation, effectiveness and proportionality of the declared areas provisions prior to their new sunset date. |
| Portfolio | Attorney-General |
| Introduced | House of the Senate on 4 August 2021 |

Trespass on personal rights and liberties

Parliamentary scrutiny¹

1.2 A number of items in the bill seek to extend the operation of significant counter-terrorism measures that are due to sunset in September 2021. In particular, the following measure is proposed to be extended until September 2024:

- **the declared areas provisions,**² which make it an offence for a person to enter or remain in an area declared by the Minister for Foreign Affairs to be an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity.

1.3 The following measures are proposed to be extended until December 2022:

1 Schedule 1, items 1, 5, 6 and 7. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (v).

2 In sections 119.2 and 119.3 of the *Criminal Code*.

- **the control order regime**,³ which allows a court to impose obligations, prohibitions and restrictions on a person without charge, for purposes related to preventing terrorist acts or support for terrorist acts;
- **the preventative detention order regime**,⁴ which allows a person to be taken into custody for up to 48 hours for the purpose of either preventing a terrorist attack that is capable of being carried out and could occur within the next 14 days, or to preserve evidence relating to a recent terrorist act; and
- **the stop, search and seizure powers**,⁵ which allow a police officer to stop, question and search persons and seize items in a Commonwealth place or prescribed security zone without a warrant (and, in relation to prescribed security zones, without the need for reasonable suspicion).

1.4 The committee has previously raised scrutiny concerns regarding a number of these broad coercive powers. In particular, the committee has previously noted that the control order regime constitutes a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction.⁶ That traditional approach involves a number of steps: investigation, arrest, charge, remand in custody or bail, and then sentence on conviction.

1.5 In contrast, control orders provide for restraint on personal liberty without there being any criminal conviction (or without even a charge being laid) on the basis of a court being satisfied on the balance of probabilities that the threshold requirements for the issue of the orders have been satisfied. Protections of individual liberty, built into ordinary criminal processes, are necessarily compromised.

1.6 Similarly, the committee considers that preventative detention orders raise significant scrutiny concerns as they permit a person's detention by the executive without charge or arrest, and without even a necessary intention to charge the subject with an offence.

1.7 The committee has also previously raised concerns regarding the breadth of the offence for entering, or remaining, in declared areas, and the broad delegation of power in allowing the Minister for Foreign Affairs to make this declaration.⁷ In

3 In Division 104 of the *Criminal Code*.

4 In Division 105 of the *Criminal Code*.

5 In Division 3A of Part 1AA of the *Crimes Act 1914*.

6 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2016 and Report No. 8 of 2016*.

7 See Senate Standing Committee for the Scrutiny of Bills, *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.

particular, the committee has noted its concerns that the offence could apply even if a person did not know the area was subject to a relevant declaration and they had no intention to commit any particular crime or activity.

1.8 In addition, the committee notes that the power to stop, search and question a person in a prescribed security zone, without the need for any reasonable suspicion, has the potential to be highly coercive. Once a prescribed security zone is declared, everyone in that zone is subject to stop, question, search and seizure powers, regardless of whether there are reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act.

1.9 The extraordinary nature of the regimes outlined above is recognised in the current legislation by the inclusion of a sunset period. In extending these significant powers by a period of one to three years, the committee expects that the explanatory materials accompanying the bill should provide a comprehensive justification for the continued need for such powers. In relation to the extension of the declared area provisions, the statement of compatibility states:

The declared areas provisions in section 119.2 will sunset on 7 September 2021. The Bill extends the operation of section 119.2 by a further three years, until 7 September 2024. This implements Recommendation 1 of the 2021 PJCIS Review of 'Declared Areas' Provisions. The Committee was disinclined to allow these provisions to sunset at a time of possible economic and security fallout from COVID-19 and when international borders might be reopening.⁸

1.10 In relation to the other provisions, the statement of compatibility notes that this is to allow time for the Parliamentary Joint Committee on Intelligence and Security to table its report of its most recent review into Australian Federal Police powers.⁹

1.11 While the committee acknowledges the importance of the stated purpose of the measures described above and the importance of allowing appropriate review by parliamentary committees, it reiterates that these measures substantially depart from traditional approaches to the criminal law and the presumption of innocence, particularly in giving coercive powers to detain and restrain persons who may not have been convicted of, or even charged with, a criminal offence.

1.12 The committee has previously commented on past extensions to the sunset date for these powers and notes that a similar explanation was provided to justify extending the sunset date until September 2021.¹⁰ The committee

8 Statement of compatibility, p. 6.

9 See for example, statement of compatibility, p. 16.

10 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, pp. 13–16.

reiterates its previous concerns that there is a risk that measures that were originally introduced on the basis of being a temporary response to an emergency situation may become permanent by their continual renewal. The committee considers the measures being extended by this bill raise significant scrutiny concerns and may, in some instances, unduly trespass on personal rights and liberties.

1.13 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of extending, by a further one to three years, the operation of a number of broad coercive powers which raise significant scrutiny concerns.

International Human Rights and Corruption (Magnitsky Sanctions) Bill 2021

| | |
|-------------------|--|
| Purpose | This bill seeks to make provisions enabling sanctions to be imposed, at the discretion of the Minister, for the purposes of compliance with United Nations obligations or other international obligations; or for the purposes of preventing or responding to gross human rights abuse or violations; or acts of significant corruption. |
| Sponsor | Senator Kimberley Kitching |
| Introduced | Senate on 3 August 2021 |

Significant matters in delegated legislation¹¹

1.14 Clause 7 of the bill provides that the Governor-General may make regulations that impose immigration sanctions, or financial or trade sanctions, on a prescribed foreign person or class of foreign persons.¹² In addition, clause 9 provides that the regulations may prescribe penalties, including imprisonment for up to 12 months, for offences against the regulations.

