

Senate Standing Committee
for the
Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, 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.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

Courts Legislation Amendment (Judicial Complaints) Bill 2012

Introduced into the House of Representatives on 14 March 2012

Portfolio: Attorney-General

Background

This bill amends the *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, and the *Federal Magistrates Act 1999* to:

- provide a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers;
- provide immunity from suit for heads of jurisdiction as well as participants assisting a head of jurisdiction in the complaints handling process.

The bill also amends the *Freedom of Information Act 1982* to exclude documents created through the complaints handling scheme from the operation of the Act.

Broad discretion

Item 5, proposed paragraph 21B(1A)(d), item 18 and item 28

This paragraph relates to the power of the Chief Judge to deal with a complaint about another judge's performance of official duties. The bill seeks to enable a Chief Judge to take *any* measures that he or she reasonably believes are necessary to maintain public confidence in the Court, including, but not limited to, temporarily restricting another judge to non-sitting duties.

The explanatory memorandum confirms, at page 10, that this paragraph does not limit action that the Chief Judge may take to give effect to his or her general obligation to ensure the effective and orderly discharge of the business of the court. However, the explanatory memorandum also states that:

This paragraph enables a Chief Judge to take timely action that he or she believes is reasonably necessary to maintain public confidence in the Court. The Chief Judge would need to establish a clear basis for his or her belief that measures are reasonably necessary.

The same issue arises in item 18 in relation to the *Federal Court of Australia Act 1976*, and in item 28 in relation to the *Federal Magistrates Act 1999*.

To the extent that there is a requirement that a belief must arise that a measure is necessary to facilitate the maintenance of public confidence in the court, the discretionary power to impose measures is not entirely at large. In this context, **the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Trespass on personal rights, excluding *Freedom of Information Act* Item 35

This item has the purpose of providing broad exclusions from the operation of the *FOI Act* for documents of a court that relate to complaints handling processes within the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court. This approach is justified in the explanatory memorandum, at page 31, on the basis that it will 'protect potentially sensitive documents that arise in the course of...dealing with a complaint about a judicial officer.' Further, the Statement of Compatibility with Human Rights (SOC) argues that the exclusion of the *FOI Act* advances human rights by protecting privacy and reputation. In the circumstances **the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Trespass on personal rights, natural justice General

It is noted that although the bill provides a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers, the process for dealing with the complaints remains non-statutory. The Statement of

Compatibility notes, at page 5 of the explanatory memorandum, that in gathering information in relation to a complaint, the 'courts' own internal complaints processes' would be used and that 'it would be expected that procedural fairness protocols are adopted and applied'.

The bill does not, as the Statement of Compatibility notes, enable formal disciplinary action to be taken against a judicial officer and has the focus of maintaining public confidence in federal courts. However, the legal basis on which an 'officer of the Commonwealth' exercising non-statutory administrative powers is bound by procedural fairness obligations has not been clearly established by the High Court. Although such powers are, in principle, subject to review, the Committee would prefer that the legislation is explicit on this point. **The Committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach and requests advice as to whether the legislation can be amended to ensure that procedural fairness obligations apply to the non-statutory aspects of the complaints process.**

Pending the Attorney-General's reply, the Committee draws Senators' attention to this matter, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Family Law Amendment (Validation of Certain Orders and Other Measures) Bill 2012

Introduced into the House of Representatives on 14 March 2012

Portfolio: Attorney-General

Background

This bill confers rights and liabilities on all persons who had sought or were granted orders by the Family Court of Australia or the Federal Magistrates Court of Australia in the de facto financial causes jurisdiction and the relevant appellate jurisdiction of the Family Court of Australia between the date the jurisdiction was conferred and when relevant Proclamations were made.

The bill also amends the *Family Law Act 1975* to provide that regulations may be made to provide a date from which the jurisdiction of the Family Court of Australia must not be exercised in certain circumstances.

Trespass on personal rights, retrospective application

This bill draws on precedents of earlier Commonwealth validation legislation (which have been upheld by the High Court). The bill would create 'new statutory rights and liabilities for all persons who have been affected by two Proclamations not having been made under subsection 40(2) of the *Family Law Act 1975*' (see the explanatory memorandum at page 1).

The bill aims to rectify the invalidity of a particular type of orders relating to de facto financial matters. This has resulted from the fact that, although jurisdiction was conferred to make the orders on the Family Court and Federal Magistrates' Court, Proclamations necessary to enable the exercise of this jurisdiction were not made at the appropriate time. The effect of the bill, if passed, will be to 'put persons in the same position they would have been if the Proclamations had been made at the time of conferral of jurisdiction' (see the explanatory memorandum at page 1). The bill is said to provide individuals with certainty.

