

Senate Standing Committee
for the
Scrutiny of Bills

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Members of the Committee

Current members

| | |
|--------------------------------------|-----------------------|
| Senator Helen Polley (Chair) | ALP, Tasmania |
| Senator John Williams (Deputy Chair) | NATS, New South Wales |
| Senator Jonathon Duniam | LP, Tasmania |
| Senator Jane Hume | LP, Victoria |
| Senator Janet Rice | AG, Victoria |
| Senator Murray Watt | ALP, Queensland |

Secretariat

Ms Anita Coles, Acting Secretary
Mr Glenn Ryall, Principal Research Officer
Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Phone: 02 6277 3050
Email: scrutiny.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_scrutiny

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 or the provisions of bills not yet before 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 on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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Commentary on bills

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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.

Australian Organ and Tissue Donation and Transplantation Authority Amendment (New Governance Arrangements) Bill 2016

| | |
|-------------------|--|
| Purpose | This bill seeks to establish the Australian Organ and Tissue Donation and Transplantation Authority (AOTDTA) Board, and abolish the existing AOTDTA Advisory Council |
| Portfolio | Health |
| Introduced | House of Representatives on 10 November 2016 |

The committee has no comment on this bill.

Civil Nuclear Transfers to India Bill 2016

| | |
|-------------------|---|
| Purpose | This bill seeks to clarify that decisions approving civil nuclear transfers to India are taken not to be inconsistent with Australia's obligations relating to nuclear safeguards under specified international agreements if particular conditions are met |
| Portfolio | Foreign Affairs and Trade |
| Introduced | House of Representatives on 9 November 2016 |

The committee has no comment on this bill.

Export Finance and Insurance Corporation Amendment (Support for Commonwealth Entities) Bill 2016

| | |
|-------------------|--|
| Purpose | This bill seeks to expand the Export Finance and Insurance Corporation's functions to include the provision of services to Commonwealth entities and companies |
| Portfolio | Foreign Affairs and Trade |
| Introduced | House of Representatives on 9 November 2016 |

The committee has no comment on this bill.

Interactive Gambling Amendment Bill 2016

| | |
|-------------------|--|
| Purpose | <p>This bill seeks to amend the <i>Interactive Gambling Act 2001</i> (the Act) to:</p> <ul style="list-style-type: none"> • clarify services to which the Act applies by recognising two types of gambling services; • introduce a new civil penalty and enforcement regime; • prohibit ‘click-to-call’ in-play betting services; • allow the Australian Communications and Media Authority to disclose information to the Department of Immigration and Border Protection and foreign regulators; • amend complaints handling and investigation processes; and • establish a register of ‘eligible regulated interactive gambling services’ and define ‘eligible interactive gambling services’ |
| Portfolio | Communications and the Arts |
| Introduced | House of Representatives on 10 November 2016 |

The committee has no comment on this bill.

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

| | |
|-------------------|---|
| Purpose | This bill seeks to prevent unauthorised maritime arrivals who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 from making a valid application for an Australian visa |
| Portfolio | Immigration and Border Protection |
| Introduced | House of Representatives on 8 November 2016 |

Retrospective application

Items 1, 4 and 13, proposed subsections 5(1), 46A(2AA) and 46B(2AA)

The purpose of this bill is to prevent unauthorised maritime arrivals (UMAs) and transitory persons who were taken to a regional processing country after 19 July 2013 (and who were at least 18 years of age at that time) from making a valid application for an Australian visa. Together these persons are included in the definition of a ‘member of the designated regional processing cohort’. This bar applies whether the person is in Australia or outside Australia, or whether they are a lawful non-citizen (i.e. they hold a visa in Australia) or an unlawful non-citizen.

As stated in the explanatory memorandum, the purpose of the amendments is to ensure that a member of the regional processing cohort is not eligible to apply for an Australian visa of any kind. In relation to UMAs and transitory people, the Minister has a discretionary power to lift the relevant bar on making an application if he or she thinks it is in the public interest to do so. This power may be exercised in individual cases (see subsections 46A(2AB) and 46B(2AB)) or, by legislative instrument, by reference to a ‘class’ of persons (see subsections 46A(2AC) and 46B(2AC)). The power is non-delegable and non-compellable. Further, as the explanatory memorandum emphasises, it is for the Minister to determine what is in the ‘public interest’ (at p. 7).

