

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 I 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.

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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.

Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013

Introduced into the Senate on 26 February 2013

By: Senator Xenophon

Background

This bill amends the *Criminal Code Act 1995* to make it an offence for a person who is over 18 years of age to misrepresent their age to a person they reasonably believe to be under 18 years of age for the purposes of encouraging a physical meeting, or with the intent of committing an existing offence.

Trespass on personal rights and liberties—penalties Schedule 1, item 1, proposed subsections 474.40(1) and (2)

The Committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. These subsections impose the possibility of significant custodial penalties (respectively 5 years and 8 years imprisonment). **However, this issue is not addressed in the explanatory memorandum and the Committee therefore seeks further advice as to the justification for the penalties imposed by these subsections.**

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.

Trespass on personal rights and liberties—absolute liability Schedule 1, item 1, proposed subsection 474.41(1)

This subsection provides that for the purposes of an offence against section 474.40 (misrepresenting age to a person under 18 years of age in online communications), 'absolute liability applies to the physical element of the

circumstance of the offence that the recipient is someone who is under 18 years of age'. The explanatory memorandum (at page 3) states incorrectly that *strict*, not *absolute*, liability applies to the physical element of an offence as provided in this subsection. There is no justification given in the explanatory memorandum for the application of strict or absolute liability. **The committee seeks clarification as to whether strict or absolute liability is intended and seeks an appropriately detailed justification for the application of either form of liability taking into consideration the relevant principles stated in the *Guide to Framing Commonwealth Offences*.**

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.

**Trespass on personal rights and liberties—burden of proof
Schedule 1, item 1, proposed subsection 474.41(2)**

This subsection provides that for the purposes of prosecuting an offence 'evidence that the recipient was represented to the sender as being under or of a particular age is, in the absence of evidence to the contrary, proof that the sender believed the recipient to be under or of that age'.

The subsection appears to introduce a presumption that a sender believes a particular matter in certain circumstances. As such, the intended effect of the provision may be similar that achieved by expressly placing a legal burden of proof on a defendant to disprove a particular matter in specified circumstances. Unfortunately, the explanatory memorandum simply restates the effect of this provision. **The committee therefore seeks the Senator's advice as to whether this provision may be considered to undermine the common law principle that those charged of an offence have the right to be presumed innocent and, given that it appears that the provision may operate in a way that in practical effect reverses the burden of proof, the committee requests a detailed justification of the proposed approach.**

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.

Trespass on personal rights and liberties—burden of proof
Schedule 1, item 1, proposed section 474.42

This section outlines defences against the offences in section 474.40. Reading subsections 474.42(1) and (2) together, it is a defence to prosecution that the defendant had a reasonable belief that the recipient was not under 18 years of age. Subsection 474.42(3) provides that a person is not criminally responsible if the person is a law enforcement officer acting in the course of his or her duties and the conduct of the person is reasonable in the circumstances.

Defendants bear an evidential burden in relation to the matters referred to in these defences, but the explanatory memorandum does not justify the proposed approach. **The committee therefore seeks the Senator's advice as to the rationale for reversing the burden of proof and the appropriateness of including the vague language of reasonableness in the circumstances defining the availability of the defences.**

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.

Marriage Equality Amendment Bill 2013

Introduced into the Senate on 25 February 2013

By: Senator Hanson-Young

This bill is in identical terms to the bill introduced into the House of Representatives on 13 February 2012 by Mr Bandt. The committee repeats the comments it made about the bill in *Alert Digest No. 2 of 2012*.

Background

This bill amends the *Marriage Act 1961* to remove all discrimination to ensure that two people, regardless of their sex, sexual orientation or gender identity have the opportunity to marry.

Inappropriate delegation of legislative power Schedule 1, subitem 9(1)

Subitem 9(1) of Schedule 1 enables regulations to be made which amend 'Acts (other than the *Marriage Act 1961*) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act'. This enables regulations to amend Acts of the Parliament. **The appropriateness of this delegation of legislative power is not addressed in the explanatory memorandum and the Committee therefore seeks the Private Members' rationale for the proposed approach.**

Pending the Private Members' reply, 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.

