

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 the Hon Ian Macdonald (Chair)

Senator C Brown (Deputy Chair)

Senator M Bishop

Senator S Edwards

Senator R Siewert

Senator the Hon L Thorp

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.

TABLE OF CONTENTS

Commentary on bills

- Banking Amendment (Banking Code of Conduct) Bill 2012 1
- Corporations Legislation Amendment (Derivative Transactions) Bill 2012 3
- Dental Benefits Amendment Bill 2012 5
- Environment Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Bill 2012 6
- Environment Protection and Biodiversity Conservation Amendment (Making Marine Parks Accountable) Bill 2012 9
- Higher Education Support Amendment (Maximum Payment Amounts and Other Measures) Bill 2012 10
- Industrial Chemicals (Notification and Assessment) Amendment Bill 2012 12
- International Fund for Agricultural Development Amendment Bill 2012 13
- Livestock Export (Animal Welfare Conditions) Bill 2012 14
- Marriage Amendment Bill (No. 2) 2012 15
- Migration Amendment (Health Care for Asylum Seekers) Bill 2012 16
- Minerals Resource Rent Tax Amendment (Protecting Revenue) Bill 2012 17
- Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012 18

Commentary on amendments to bills 23

- Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012
- Courts Legislation Amendment (Judicial Complaints) Bill 2012
- Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012
- Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012

- Legislative Instruments Amendment (Sunsetting Measures) Bill 2012

Provisions of bills which impose criminal sanctions for a failure to provide information 25

Scrutiny of standing appropriations 26

Senate Standing Legislation Committee Inquiries

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

- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Banking Amendment (Banking Code of Conduct) Bill 2012

Introduced into the House of Representatives on 10 September 2012

By: Mr Wilkie

Background

This bill amends the *Banking Act 1959* to provide for:

- the minister to make, by legislative instrument, a mandatory Banking Code of Conduct stipulating standards to be complied with by authorised deposit-taking institutions when dealing with their customers;
- the Australian Prudential Regulation Authority to accept and investigate complaints by bank customers and to name banks found to be non-compliant; and
- amendments to the code to be made after consultation; and a three-yearly review of the code.

Delegation of legislative power

Items 3 and 4

Under proposed section 36A, inserted by item 3, the Minister is empowered to make the Banking Code of Conduct (the Code) by legislative instrument. Customers may then, under other amendments inserted by item 3, make complaints to the Australian Prudential Regulation Authority (APRA) in relation to possible breaches of the Code. If APRA is satisfied that there has been a breach of the Code it must name the Authorised Deposit-taking Institution (ADI) in question on a website and in a newspaper, indicating the reasons for the publication. Item 2 proposes amendments which would enable civil penalty provisions to be included in the Code.

Item 4 provides that the Code must be made within three months of commencement and must include and limit itself to standards equivalent to those already present in the Code of Banking Practice published by the Australian Bankers' Association as in force on 1 May 2012. (However, a standard is not required to be included if the Minister is satisfied that compliance with the standard would be impossible or impracticable to assess.)

Given that the Code is to be based on existing professional standards it is unclear to the Committee why the standards which are to be adopted cannot be included in the primary legislation. As it is envisaged that breach of some of the standards will amount to civil penalty provisions, the Committee is concerned that important matters are being inappropriately dealt with in delegated legislation. As currently drafted, the explanatory memorandum does not give a detailed explanation as to why it is not possible or not desirable for the standards to be included in the primary legislation.

The Committee therefore seeks the Member's advice as to why the standards cannot be included in the primary legislation.

Pending the Member's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Corporations Legislation Amendment (Derivative Transactions) Bill 2012

Introduced into the House of Representatives on 12 September 2012

Portfolio: Treasury

Background

This bill amends the *Australian Prudential Regulation Authority Act 1998*, *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001*, the *Mutual Assistance in Business Regulation Act 1992*, and the *Reserve Bank Act 1959* to provide a legislative framework to implement Australia's G-20 commitments in relation to over-the-counter derivatives reforms.

