



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS

27 February 2015 (drawing on material in the committee's *Alert Digest No. 1 of 2015* and *First Report of 2015*)

Introduction

This newsletter highlights key aspects of the Senate Scrutiny of Bills Committee's work, with a particular focus on information that may be useful when bills are debated and to raise awareness about scrutiny principles (see Senate Standing Order 24).

For more detail and discussion of these matters and comments on additional bills look to the committee's [Alert Digests](#) and [Reports](#). An index to all committee comments is available [here](#).

Key scrutiny issues

- **Acts and Instruments (Framework Reform) Bill 2014** ([First Report of 2015](#))

Parliamentary scrutiny – the committee had sought advice about a number of issues, and following consideration of the Attorney-General's response, noted the following points:

- ❖ **Disallowance and sunseting of legislative instruments** – the committee considers that the default position for all legislative instruments should be that they are subject to the usual disallowance and sunseting processes. While this is not the effect of the bill, appropriate use of the standard drafting provision outlined in OPC Drafting Direction 3.8 in future bills will significantly address the committee's concerns. If the standard provision is not used the committee will expect the provision of a detailed justification in the explanatory material.
- ❖ **Scope of the editorial powers being proposed for the First Parliamentary Counsel to alter the text of Acts** in some circumstances – the committee noted the intended practical application of the power and requested that the matters outlined be included in the explanatory memorandum.

- **Asset Recycling Fund Bill (No. 1) 2014** ([First Report of 2015](#))

- ❖ Delegation of legislative power – the committee, in tandem with the Regulations and Ordinances Committee, has been considering the move to use general rule-making powers (rather than general regulation-making powers) in bills coming before the Parliament. The scrutiny concern is around maintaining drafting standards and the level of executive scrutiny to which legislative instruments (including rules) are subject as they do not go through the Executive Council process, and particularly as they usually come into effect before the parliamentary scrutiny process is undertaken.
- ❖ Following discussions with relevant people and further consideration of the issues (including noting the views of the Regulations and Ordinances Committee outlined in its *Monitor No. 17 of 2014*), the committee noted that the use of instrument-making powers is an area of continuing interest to it, particularly: the need for a strong justification if significant matters rely on general instruments rather than regulations; the requirement that Acts should prevent the delegation of general instrument-making powers; the requirement that regulations will prevail over general instruments; and the use of the standard drafting provision.

- **Counter-Terrorism Legislation Amendment Bill (No. 1) 2014** ([First Report of 2015](#))

- ❖ Trespass on personal rights and liberties – the committee welcomed the implementation of a number of PJCS recommendations, but particularly noted its continuing scrutiny concerns in relation to the

control order regime and the committee's view that any decision to expand the grounds upon which a control order can be requested and issued must be subject to close scrutiny.

- **Enhancing Online Safety for Children Bill 2014** ([Alert Digest No. 1 of 2015](#))
 - ❖ Discretionary powers – the committee is seeking advice in relation to a number of matters relating to broad and delegated legislative powers, including whether the legislation itself should include guidance about the application of the Commissioner's intended discretion as to whether or not to investigate a complaint.
- **Regulator of Medicinal Cannabis Bill 2014** ([First Report of 2015](#))
 - ❖ Delegation of legislative power – this non-government bill provides that key elements of the scheme will be established and defined in delegated legislation. The committee sought advice about whether these complex matters are more suitable for inclusion in primary legislation or could at least be required to be contained in regulations (rather than legislative instruments) to ensure that they are drafted by the Office of Parliamentary Counsel and are considered by the Federal Executive Council. The bill's sponsors provided helpful information about the need for negotiations with other jurisdictions before content of the scheme can be finalised. The committee reiterated its general view that it will have scrutiny concerns where such 'framework legislation' leaves the core elements of a regulatory scheme to delegated legislation.
- **Tax and Superannuation Laws Amendment (2014 Measures No. 6) Bill 2014** ([First Report of 2015](#))
 - ❖ Retrospective application – the committee noted that it is of considerable concern that tax law amendments are taking so long to be brought before Parliament and drew attention to Senate procedural order of continuing effect no. 44, which provides that taxation amendments not brought before Parliament within 6 months of being announced risk having the commencement date amended by the Senate. The approach means that taxpayers may be uncertain whether to arrange their financial affairs in accordance with the law as it exists or as it has been announced. This is particularly problematic as laws can be amended by the Parliament before they are finalised.
 - ❖ In his reply the Assistant Treasurer acknowledged the committee's concerns and the importance of introducing taxation bills promptly, and in this particular instance noted that no taxpayer would be disadvantaged. The committee thanked the Assistant Treasurer for his response, but restated its concerns outlined above.
- **Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014** ([First Report of 2015](#))
 - ❖ Inappropriate delegations of legislative power and insufficiently defined administrative powers – providers of telecommunications services will be required to retain particular data for all communications for a period of two years to facilitate access to that data by specified agencies. However, key elements relating to the scope and application of the scheme will be left to be determined by delegated legislation. The committee's view is that these important matters should be included in primary legislation, or at least not come into effect until the relevant regulations have been positively approved by each House of Parliament.
 - ❖ Delegation of legislative power – in relation to the delegation of power to the Minister to determine further authorities or bodies that are able to access retained data, the committee drew the Senate's attention to a scrutiny concern because, while a number of matters must be 'considered' by the minister before making a determination, unfortunately these do not have legal status as preconditions (for example, the Minister would consider whether the particular agency was required to comply with the Australian Privacy Principles, but would not need to establish that it did).
 - ❖ The committee also noted that periodic reconsideration of which agencies are able to access stored data would be desirable.
- **Tribunals Amalgamation Bill 2014** ([Alert Digest No. 1 of 2015](#))
 - ❖ Various – the committee has sought advice about several matters, including the proposal to amend the process for terminating the appointment of an AAT member, limiting a failure to comply with a

procedural direction to minor departures, whether procedural directions can override usual principles of administrative law (such as rules of procedural fairness) and whether a provision relating to a second review of social services and child support matters compromises the right to a fair hearing.

Other bills for which advice is being sought from the Minister or proposer

(Alert Digest No. 1 of 2015)

The Senate Scrutiny of Bills Committee is also seeking advice from the relevant Minister or proposer in relation to provisions of other bills (responses will be considered and tabled in the committee's future *Reports*), including:

- **Commonwealth Electoral Amendment (Donations Reform) Bill 2014** – about the level of penalties and freedom of expression;
- **Defence Legislation Amendment (Military Justice Enhancements–Inspector-General ADF) Bill 2014** – about self-incrimination, particularly as the arrangements are being left to delegated legislation (regulations); and
- **Private Health Insurance Amendment Bill (No. 2) 2014** – about the delegation of some powers, an information gathering power and a timeframe for compliance.

Other responses received *(First Report of 2015)*

- **Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014**
- **Building Energy Efficiency Disclosure Amendment Bill 2014**
- **Carbon Farming Initiative Amendment Bill 2014**
- **Crimes Legislation Amendment (Psychoactive Substances & Other Measures) Bill 2014**
- **Federal Courts Legislation Amendment Bill 2014**
- **Higher Education and Research Reform Bill 2014**
- **Omnibus Repeal Day (Spring 2014) Bill 2014**
- **Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014**

This document contains a very brief summary of some recent comments made by the Senate Scrutiny of Bills Committee (Chair: Senator Helen Polley, and Deputy Chair: Senator John Williams).

For any comments or questions, please contact:

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