A number of features of the bill should be emphasised. First, 'affected individuals' may seek to alter rights and obligations that were established by the orders to be validated by this legislation 'in the same way they would have

been able to if the original orders had been validly made' (see the explanatory memorandum at pages 1 and 2). Secondly, it is argued that the bill:

...protects against prosecution for retrospective criminal offences as it provides that if, before the commencement of the Bill, a court purported to convict a person of an offence, nothing in the Bill is to be taken to validate or confirm that conviction.

This means that the bill will not operate to 'validate a conviction for an offence' which relates to the subject matter of a court order which would be validated by this amendment (see subitems 2(3) and 8(3)).

Finally, items 5 and 11 provide that the bill will not validate any order specifically declared or held to be invalid by a court prior to the commencement of the amendments.

The Committee understands the proposed approach, notes the justification provided for it and, in general, leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

However, the Committee seeks the Attorney-General's advice as to the whether any of the amendments in the bill are likely to have an adverse effect on any legal proceedings that have been initiated, but are not yet finalised.

Pending the Attorney-General's reply, the Committee draws Senators' attention to this issue, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Judges and Governors-General Legislation Amendment (Family Law) Bill 2012

Introduced into the House of Representatives on 15 March 2012

Portfolio: Finance and Deregulation

Background

This bill amends the *Judges' Pensions Act 1968* and the *Governor-General Act 1974* to implement new family law splitting arrangements in relation to Federal Judges and Governors-General.

Standing appropriation

Schedule 1, item 39, subsection 17AB(7)

Schedule 1, Part 2, subitem 47(4); and

Schedule 2, item 26, subsection 4AC(7)

These items seek to authorise appropriations for payments from the Consolidated Revenue Fund for lump-sum benefits and a transitional pension in specified circumstances relating to pension-splitting for judges or the Governor-General. The explanatory memorandum argues, at page 2, that this is 'consistent with family law, which aims to provide separating parties with a clean break' and 'consistent with the family law splitting arrangements in the other Commonwealth defined benefit schemes.' If an amount is transferred to a former spouse under these arrangements, the Judge's or Governor-General's benefit will be reduced accordingly from the time it becomes payable.

In its *Fourteenth Report of 2005*, the Committee stated at page 272 that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, 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 upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other

circumstances such as a cap on the funding or a limitation in the period during which it applies.

In this bill the explanatory memorandum respectively describes the arrangements as ‘similar to the arrangements in the Judges’ Act for payment of other lump sum benefits’ (see page 10 of the explanatory memorandum), ‘consistent with the payment of other pensions under the Judges’ Act’ (see page 16 of the explanatory memorandum) and ‘similar to the arrangements in the GG Act for payment of other benefits’ (see page 21 of the explanatory memorandum).

In the circumstances, **the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The Committee draws Senators’ attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.

Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012

Introduced into the House of Representatives on 14 March 2012

Portfolio: Attorney-General

Background

This bill enables parliamentary commissions to be established following a resolution by each House of the Parliament to investigate specified allegations of misbehaviour or incapacity of a specified Commonwealth judicial officer (including a Justice of the High Court of Australia).

Trespass on personal rights or liberties

Subclause 28(1)

This provision empowers a Commission to issue a search warrant where the Commission or a member of the Commission has reasonable grounds for suspecting that there may be, within 24 hours on or in any premises, documents or things connected with the matter being investigated and that if a notice were given for these documents or things that they might be concealed, lost, mutilated or destroyed.

The explanatory memorandum argues, at page 21, that this approach is appropriate because the alternative of giving the function to a judicial officer instead of the Commission would not recognise the ‘special nature of [the Commission’s] role investigating allegations about judicial misbehaviour or misconduct.’ Further, as the Commission’s role is ‘limited to investigating an allegation of misbehaviour or incapacity against a Commonwealth judicial officer specified through a resolution of the Parliament’, and the ‘scope of the issue and execution of search warrants by a Commission’ is limited.

In addition, special safeguards and procedures are established to reflect the fact that it is a Commission issuing search warrants. Clause 80 requires that the reasons for issuing a warrant be recorded in writing and retained. Ultimately, these reasons become part of the records of the Commission that, pursuant to clause 82, must be given to a House of Parliament when they are no longer needed. (See the discussion in the explanatory memorandum at pages 21 and 22.)

In the circumstances, **the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Trespass on personal rights and liberties, privacy Clauses 23, 44 and 48

Clause 23 enables the Commission to direct that part or all of a hearing be held in private, although the default rule is that hearings be public. Clause 44 requires the Commission to direct that material not be published if *not* giving such an order might prejudice the safety of a person or the fair trial of a person who has been or may be charged with an offence.