Delegation of legislative power

General, in particular item 32, proposed sections 901A–901D and 903A–903C

The primary purpose of the bill is to provide a legislative framework to implement Australia's G-20 commitments in relation to 'over-the-counter' derivatives reforms. An important component of the framework will involve the issuing of 'derivatives transaction rules' (DTRs) by the Australian Security and Investments Commission (ASIC). DTRs could establish one or more mandatory obligations (relating to things such as reporting, clearing or execution) for participants transacting in a prescribed class of derivatives. The explanatory memorandum provides an explanation as to why it is appropriate for the relevant rule making powers, 'carve outs' and exceptions to be dealt with flexibly (at page 5). This necessity is said to be of particular importance so as to 'adapt our requirements to international developments, to be able to tailor the nature of any carve outs to the requirements for any derivative classes and the need to adapt to changing market practices and concerns (including but not limited to avoidance activities)'.

Similar issues arise in relation to the issuing of 'derivative trade repository rules' by ASIC.

Although the Committee prefers in general to see important matters dealt with in primary legislation in light of the explanation provided **the Committee leaves the question of whether the approach adopted in this bill is appropriate to the consideration of the Senate as a whole.**

The Committee draws Senators' attention to this matter, as the approach may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Delegation of legislative power Schedule 1, item 32, proposed section 907B

This proposed section provides that determinations, regulations, DTRs and derivative trade repository rules may incorporate matters contained in writing as in force from time to time, or at a particular time. At page 37 the explanatory memorandum states that this exemption from subsection 14(2) of the *Legislative Instruments Act 2003* is justified as it 'enables regulations, rules and determinations to incorporate the requirements of foreign jurisdictions as applying to persons in Australia' and will 'help to ensure that requirements in Australia are harmonised with requirements in other jurisdictions to allow for a coordinated international approach and to help to facilitate open international capital markets'.

The Committee generally prefers that bills do not seek to exempt provisions from the requirements of the *Legislative Instruments Act 2003* in this way, however, in light of the explanation provided, **the Committee leaves the question of whether this 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Dental Benefits Amendment Bill 2012

Introduced into the House of Representatives on 12 September 2012

Portfolio: Health and Ageing

Background

The Bill amends the *Dental Benefits Act 2008* to allow the establishment of the Child Dental Benefits Schedule to extend eligibility for subsidised dental care from children aged at least 12 years but under 18 years to children aged at least 2 years but under 18 years.

Commencement

Clause 2

The bill will commence on 1 January 2014, the planned start date for the Child Dental Benefits Schedule. Although the explanatory memorandum does not expressly address the reason for delayed commencement, it does note that the caps applying to different groups and services that will be applicable under the Dental Benefit Rules (see item 17) will reflect the outcomes of consultations with dental professions in developing the schedule of services, which will occur after the passage of the Bill (see page 3).

In the circumstances, the Committee **leaves the question of whether the delayed commencement is appropriate to the Senate as a whole.**

Environment Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Bill 2012

Introduced into the House of Representatives on 11 September 2012

Portfolio: Sustainability, Environment, Water, Population and Communities

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to provide for the Minister to establish an independent expert panel to conduct an assessment into the potential environmental, social and economic impacts of a declared fishing activity and to prohibit the declared fishing activity while the assessment is undertaken.

Undue trespass—strict liability

Schedule 1, item 1, proposed subsection 390SB(2)

Proposed section 390SB seeks to create an offence relating to ‘declared fishing activities’ in Commonwealth marine areas. Proposed subsection (2) would make the circumstance that a ‘declared fishing activity’ is undertaken in a Commonwealth marine area a strict liability element of the offence. The Statement of Compatibility provides a detailed explanation for the approach:

It is appropriate that strict liability apply to the Commonwealth marine area element of the offence as it may be difficult to prove that a person knew they were in a Commonwealth marine area (or were reckless to that fact) making the offence difficult to prosecute and accordingly undermining the deterrent effect of the provisions. The application of strict liability is also justifiable on the basis that a defendant can reasonably be expected, because of his or her professional involvement in the fishing industry, to know the requirements of the law. Although the penalty for the offence is higher than those applicable to most other offences in the EPBC Act, it is identical to the offences in Part 3 of the EPBC Act and is at an appropriate level to deter people from engaging in declared fishing activities. (Page 4)

The explanatory memorandum also states that ministerial declarations will generally specify the proscribed fishing activity by reference ‘to a number of criteria’ and that this ‘will mitigate the possibility of a declaration applying arbitrarily to a particular operator who is not intended to be caught by a declaration’ (at page 4). It is also noted that the *Guide to Framing*

Commonwealth Offences, Infringement Notices and Enforcement Powers was considered in drafting the legislation and that the approach to strict liability is considered to be consistent with the principles articulated in that document (at page 5).