The amendments sought to be made apply only in relation to applications made after the commencement of the bill (subject to an exception relating to applicants who are outside of Australia—see discussion under item 36 below).

However, the substantive provisions, by defining a ‘member of a designated regional processing cohort’ as being those adults who were transferred to Nauru or Papua New Guinea after 19 July 2013, ensures the provisions have a retrospective application in relation to these persons. The explanatory memorandum states that the ‘date of 19 July 2013 is the date when Regional Resettlement Arrangement between Australia and Papua New Guinea (PNG) was signed’ and that the ‘effect of this arrangement was that any UMA entering Australia after this date, who is found to be a refugee, would be resettled in PNG or another participating regional processing country’ (explanatory memorandum p. 5).

The bar on making a valid visa application operates quite differently on people who were taken to a regional processing country prior to the bill commencing and those who may be taken to a regional processing country after commencement.

In relation to adults who may be transferred to a regional processing centre *after* the Act commences, this bill will put them on notice that if they seek to arrive in Australia in defined circumstances then they will be barred for life from making a valid application for an Australian visa.

However, for those who on commencement of the Act will, by definition, already be included in the regional processing cohort, the bill does not place them on notice in a similar way. Rather, the bill prevents people within the cohort who were taken to a regional processing country prior to the commencement of the bill from making a valid visa application. Those people cannot avoid the adverse consequences that apply through the operation of the bill and were not aware that this law was applicable at the time they sought to make the journey to Australia.

It is a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). This is because people should be able to guide their actions on the basis of fair notice about the legal rules and requirements that will apply to them.

The statement of compatibility states that one of the purposes of the bill is to further discourage ‘persons from attempting hazardous boat journeys with the assistance of people smugglers and encouraging them to pursue regular migration pathways instead’ (statement of compatibility pp 21–22). However,

for people who have already undertaken such a journey, it seems that the proposed law can only play a punitive, rather than deterrent, function.

The explanatory materials emphasise that from 19 July 2013 people have been on notice that unauthorised maritime arrivals would not be resettled in Australia, because on that date the Regional Resettlement Arrangement between Australia and PNG was signed (explanatory memorandum p. 5 and statement of compatibility p. 21). However, the extent to which the Arrangement has any status in Australian law is unclear. In addition, the amendments in this bill go beyond measures needed to ensure that ‘these people would not be resettled in Australia’ (statement of compatibility p. 21). The amendments in the bill ensure that not only will people within the relevant cohort be prevented from settling in Australia, they will also be prevented from applying for *any* type of Australian visa (including, for example, a visitor or business visa).

Although the bill does provide the Minister with a broad discretionary power to raise the bar on applications, this does not ameliorate the retrospective application of the law. This is a broad personal discretionary power that applies only where the Minister considers it is in the ‘public interest’ to allow the person to make a valid application. No other legislative guidance is provided as to when it may be appropriate for the Minister to use this power.

The retrospective effect of these laws may have a particularly adverse effect on young people. The statement of compatibility states that the bill ‘recognises that children may not be able to make decisions on their own behalf and may have been subject to regional processing through the decision of their parents’ (p. 23). Although those who were under 18 at the time they were taken to a regional processing country are not within the cohort to which the law will apply, there may be cases where young adults taken to the regional processing centre were children at the time relevant decisions leading them to seek to travel to Australia were made. This is not addressed in the explanatory materials and does not appear to be adequately reflected in the bill.

The committee considers that the bill, in imposing a lifetime visa bar on adults who were transferred to a regional processing country after 19 July 2013, has a retrospective application. In assessing bills from a scrutiny perspective, the committee has consistently highlighted that it is a basic value of the rule of law that, in general, laws should only operate

prospectively, as people should be able to guide their actions on the basis of fair notice about the legal rules and requirements applicable to them. In light of this and the committee's comments above, the committee does not consider that the explanatory materials provide sufficient justification as to the fairness of the approach in applying the law retrospectively. The committee therefore seeks a detailed justification from the Minister for the retrospective application of these amendments.