Migration Amendment (Reinstatement of Temporary Protection Visas) Bill 2013 [No. 2]

Introduced into the Senate on 28 February 2013

By: Senator Cash

This bill is in identical terms to the bill introduced into the House of Representatives on 11 February 2013 by Mr Morrison. The committee repeats the comments it made about the bill in *Alert Digest No. 2 of 2013*.

Background

This bill amends the *Migration Act 1958* to restore two classes of temporary protection visas to provide safe haven and protection to those who have arrived illegally in Australia or at an excised offshore place and are found to engage Australia's protection obligations under the Refugee Convention.

Delegation of Legislative Power—important matters contained in regulations

Schedule 1, item 4, proposed subsections 76D(2) and 76H(2)

This subsection provides that regulations made for the purposes of providing for access to social security and other benefits, to be prescribed in the regulations as visa conditions (for a temporary protection (offshore entry) visa), 'must ensure that the holder of the visa must participate in a mutual obligation program specified in the regulations in order to access relevant social security benefits'. The same issue arises in proposed subsection 76H(2) in relation to conditions of temporary protection for a 'secondary movement offshore entry' visa.

The committee's long-standing view is that important matters should be included in primary legislation whenever possible. As the explanatory memorandum does not elucidate the nature of the 'mutual obligations' that may be mandated by the regulations **the committee seeks an explanation as to what obligations are envisaged and why it is appropriate that they be provided for in the regulations.**

Pending the Senator's reply, 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.

Rights, Liberties or obligations unduly dependent upon insufficiently defined administrative powers

Schedule 1, item 4, proposed subsections 76E(2) and 76E(7)

Proposed subsection 76E(2) gives the Minister a power to lift the bar (created by subsection 76E(1)) on the grant of a permanent visa for persons holding temporary protection visas. This power may be exercised on the basis of what the Minister thinks is in the public interest. Subsection 76E(7) provides that the Minister ‘does not have a duty to consider whether to exercise the power under subsection (2) in respect of any person who holds a temporary protection (offshore entry) visa, whether the Minister is requested to do so by the visa holder or by any other person, or in any other circumstances’.

The result is that the power is conferred on the basis of broad discretionary considerations and, indeed, the Minister need not even consider whether or not it should be exercised. Although the courts’ judicial review jurisdiction is not ousted by these clauses, the practical result of the combination of a broadly framed power and a ‘no-consideration clause’ (ie subsection 76E(2)) would be that judicial review would not provide any significant control of the exercise of the powers. **As the explanatory memorandum does not specifically address the justification for the proposed approach in these subsections, the committee seeks further advice as to why the power should not be subject to clearer criteria and why the no-consideration clause is considered necessary given that the non-exercise or refusal to exercise this power does not appear to be subject any accountability mechanisms.**

Pending the Senator's reply, 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.

Delegation of legislative power—Henry VIII clause

Item 5

Henry VIII clauses enable delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government. It is the practice of the committee to comment on so-called when the rationale for their use is not

clear. In this instance, no explanation is provided for the necessity of paragraph (1) of this item which enables the regulations to amend Acts.

The committee accepts that there may be justification for the use of such clauses, but expects the issue to be comprehensively addressed in the explanatory memorandum accompanying the bill. **As the explanatory memorandum does not provide information about item 5(1), the committee seeks advice as to the rationale for including it in the bill.**

Pending the Shadow Minister's reply, 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.

Small Business Commissioner Bill 2013

Introduced into the Senate on 25 February 2013

By: Senator Whish-Wilson

Background

This bill provides for an advocate and representative of small business at a Federal level by establishing an Office of the Small Business Commissioner.