Given the detailed explanation for the approach, **the Committee leaves the question of whether the application of strict liability in this case is appropriate to the Senate as a whole.**

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

Broad discretionary powers

Schedule 1, item 1, proposed sections 390SD and 390SF

The Minister is empowered to make both interim declarations (lasting no longer than 60 days) and final declarations (lasting no longer than 24 months) the effect of which is that fishing activity specified in the declarations becomes a ‘declared fishing activity’ (and is thus prohibited in a Commonwealth marine areas).

In relation to interim declarations, the Fisheries Minister and the Minister responsible for the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) must agree that there is uncertainty as to the environmental, social or economic impacts of the fishing activity and that it is appropriate that the fishing activity be prohibited in a Commonwealth marine area while consultation occurs about whether to make a final declaration in relation to the fishing activity (proposed subsection 390SD(3)). In relation to final declarations, the Fisheries Minister and the Minister responsible for the EPBC Act must agree that there is uncertainty about the environmental, social or economic impacts of the fishing activity and that it is appropriate that an expert panel be established and that fishing activity be prohibited in Commonwealth marine areas while that panel conducts an assessment.

Although these powers given to the Minister are broad, in addition to the above requirements it is noted that the declarations are made by legislative instrument and are subject to parliamentary accountability and disallowance.

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

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

Environment Protection and Biodiversity Conservation Amendment (Making Marine Parks Accountable) Bill 2012

Introduced into the Senate on 13 September 2012

By: Senator Colbeck

Background

The bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to:

- require the relevant Minister to commission an independent social and economic impact assessment before any proclamations are made;
- require the Minister to obtain independent scientific peer-reviewed advice that is made publicly available;
- establish an independent scientific reference panel and stakeholder advisory group to analyse possible scientific, economic and social impacts of proposed Marine Protected Areas; and
- make declarations disallowable by the Parliament.

The Committee has no comment on this bill.

Higher Education Support Amendment (Maximum Payment Amounts and Other Measures) Bill 2012

Introduced into the House of Representatives on 12 September 2012

Portfolio: Industry, Innovation, Science, Research and Tertiary Education

Background

This bill amends the *Higher Education Support Act 2003* (the Act) and the *Australian Research Council Act 2001* to:

- update the maximum payment amounts for Other Grants and Commonwealth scholarships and also authorise wider use and disclosure of personal information collected for the purposes of the Act; and
- update appropriation amounts to apply indexation and to insert a new funding cap for the last year of the forward estimates.

Undue trespass—privacy

Schedule 3, item 2, proposed section 180-25

This schedule of the bill substitutes a new Division 180 of the *Higher Education Support Act 2003* to allow disclosure of Higher Education Support Act information by the Secretary to relevant Commonwealth and state agencies, higher education providers, VET providers and bodies or associations determined by the Minister by legislative instrument. The statement of compatibility (SOC) contains a detailed discussion of the extent to which the provisions of this schedule may be thought to interfere with the right to privacy.

The committee notes that persons to whom information may be disclosed include persons who are ‘employed or engaged by a body or association’ identified in a legislative instrument (see proposed subsections 180-25(3) and (4)). The SOC indicates that ‘where personal information is disclosed to a third party engaged by the Department...this will be under a contract of services that requires the third party to act as though it were an agency bound by the Privacy Act’. However, this requirement does not appear to be mandated by the bill.

The Committee therefore **seeks the Minister's advice in relation to whether consideration has been given to including such an obligation in the legislation or requiring such a term to be included in a relevant contract.**

Pending the Minister's advice, 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.

Industrial Chemicals (Notification and Assessment) Amendment Bill 2012

Introduced into the House of Representatives on 12 September 2012

Portfolio: Health and Ageing

Background

The bill amends the *Industrial Chemicals (Notification and Assessment) Act 1989* (ICNA Act) to:

- implement specific measures arising from the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) Cost Recovery Impact Statement (CRIS) to:
 - change the current three-tier NICNAS registration structure to a four-tier structure to deliver a more equitable charging arrangement for business;
 - introduce an application fee for businesses seeking authorisation from NICNAS to import or export industrial chemicals under the Prior Informed Consent procedure of the Rotterdam Convention;
 - remove an obsolete fee for the transfer of a chemical from the non-confidential section of the Australian Inventory of Chemical Substances (AICS) to the confidential section of AICS;
- make two minor technical amendments concerning payment of NICNAS registration charges and differential fees for applications made under the ICNA Act;
- make minor consequential technical amendments arising from the new *Model Work Health and Safety Regulations 2011*; and
- make a minor consequential amendment to the *Agricultural and Veterinary Chemicals Code Act 1994* which refers to the ICNA Act.