The committee also considers that the bill, in applying to anyone aged 18 at the time of transfer to a regional processing country, may, from a scrutiny perspective, have particularly adverse consequences for those who were children at the time the decision was made to seek to travel to Australia. The committee seeks the Minister's advice as to whether consideration has been given to the consequences for young people of this bill, in light of the committee's comments above.

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.

Retrospective application

Item 36

Item 36 is an application provision which provides that, in relation to an applicant outside of Australia, the amendments will apply to any application for a visa made after the bill was introduced in the House of Representatives (but before the Act commences), so long as the application was not finally determined before commencement.

The explanatory memorandum suggests that the retrospective application of these provisions is required to prevent 'members of the designated regional processing cohort from attempting to circumvent the amendments by lodging an offshore visa application after introduction of the Bill and before the commencement of Schedule 1' (p. 19).

However, introduction of the bill into the House of Representatives is not the same as the commencement of an Act of Parliament. At the time the bill was introduced, the relevant law did not impose a permanent lifetime ban on visa applications to Australia. For the reasons set out above, for those who have

already sought to enter Australia, notice of the intention to enact this law does not operate as a deterrent, as the relevant actions have already been undertaken.

The committee notes the retrospective application of item 36 in that it applies the bar on visas to applications made from outside of Australia after the bill was introduced in the House of Representatives (but before commencement of this Act). In light of the discussion above, the committee draws its scrutiny concerns as to the appropriateness of the retrospective application of this item to the attention of Senators and leaves consideration of this issue to 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.

Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016

| | |
|-------------------|---|
| Purpose | This bill seeks to duplicate the existing <i>Safety, Rehabilitation and Compensation Act 1988</i> as a stand-alone Act, including amendments to provide full control of the Act to the Minister for Veterans' Affairs |
| Portfolio | Veterans' Affairs |
| Introduced | House of Representatives on 9 November 2016 |

The committee has no comment on this bill.

Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016

| | |
|-------------------|---|
| Purpose | This bill seeks to impose a tax on the notional earnings of capital moved into a retirement phase superannuation account that is in excess of \$1.6 million |
| Portfolio | Treasury |
| Introduced | House of Representatives on 9 November 2016 |

The committee has no comment on this bill.

Superannuation (Objective) Bill 2016

| | |
|-------------------|--|
| Purpose | This bill seeks to establish a legislative framework to require new bills and regulations relating to superannuation to be accompanied by a statement of compatibility with the primary and subsidiary objectives of the superannuation system |
| Portfolio | Treasury |
| Introduced | House of Representatives on 9 November 2016 |

The committee has no comment on this bill.

Telecommunications and Other Legislation Amendment Bill 2016

| | |
|-------------------|---|
| Purpose | This bill seeks to amend various telecommunications Acts to introduce a regulatory framework relating to the management of national security risks of espionage sabotage and foreign interference to Australia's telecommunications networks and facilities |
| Portfolio | Attorney-General |
| Introduced | Senate on 9 November 2016 |

The committee has no comment on this bill.

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

| | |
|-------------------|--|
| Purpose | <p>This bill seeks to amend various taxation and superannuation Acts to:</p> <ul style="list-style-type: none"> • impose a \$1.6 million cap on the amount of capital that can be transferred to the tax-free earnings retirement phase of superannuation; • amend the annual concessional superannuation contributions cap and threshold at which high-income earners pay tax on their concessional contributions to superannuation; • amend the annual non-concessional contributions cap; • enable eligible low income earners to receive the low income superannuation tax offset; • remove the requirement in the income tax law that an individual must earn less than 10 per cent of their income from their employment related activities to be able to deduct a personal contribution to superannuation and make it a concessional contribution; • introduce provisions to allow catch-up concessional contributions; • amend the spouse superannuation tax offset; • amend the earnings tax exemptions in the <i>Income Tax Assessment Act 1997</i>; • remove the income tax deduction available to a complying superannuation fund, life insurer, or complying approved deposit fund; and • amend the tax law to simplify and consolidate a range of existing processes and make consequential amendments |
| Portfolio | Treasury |
| Introduced | House of Representatives on 9 November 2016 |

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*.

Bills introduced with standing appropriation clauses in the 45th Parliament since the previous Alert Digest was tabled:

Nil

Other relevant appropriation clauses in bills

Nil