In relation to clause 23, it is clear that the Commission is able to consider and balance privacy and reputational interests on a case-by-case basis with competing public interests in the removal of unfit judicial officers where necessary (see the Statement of Compatibility at page 6; and the explanatory memorandum generally at page 17). In the Committee's view these interests would be difficult to balance through the application of a blanket rule.

It is noted that clause 48 also enables separate reports to be made to the Parliament on 'sensitive matters' and that this provision also enables privacy and reputational interests to be considered on a case-by-case basis.

In the circumstances, **the Committee leaves the question of whether the proposed approach, which enables the Commission to balance these interests in individual cases, is appropriate to the consideration of the Senate as a whole.**

The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Trespass on personal rights and liberties, reversal of onus Clauses 51, 52 and 53

There is a ‘reasonable excuse’ defence to the offence of not appearing as a witness if required to do so. Subclause 51(2) includes a note that confirms that a person relying on this defence bears an evidential burden of proof. The approach taken is consistent with *The Guide to Framing Commonwealth Offences*, and adequately explained in the explanatory memorandum at page 34.

The same issue arises in clause 52 relating to the failure to produce a document or thing as requested and in clause 53 relating to a refusal to be sworn or give evidence. In both these instances the approach taken is also consistent with *The Guide to Framing Commonwealth Offences*, and adequately explained in the explanatory memorandum at pages 20 and 35 respectively.

In the circumstances, the Committee makes no further comment on this issue.

Trespass on personal rights and liberties, self-incrimination Clause 54

This clause provides that a person is not excused from requirements to provide documents or information under the legislation on account that doing so may tend to incriminate or expose them to a penalty. Although the Committee routinely comments on provisions that remove the privilege against self-incrimination, and notes that the explanatory memorandum, at pages 35 and 36, provides a comprehensive explanation of the justification for the approach.

Importantly, subclause 54(2) provides for use and derivative use protections, which have the effect of restricting the use of self-incriminatory information in later court proceedings or to gather evidence against a person. However, these restrictions do not apply in relation to certain specified crimes under the *Crimes Act 1914* (see paragraphs 54(2)(d) and (e)).

The general justification for the overall approach at page 36 of the explanatory memorandum is the importance of enabling the Commission to obtain evidence which will assist the Parliament’s consideration of any possible

exercise of its power under section 72(ii) of *The Constitution* and that this, in turn, supports ‘public confidence in the independence and impartiality of the federal judiciary’. In the circumstances **the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The Committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.

Solar Hot Water Rebate Bill 2012

Introduced into the Senate on 14 March 2012

By: Senator Birmingham

Background

This bill provides for the remaining portion of expenditure allocated to the Solar Hot Water Rebate in 2011-2012 to be reinstated.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Classification (Publications, Films and Computer Games) Amendment (R18+ Computer Games) Bill 2012

[Digest 2/12 – response in 3rd Report]

On 14 March 2012 the House of Representatives tabled a correction to the explanatory memorandum relating to the Statement of Compatibility. This followed a comment by the Committee reported in *Alert Digest No. 2 of 2012*. The Committee thanks the Minister for taking action to amend the Statement of Compatibility.

Crimes Legislation Amendment (Powers and Offences) Bill 2011

[Digest 1, 2 and 3/12 [amendments] – response in 3rd Report]

On 13 March 2012 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on this additional material.

Insurance Contracts Amendment Bill 2011

[Digest 1/12 – response in 3rd Report]

On 14 March 2012 the House of Representatives agreed to six Government amendments and tabled a supplementary memorandum. The Committee has no comment on this additional material.

National Radioactive Waste Management Bill 2010

[Digest 8/10 & 3/12 [amendments] – no comment]

On 13 March 2012 the Senate agreed to three Government, one Opposition and two Australian Greens amendments. On 14 March 2012 the House of Representatives agreed to the Senate amendments and the bill was passed. The Committee has no comment on the amendments.

Provisions of bills which impose criminal sanctions for a failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

Bill/Act	Section/Subsection	Offence	Penalty
Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012	Item 52	Failure of a witness to produce document or other thing	Imprisonment for 6 months

SCRUTINY OF STANDING APPROPRIATIONS

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. 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.

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

Bills introduced with standing appropriation clauses in the 43rd Parliament since the previous *Alert Digest*

Judges' and Governors-General Legislation Amendment (Family Law) Bill 2012 — Schedule 1, item 39, subsection 17AB(7); Schedule 1, Part 2, subitem 47(4); and Schedule 2, item 26, subsection 4AC(7).

Other relevant appropriation clauses in bills

Nil