The Committee has no comment on this bill.

International Fund for Agricultural Development Amendment Bill 2012

Introduced into the House of Representatives on 13 September 2012

Portfolio: Foreign Affairs

Background

This bill amends the *International Fund for Agricultural Development Act 1977* to allow Australia to accede to the Agreement Establishing the International Fund for Agricultural Development under Australian law.

The Committee has no comment on this bill.

Livestock Export (Animal Welfare Conditions) Bill 2012

Introduced into the House of Representatives on 10 September 2012

By: Mr Wilkie

Background

This bill amends the *Australian Meat and Live-stock Industry Act 1997* to:

- provide that livestock exported for slaughter are transported and slaughtered humanely; and
- make the secretary responsible to ensure that livestock exported for slaughter under a livestock export licence are treated humanely and if not, cease their export; and penalise the holder of a livestock export licence if they fail to inform the secretary of the inhumane treatment of livestock.

The Committee has no comment on this bill.

Marriage Amendment Bill (No. 2) 2012

Introduced into the Senate on 10 September 2012

By: Senators Crossin, Brown, Pratt and Marshall

Background

This bill amends the *Marriage Act 1961* to establish marriage equality for same-sex couples principally by amending the definition of marriage in subsection 5(1) of the Act.

The bill also inserts a new paragraph into section 47 to specify that a minister of religion, a person authorised under a State or Territory law, or a marriage celebrant is not under an obligation to solemnise a marriage where the parties are of the same sex.

Delegation of Legislative Power—Henry VIII clause Item 10(2)

This item enables the Governor-General to make regulations ‘amending Acts (other than the *Marriage Act 1961*) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act’. Unfortunately, the explanatory memorandum does not indicate why it is necessary and appropriate for consequential amendments to other Acts be made by regulations. While the Committee prefers that the use of delegated legislation rather instead of primary legislation is outlined in the explanatory memorandum, in the circumstances **the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

The Committee draws Senators’ attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Migration Amendment (Health Care for Asylum Seekers) Bill 2012

Introduced into the Senate on 11 September 2012

By: Senators Hanson-Young and Di Natale

Background

This bill amends the *Migration Act 1958* to establish an independent panel of medical experts tasked with investigating and reporting to the Parliament on the health of asylum seekers who are detained in offshore detention and processing facilities.

Undue trespass—privacy

Schedule 1, item 1, proposed subclause 198ABA(8)

This subclause gives the expert medical panel powers to require that information be given or documents produced by a relevant agency. The panel may give a notice to the head of the agency (or their nominee) to produce information or documents held by the relevant agency (or consultants or independent contractors engaged by a relevant agency).

Although subclause 198ABA(7) prohibits the disclosure of personally identifiable information, **the Committee seeks the Senators' advice as to whether the right to privacy is adequately protected. For example, the Committee notes that there is no offence for the disclosure of personal information as is often found in legislation which authorises information to be disclosed for limited purposes.**

Pending the Senators' advice, 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.

Minerals Resource Rent Tax Amendment (Protecting Revenue) Bill 2012

Introduced into the Senate on 12 September 2012

By: Senator Milne

Background

This bill amends the *Minerals Resource Rent Tax Act 2012* to protect the revenue generated from the Minerals Resource Rent Tax from being eroded by state governments increasing royalties.

Retrospective application

Items 2 and 3

Item 2 to Schedule 1 of this bill seeks to amend section 60-25 of the *Minerals Resource Rent Tax Act 2012* so that any increases in royalties after 1 July 2011 would be disregarded when calculating royalty credits for the Minerals Resource Rent Tax (MRRT). Item 3 provides that this change would apply to MRRT assessments from the 2012-13 MRRT year, which is the first year of the operation of the tax. As such, the change may be considered to have a retrospective application.

The Committee routinely comments on provisions which may have a detrimental retrospective effect, particularly when the explanatory memorandum does not provide a justification for the proposed approach. **The Committee therefore seeks the Senator's advice as to why this retrospective application is considered necessary.**

Pending the Senator's advice, 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.

Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012

Introduced into the House of Representatives on 12 September 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill provides for amendments to the:

- *Social Security (Administration) Act 1999* to extend the welfare reform trial in the Cape York area until 1 January 2014.
- *Indigenous Education (Targeted Assistance) Act 2000* to increase the Act's legislative appropriation for 2012 and 2013 calendar years.
- operation of the Social Security Appeals Tribunal in the social security, child support, family assistance and paid parental leave jurisdictions.

The bill also makes technical amendments to the 'schoolkids bonus' and other minor clarifications.

Undue trespass—reversal of burden of proof

Schedule 3, item 28, proposed sections 141C(4) and 141E(3)

Schedule 3, item 74, proposed sections 103ZAA(4) and 103ZAC(3)

Schedule 3, item 116, proposed sections 273A(4) and 273C(3)

Schedule 3, item 140, proposed sections 177B(4) and 177D(3)

These provisions provide for a defence where a person contravenes an order, made by the Social Security Appeals Tribunal (SSAT), which directs the person not to disclose information specified in the order. The non-disclosure order may only relate to information disclosed to a person for purposes relating to an SSAT review. The defence is that a non-disclosure order does not apply to information which the person knew before the disclosure was made for the purposes of the SSAT review. An evidential burden is placed on a defendant in relation to this defence on the basis that the 'recipient of the information that is subject to a non-disclosure order given by the SSAT... will be best placed to know whether he or she knew the information before they were given the information at the review and produce appropriate evidence' (see the explanatory memorandum at page 14).

The same issue also arises in relation to a number of transitional provisions.

In the committee's view the explanation in the explanatory memorandum is useful and the approach is consistent with that set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, and in particular with the principle that evidential burdens may be appropriate where the matter is peculiarly within the knowledge of the defendant.

In the circumstances, the Committee makes no further comment on the items.

Undue trespass—privacy

Schedule 3, item 36, proposed section 16(3A)

Schedule 3, item 90, proposed section 130A

Schedule 3, item 156, proposed section 19A

Section 16 of the *Child Support (Registration and Collection) Act 1988* prohibits the disclosure of certain information that is disclosed in relation to the administration of the Act. Under the Act there is an exception relating to disclosure by the Child Support Registrar where the Registrar believes on reasonable grounds that communication of the information is necessary to lessen a credible threat to the life, health or welfare of a person or there is reason to suspect that the threat may afford evidence that an offence may be or has been committed against a person and the information is communicated for the purpose of preventing, investigating or prosecuting such an offence.

Proposed section 16(3A) provides for an equivalent exemption for members of the SSAT. The Statement of Compatibility (at page 6) states that this provision may be considered 'reasonable and proportionate' to any infringement on the right to privacy 'because it strengthens a person's right to protection from exploitation, violence and abuse, and ensures there is no legal impediment to attempts to safeguard the welfare and safety of individuals'.

This also arises in relation to items 90 and 156 of Schedule 3.

In light of the explanation provided, the Committee **leaves the question of whether these measures are 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.

**Undue Trespass—retrospective application
Schedule 4, subitem 2(1)**

This subitem would apply amendments in schedule 4 retrospectively.

The amendments made in schedule 4 are designed to 'undo the effect of the majority's interpretation of the child support legislation in the judgment of the Full Court of the Family Court of Australia in *Child Support Registrar v Farely* [2011] FAMCAFC 207 (*Farley*)' (see the explanatory memorandum at page 51). Prior to this decision the Child Support Registrar had a longstanding policy that had been assumed to be consistent with the legislation. In effect, however, the Full Court held that this policy was not consistent with the legislative scheme.

The policy in question dealt with the situation where a Court had made a declaration (under section 107 of the *Child Support (Assessment) Act 1989*) that the payer of child support was not the parent of one of the children that were covered by a child support assessment for which they were liable, but that the payer remains liable for at least one other child in the assessment. In such circumstances the longstanding policy of the Child Support Registrar can be described as follows:

[T]he total amount of child support previously paid (including amounts paid for the child that was found to be not theirs) would be applied to their child support liability for any remaining children in the case, and any child support debt for those children. Any excess child support they paid may be recovered from the payee by applying for a court order under the existing child support legislation. (Explanatory memorandum at page 51)

Subsection 107(5) of the *Child Support (Assessment) Act 1989* provides that once a declaration that a child was not the child of the payer has been made the original application for administrative assessment for the child is 'to be taken never to have been accepted by the Registrar'. The effect of the Full Court of the Family Court of Australia's decision in *Farley* is that the payer must take court action to obtain repayment from the payee of the amount that they had paid in relation to the child of which they were not the parent.

