



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

FOURTEENTH REPORT
OF
2012

21 November 2012

ISSN 0729-6258

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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT OF 2012

The Committee presents its *Fourteenth Report of 2012* to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Bill	Page No.
Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012	478

Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2012*. The Attorney-General responded to the Committee's comments in a letter dated 12 November 2012. A copy of the letter is attached to this report.

Alert Digest No. 13 of 2012 - extract

Background

This bill amends the *Australian Federal Police Act 1979*, *Crimes Act 1914*, *Crimes (Superannuation Benefits) Act 1989*, *Criminal Code Act 1995*, *Customs Act 1901*, and *Law Enforcement Integrity Commissioner Act 2006* to:

- ensure that the Commonwealth's serious drug offences framework can respond quickly to new and emerging substances;
- expand the scope of existing identity crime offences, as well as enact new offences for the use of a carriage service in order to obtain and/or deal with identification information;
- create new offences relating to air travel and the use of false identities;
- improve the operation of the *Law Enforcement Integrity Commissioner Act 2006*;
- clarify that superannuation orders can be made in relation to all periods of a person's employment as a Commonwealth employee, not only the period in which a corruption offence occurred; and
- increase the value of a penalty unit and introduce a requirement for the triennial review of the penalty unit.

Undue trespass on personal rights and liberties—possible retrospective effect
Schedule 3, items 14 and 15

Part 3 of Schedule 3 of the bill amends the *Crimes (Superannuation Benefits) Act 1989* and the *Australian Federal Police Act 1979*. Those Acts provide for the forfeiture and recovery of employer funded superannuation benefits that are payable or have been paid to Commonwealth employees who have been convicted of corruption offences by a court and sentenced to more than 12 months imprisonment. The amendments in the bill provide that a superannuation order can be made in relation to employer funded contributions and benefits accrued during all periods of Commonwealth employment, regardless of whether an employee had a continuous period of employment or several separate periods of employment.

The explanatory memorandum states that the amendments ‘clarify’ that ‘the legislation applies equally to all...employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment’ (see page 68). Items 14 and 15 of Schedule 3 both provide that the amendments apply in relation to a superannuation order ‘applied for on or after the commencement of this item, whether an offence to which the order relates was committed before, on or after that commencement’. The effect of the provision is thus that some employees may suffer an increased financial detriment for convictions which occurred prior to the commencement of the bill.

Items 14 and 15 are not retrospective in the sense that they require an affected person to perform some act or omission prior to the commencement of legislation; rather a person is subjected to a detriment operating from the enactment of the law based on a past events (namely, the conviction for a corruption offence committed prior to commencement). Nevertheless, the result of the amendments will be to increase financial liabilities to be suffered by some employees in relation to offences which have been committed prior to commencement. The line between this situation and legislation which retrospectively raises the penalty for an offence is a fine one.

Although the explanatory memorandum does not address the question, the Statement of Compatibility with Human Rights argues that ‘Commonwealth employees convicted of a ‘corruption offence’ and sentenced to more than 12 months’ imprisonment would have had an expectation that they would lose all their employer funded superannuation contributions under the existing scheme’ because ‘[u]ntil recently, it was thought that the existing scheme applied equally to employees who have one continuous period of employment as well as to those who have had several separate periods of employment’ (see page 13). It is also argued (at page 14) that employees engaged in continuous employment are not relevantly different to those who have had several separate periods of employment, and thus that the scheme should apply equally to the two categories of employees.

It is difficult for the Committee to assess the adequacy of this justification without more information as to the reasons why it is considered necessary to ‘clarify’ the existing law.

More particularly, there is little information in the explanatory memorandum or the statement of compatibility to enable the Committee to consider the reasonableness of the claim that Commonwealth employees should be taken to have had a reasonable expectation that they would lose all of their employer funded superannuation contributions under the existing scheme, regardless of whether they were engaged for several separate periods as opposed to one continuous period. **The Committee therefore seeks the Attorney-General's advice in relation to these issues and the appropriateness of the approach.**

Pending the Attorney-General'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.

Minister's response - extract

Part 3 of Schedule 3 of the Bill amends the *Crimes (Superannuation Benefits) Act 1989* and the *Australian Federal Police Act 1979* to clarify that a superannuation order can be made in relation to employer funded contributions and benefits accrued during all periods of Commonwealth employment, regardless of whether an employee had a continuous period of employment or several separate periods of employment.

Items 14 and 15 of Part 3 of Schedule 3 make it clear that these amendments apply in relation to a superannuation order applied for on or after the commencement of the amendments, regardless of whether an offence to which the order relates was committed before or after the commencement date.

The Committee has noted that Items 14 and 15 are not retrospective, but the result of the amendments will be to increase financial liabilities incurred by some employees in relation to offences that were committed prior to commencement. You have asked for my advice in relation to these issues, including the reason it is considered necessary to clarify the existing law, as the Committee believes the retrospective effect of amendments may be considered to unduly trespass on personal rights and liberties.

The *Crimes (Superannuation Benefits) Act* and the *Australian Federal Police Act* provide for the forfeiture and recovery of employer funded superannuation benefits that are payable, or have been paid, to Commonwealth employees who have been convicted of corruption offences by a court and sentenced to more than 12 months' imprisonment. This legislative scheme has been in place since 1989.

The impetus for these amendments was the decision of the New South Wales Supreme Court in *Director of Public Prosecutions (Cth) v Della-Vedova* (2010) 75 NSWLR 602. In that case, the defendant was employed by the Commonwealth for three separate and

distinct periods of employment. The defendant was convicted of two corruption offences, which were both committed during the third period of Commonwealth employment.