Poor explanatory memorandum

The committee recognises the manner in which explanatory memoranda assist in the interpretation of bills, and ultimately, Acts and looks to them for information about proposals which may, without further information, seem to breach the Senate's scrutiny principles outlined in standing order 24(1). Unfortunately, the explanatory memorandum and statement of compatibility accompanying this bill are inadequate to enable a proper consideration of the bill. The explanatory memorandum fails to address matters which the committee would routinely expect to see addressed. The statement of compatibility claims that the bill does not engage any applicable rights or freedoms, however, this claim cannot be reconciled with a number of provisions of the bill which clearly appear to engage a number of the applicable rights and freedoms. **The committee therefore requests that the sponsor provides a comprehensive explanatory memorandum for the bill.**

Insufficiently defined administrative powers

Subclauses 8(c) and (d)

These subclauses state that the commissioner has dispute resolution functions and powers to undertake *any* action appropriate for the purpose of facilitating the fair treatment of small business in their commercial arrangements with government departments and other government entities and, subject to constitutional limits, to undertake *any* action appropriate for the purpose of facilitating the fair treatment of small business in their commercial arrangements with other businesses.

These are broadly framed powers yet neither the limits of the powers nor the criteria for their exercise are specified. Regrettably, the explanatory memorandum merely repeats the text of these provisions without explaining

their intended operation or why such broadly framed powers are necessary or appropriate. **The committee therefore seeks a detailed explanatory statement of the intended operation and effect of these provisions and a justification for the breadth of the powers.**

Pending the Senator's reply, 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 and liberties—various Division 3

This proposed Division includes a number of information gathering powers that empower the commissioner to issue notices in writing that require recipients (on pain of conviction of an offence) to produce documents or information or to attend a hearing to answer questions. These are coercive powers and it is regrettable that the explanatory memorandum does not explain why they are justified in this context. Further, the provisions do not conform with a number of the principles applicable to the drafting of such powers set out in Chapter 9 the *Guide to Framing Commonwealth Offences*.

It is also the case that the offence in subclause 13(6) for failing to comply with a notice to attend is (by subclause 13(7)) made an offence of strict liability, and that the defence set out in subclause 18(8) places an evidential burden of proof on the defendant. These are issues which, bearing in mind the principles set out in the *Guide to Framing Commonwealth Offences*, the committee expects to be explained in detail in the explanatory memorandum. **The committee therefore seeks a detailed explanation of the intended operation of Division 3 of the bill, including consideration of the principles set out in the *Guide to Framing Commonwealth Offences* as appropriate.**

Pending the Senator'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.

Trespass on personal rights and liberties—privacy Clause 11 and Division 3

Clause 11 of the bill empowers the commissioner to share information obtained in the exercise of the functions or powers set out in the Act with the ACCC and ASIC. As discussed above, Division 3 of the bill contains coercive information gathering powers. Neither the explanatory memorandum nor the statement of compatibility consider whether these provisions may be considered to unduly trespass on individual privacy or what protections are in place to limit the disclosure of personal information. **The committee therefore seeks further information on these matters.**

Pending the Senator'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.

Insufficiently defined administrative powers—delegation of power Clause 27

This clause enables the commissioner to delegate all or any of his or her powers (other than the reporting function mentioned in clause 29) to a 'member of staff of the Office of the Small business commissioner'. Given the nature of the powers of the commissioner (some are broadly framed and others have a coercive effect) the committee expects that the necessity for the breadth of this power to be justified in the explanatory memorandum. In this regard it is noted that, in general, the committee's expectation is that notices to produce or attend should, due to their coercive nature, only be issued by relatively senior members of a government agency with appropriate safeguards in place. Similarly, it may be thought that the nature of the dispute resolution functions and powers conferred by clause 8 of the bill would limit the class of persons to whom an appropriate delegation should be made

The committee seeks a justification of the approach taken to delegation, noting that the justification should consider the nature and variety of functions and powers proposed to be conferred on the commissioner.

Pending the Senator's reply, 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.

Therapeutic Goods Amendment (Pharmaceutical Transparency) Bill 2013

Introduced into the Senate on 28 February 2013

By: Senator Di Natale

Background

This bill amends the *Therapeutic Goods Act 1989* to place restrictions on the way that pharmaceutical companies may interact commercially with doctors and creates the requirement for more transparent reporting of such interactions.

The Committee has no comment on this bill.

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

Nil