Further, the Court's interpretation of the legislation means that it is not open to the Registrar to apply such amounts to cover any unpaid amounts in relation to any other child for whom the payer is liable.

The effect of the amendments in schedule 4 would enable the Registrar to continue to administer the legislation according to its existing policy (which the Court held to be inconsistent with the existing legislation).

In justification of applying the amendments retrospectively, the explanatory memorandum states that:

These amendments are required because the Family Court's decision...changed the way the policy has always operated...The amendments are being applied retrospectively to support the longstanding policy and administration so that previously decided cases are not revisited, which could significantly disadvantage parties who have relied on those decisions in their financial affairs. (Pages 51 and 52)

Given the potential significance of the proposal, this explanation is not sufficiently detailed to enable the committee to adequately consider the appropriateness of retrospective legislation in this instance. Although it may be suggested that those who have relied on the Registrar's existing policy may be disadvantaged were their cases to be revisited, the effect of the retrospective change to the legislative provisions may also operate to the detriment of a party to an assessment for child support. The decision in *Farley* concluded that the policy was unlawful.

The Committee therefore **seeks further information from the Minister relating to the rationale for applying these provisions retrospectively. In particular, the Committee seeks information about:**

- **the nature of the disadvantage that may be occasioned in relation to all parties (including any affected children whether or not they are covered by any order);**
- **the extent of the practical problem (i.e. how many previously decided cases could potentially be revisited);**
- **whether consideration has been given to solutions to the problem that do not involve retrospective legislation (such as compensation for faulty administration); and**
- **how excess child support in these circumstances may be recovered under the existing legislation (for example, it is not clear whether**

there is a right to recover all such amounts and how the interests of the child might be factored into such proceedings).

Pending the Minister's reply, 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.

COMMENTARY ON AMENDMENTS TO BILLS

Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012

[Digest 8/12 – no response required]

On 11 September the House of Representatives agreed to three Government amendments and tabled a supplementary explanatory memorandum. On the 13 September 2012 the Senate tabled a revised explanatory memorandum. The Committee has no comment on the additional material.

Courts Legislation Amendment (Judicial Complaints) Bill 2012

[Digest 4/12 – response in 6th Report]

On 10 September 2012 the House of Representatives tabled an addendum to the explanatory memorandum. The Committee has no comment on the additional material.

Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012

[Digest 5/12 & 6 & 7/12 (amendments) – no comment]

On 10 September 2012 the Senate agreed to two Government amendments and 11 amendments moved by Senators Xenophon, Heffernan, Madigan, Nash and Waters. A supplementary explanatory memorandum was also tabled.

On 17 September 2012 the House of Representatives agreed to two Senate amendments and 11 Government amendments were made in place of the Senate amendments disagreed to. A supplementary explanatory memorandum was also tabled. The Committee has no comment on the additional material.

Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012

[Digest 4/12 – no response required]

On 10 September 2012 the House of Representatives agreed to 14 Government amendments and tabled a supplementary explanatory memorandum and an addendum to the explanatory memorandum. On

12 September 2012 the Senate tabled a revised explanatory memorandum. The Committee has no comment on the additional material.

Legislative Instruments Amendment (Sunsetting Measures) Bill 2012

[Digest 8/12 – no comment]

On 13 September 2012 the Senate tabled a correction to the explanatory memorandum and passed the bill without amendment. The Committee has no comment on the additional material.

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
Livestock Export (Animal Welfare Conditions) Bill 2012	Section 55	If a holder of a live-stock licence fails to inform the Secretary in writing of evidence the would reasonably suggest that live-stock being exported under the licence is not being treated humanely	50 penalty units

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*

Nil

Other relevant appropriation clauses in bills

Higher Education Support Amendment (Maximum Payment Amounts and Other Measures) Bill 2012 — Schedule 1, item 1, subsection 41-45(1)(table items 8 to 11), and item 6, subsection 46-40 (table items 10 to 12); and Schedule 2, item 2, paragraphs 49(m), (n) and (o): special appropriation clauses – for a finite period of time (i.e. for circumstances arising in particular financial years).

Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012 — Schedule 2, item 1, subsection 14B(1)(table item 4), and item 2, subsection 14C(1)(table item 1): special appropriation clause – for a finite period of time (i.e. for circumstances arising in particular financial years).