The court held that a superannuation order could not be made in relation to employer funded superannuation benefits paid in relation to a person for separate and distinct periods of Commonwealth employment that preceded the commission of the offences that gave rise to the making of the superannuation order. In the court's view, the Crimes (Superannuation Benefits) Act did not express with 'irresistible clearness' an intention to deprive an employee of contributions and benefits paid during periods of Commonwealth employment other than the period during which the corruption offences were committed.

The Committee has sought additional justification about the claim that 'Commonwealth employees convicted of a 'corruption offence' and sentenced to more than 12 months' imprisonment would have an expectation that they would lose all of their employer funded superannuation contributions. It is reasonable to form a view that Commonwealth employees who commit a serious offence within the course of their employment would expect to have their Commonwealth funded superannuation benefits confiscated. This legislation is designed to ensure that employees who have abused their office are not paid public monies.

As is also the case with proceeds of crime legislation, these provisions deter those contemplating criminal activity by reducing the chances of an employee keeping the Commonwealth-funded component of their superannuation and also acting to remedy the unjust enrichment of employees who have abused their position at society's expense. The second reading speech which accompanied the proposed legislation in 1989 stated that the measures would provide a strong disincentive to anyone who may be tempted to engage in corruption now or in the future.

Prior to the *Della-Vedova* case, it was thought that the existing scheme applied equally to employees who have one continuous period of employment as well as to those who have had several separate periods of employment. The intention of these amendments is to clarify government policy in relation to this matter, which is that a superannuation order can be made in relation to employer funded contributions and benefits accrued during all periods of Commonwealth employment, not just a period of employment in which a 'corruption offence' was committed.

Additionally, these amendments will ensure that the legislation does not apply less favourably to those employees who have one continuous period of employment as opposed to those who have several separate periods of employment. This is important to ensure that the scheme applies equally to all employees, regardless of the number of separate periods of employment they have undertaken. The original second reading speech stated that the Government is firmly of the view that there is no scope for watering down forfeiture in such cases as superannuation benefits and they should only be paid from public monies to persons who discharge their duties in a non-corrupt manner.

For the reasons outlined above, I consider the approach set out in the amendments to be appropriate.

Committee Response

The Committee thanks the Attorney-General for this response. **The Committee notes its view that in light of the decision of the New South Wales Supreme Court in the *Della-Vedova* case the proposed amendment amounts to a change in the law rather than a clarification of the law. The Committee also notes the further explanation provided about the justification for the proposed approach and requests that the key information be included in the explanatory memorandum. The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Senator the Hon Ian Macdonald
Chair



**THE HON NICOLA ROXON MP
ATTORNEY-GENERAL
MINISTER FOR EMERGENCY MANAGEMENT**

12 NOV 2012

12/5914

Senator the Hon Ian Macdonald
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

RECEIVED

15 NOV 2012

Senate Standing C'ttee
for the Scrutiny
of Bills

Dear Senator

I refer to Alert Digest No. 13 of 2012, which was published by the Senate Standing Committee for the Scrutiny of Bills on 31 October 2012. I would like to take this opportunity to thank the members of the Committee for their work in reporting on the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012 (the Bill). I am writing to respond to the Committee's request for advice in relation to items 14 and 15 of Schedule 3 of the Bill.

Part 3 of Schedule 3 of the Bill amends the *Crimes (Superannuation Benefits) Act 1989* and the *Australian Federal Police Act 1979* to clarify that a superannuation order can be made in relation to employer funded contributions and benefits accrued during all periods of Commonwealth employment, regardless of whether an employee had a continuous period of employment or several separate periods of employment.

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The Committee has sought additional justification about the claim that 'Commonwealth employees convicted of a 'corruption offence' and sentenced to more than 12 months' imprisonment would have an expectation that they would lose all of their employer funded superannuation contributions. It is reasonable to form a view that Commonwealth employees who commit a serious offence within the course of their employment would expect to have their Commonwealth funded superannuation benefits confiscated. This legislation is designed to ensure that employees who have abused their office are not paid public monies.

As is also the case with proceeds of crime legislation, these provisions deter those contemplating criminal activity by reducing the chances of an employee keeping the Commonwealth-funded component of their superannuation and also acting to remedy the unjust enrichment of employees who have abused their position at society's expense. The second reading speech which accompanied the proposed legislation in 1989 stated that the measures would provide a strong disincentive to anyone who may be tempted to engage in corruption now or in the future.

Prior to the *Della-Vedova* case, it was thought that the existing scheme applied equally to employees who have one continuous period of employment as well as to those who have had several separate periods of employment. The intention of these amendments is to clarify government policy in relation to this matter, which is that a superannuation order can be made in relation to employer funded contributions and benefits accrued during all periods of Commonwealth employment, not just a period of employment in which a 'corruption offence' was committed.

Additionally, these amendments will ensure that the legislation does not apply less favourably to those employees who have one continuous period of employment as opposed to those who have several separate periods of employment. This is important to ensure that the scheme applies equally to all employees, regardless of the number of separate periods of employment they have undertaken. The original second reading speech stated that the Government is firmly of the view that there is no scope for watering down forfeiture in such cases as superannuation benefits and they should only be paid from public monies to persons who discharge their duties in a non-corrupt manner.

For the reasons outlined above, I consider the approach set out in the amendments to be appropriate.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Nicola', with a long horizontal flourish extending to the right.

NICOLA ROXON