1.15 The committee's view is that significant matters, such as the power to impose sanctions or prescribe penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no justification for empowering the minister to impose sanctions or prescribe penalties by delegated legislation.¹³

1.16 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing sanctions and penalties, including custodial penalties, to be imposed by delegated legislation.

11 Clauses 7 and 9. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

12 Before the Governor-General makes a regulation under subclause 7(1), the minister must be satisfied that the purpose of the regulation is to provide accountability for, or be a deterrent to, gross violations of human rights or significant corruption, or to otherwise promote compliance with international human rights law or respect for human rights.

13 Explanatory memorandum, p. 2.

Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021

| | |
|--------------------------|---|
| Purpose | This bill seeks to facilitate the Government introducing support payments for entities adversely affected by a significant lockdown imposed by a State or Territory that affects the entities in relation to a period between 1 July 2021 and 31 December 2022. |
| Portfolio/Sponsor | Treasury |
| Introduced | House of Representatives on 3 August 2021 |

Significant matters in delegated legislation¹⁴

1.17 Schedule 1 to the bill seeks to insert proposed subsection 7(1B) into the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act) This would allow the Treasurer to make rules to prescribe payment schemes that are for the purpose of providing financial support to entities that are adversely affected by restrictions imposed under a public health order to prevent or control the transmission of COVID-19.

1.18 The committee commented on the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 and relevant amendments to the bill in *Scrutiny Digest 6 of 2020* and *Scrutiny Digest 15 of 2020*.¹⁵ The committee considered that these provisions provide the Treasurer with a broad discretionary power to create a payment scheme by legislative instrument in circumstances where there is limited guidance on the face of the primary legislation as to when these powers should be exercised. The committee reiterates these concerns in relation to Schedule 1 to the current bill.

1.19 Additionally, the committee reiterates its consistent scrutiny concerns regarding framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new

14 Schedule 1, item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2020*, 13 May 2020, pp. 5–7; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2020*, 11 November 2020, pp. 18-19.

legislative schemes. The committee notes that the explanatory memorandum does not contain a justification as to why at least high-level guidance about the operation of the additional COVID-19 payment scheme could not be included on the face of the primary legislation.

1.20 While the committee notes that the additional COVID-19 payments scheme is only intended to operate until 31 December 2022 the committee considers that some of the matters that are to be provided for in the rules (such as the core eligibility requirements for a payment and the obligations for recipients of payments) should have been included on the face of the primary legislation.

1.21 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

Reverse evidential burden¹⁶

1.22 Section 355-25 in Schedule 1 to the *Taxation Administration Act 1953* currently provides that it is an offence for a taxation officer to disclose or record protected information. Section 355-65 provides that this offence does not apply if an item in the table at subsection 355-65(8) covers the disclosure. The defendant bears an evidential burden in relation to this defence. Item 1 of Schedule 2 to the bill inserts a new item into the table at subsection 355-65(8) to provide that it is not an offence for a taxation officer to disclose protected information to an Australian government agency where the information is disclosed for the purpose of administering a program declared by the minister to be a relevant COVID-19 business support program.

1.23 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.¹⁷

1.24 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden

16 Schedule 2, item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

17 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

(requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. In this instance the explanatory memorandum states:

It is appropriate that the evidential burden be reversed in this situation. Matters relating to the disclosure of protected information and for which purposes (such as what information is being disclosed and for what purpose the disclosure is being made) are peculiarly within the knowledge of the person making the disclosure and can be raised in making their defence. It would be significantly more difficult and costly for the prosecution to disprove these facts.¹⁸

1.25 The committee notes that the *Guide to Framing Commonwealth Offences*¹⁹ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.²⁰

1.26 In this case, it is not apparent that the disclosure of information is a matter peculiarly within the defendant's knowledge, or that it would be difficult or costly for the prosecution to establish the matters. In this instance, the agency to which information was disclosed would be aware of the disclosure of information. As a result, this matter appears to be more appropriate to be included as an element of the offence.

1.27 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

18 Explanatory memorandum, p. 13.

19 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 50-52.

20 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50

Bills with no committee comment

1.28 The committee has no comment in relation to the following bills which were introduced into the Parliament between 3-5 August 2021:

- Dental Benefits Amendment Bill 2021
- Ensuring Northern Territory Rights Bill 2021
- Export Finance and Insurance Corporation Amendment (Equity Investments and Other Measures) Bill 2021
- Fair Work Amendment (Improving Paid Parental Leave for Parents of Stillborn Babies) Bill 2021
- Public Governance, Performance and Accountability Amendment (Improved Grants Reporting) Bill 2021

Commentary on amendments and explanatory materials

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

1.29 On 3 August 2021, the Attorney-General (Senator Cash) tabled a revised explanatory memorandum relating to the bill.

1.30 The committee thanks the Attorney-General for tabling a revised explanatory memorandum which includes key information previously requested by the committee.¹

1.31 The committee makes no comment on amendments made or explanatory materials relating to the following bills:

- Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021.²

¹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2021*, 17 March 2021, pp. 3-7

² On 5 August 2021, the Senate agreed to 1 Independent (Senator Patrick) amendment.

Chapter 2

Commentary on ministerial responses

- 2.1 This chapter considers the responses of ministers to matters previously raised by the committee.
- 2.2 The committee has not finalised its consideration of any responses since the tabling of *Scrutiny Digest 11 of 2021* on 4 August 2021.

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](#).