



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS



13 October 2016 (drawing on material in the committee's *Alert Digest No. 7 of 2016* and *Seventh Report of 2016*)

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

- **Appropriation Bill (No. 1) 2016-2017** ([Alert Digest No. 7 of 2016](#))
 - ❖ Insufficient parliamentary scrutiny of legislative power: this bill is intended to only appropriate money for the ordinary annual services of the government and is therefore not amendable by the Senate, however it appears that appropriations for new policies have been included in the bill. This undermines the Senate's constitutional right to amend these appropriations. The committee draws this issue to the attention of Senators.
- **Appropriation Bill (No. 2) 2016-2017** ([Alert Digest No. 7 of 2016](#))
 - ❖ Parliamentary scrutiny of section 96 grants to the States: this bill delegates to the Executive the Parliament's power under section 96 of the Constitution to determine terms and conditions on grants to the States. The committee has sought advice from the Minister in relation to providing further information about these grants in future Budget documentation.
- **Counter-Terrorism Legislation Amendment Bill (No. 1) 2016** ([Alert Digest No. 7 of 2016](#))
 - ❖ Trespass on personal rights and liberties (various matters): The committee raised a number of scrutiny concerns in relation to:
 - Extension of the control order regime to 14 and 15 year olds: the committee has noted the control order regime raises a number of scrutiny concerns which are particularly acute in the context of control orders applying to children, and therefore there is a question as to whether the extension of the regime unduly trespasses on personal rights and liberties.
 - Preventative detention orders (PDO): the committee has noted that a change in the test for applying for a PDO from *expecting* an attack will occur to a conclusion about the *capability* for an attack to occur, broadens the power to limit a person's liberty, but in light of previous correspondence leaves the matter to the Senate.
 - Use of evidence obtained pursuant to control order later declared void: the committee noted the use of information obtained in these circumstances may have serious implications for personal rights and liberties. The committee sought advice as to whether judicial discretion about whether to admit the evidence has been overridden.

- Use of secret evidence: the committee noted that the proposal to allow evidence to be admitted which has not been fully disclosed to a person who may be subject to a control order (a 'controlee') undermines the principle of natural justice. The committee has welcomes changes to allow 'sufficient information' to be provided to the controlee, but the committee has sought advice on whether that information will be disclosed before communication between a controlee and special advocate is restricted.
- Special advocates: the committee considers the special advocate scheme may help ameliorate some of the committee's concerns with the use of secret evidence. However, it has sought advice in relation to:
 - why commencement of the special advocate scheme can be delayed for up to 12 months after the secret evidence system begins and why the entire Schedule should not be delayed until the special advocate scheme is in place;
 - why the appointment of the special advocate is left to the discretion of the court;
 - why the court is empowered to prohibit/restrict communication between a special advocate and a controlee before sensitive national security information has been disclosed; and
 - why details regarding the appointment process of persons as special advocates, and their terms and conditions, are not provided for in the primary legislation.
- ❖ The committee also left a number of matters to the Senate after raising scrutiny concerns in relation to:
 - the service of relevant documents on the parent or guardian of a child who may be subject to a control order (appropriate safeguards);
 - the new 'monitoring warrant' regime in Schedule 8 (seizure of evidence);
 - the appointment of nominated Administrative Appeals Tribunal members to issue warrants (judicial oversight);
 - the offence of 'advocating genocide' (freedom of speech);
 - secret evidence proceedings being able to apply to civil proceedings commencing before the commencement of the section (retrospective commencement); and
 - disclosure of protected information to *any* Australian government agency (privacy).
- **Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016** ([Alert Digest No. 7 of 2016](#))
 - ❖ Trespass on personal rights and liberties: the committee has noted that the continued detention of terrorist offenders after their prison sentence has been served fundamentally inverts basic assumptions of the criminal justice system—that persons are only punished on the basis of offences proved beyond reasonable doubt, and has sought further justification from the Attorney-General. In addition the committee has sought advice as to:
 - what are the likely conditions of detention and what is the justification for broad exceptions;
 - whether a person will receive information included in an application for a continuing detention order (CDO) prior to the ultimate hearing for the CDO;
 - the justification for mandatory relevant considerations which the court must consider in making a CDO and more detail about the type of factors which forms part of the decision-making process.
- **Criminal Code Amendment (Firearms Trafficking) Bill 2016** ([Alert Digest No. 7 of 2016](#))
 - ❖ Penalties: the explanatory material does not contain sufficient justification as to why the **maximum penalties** for firearms trafficking offences have been doubled (despite further justification being previously provided to the committee). The committee has noted the proposed **mandatory minimum sentences** for firearms trafficking undermines the discretion of judges to ensure penalties imposed are

proportionate in light of individual circumstances. The committee has requested that key information be included in the explanatory memorandum and leaves these matters to the Senate.

- **Industry Research and Development Amendment (Innovation and Science Australia) Bill 2016** ([Alert Digest No. 7 of 2016](#))
 - ❖ Delegation of legislative power: this bill delegates to the Executive the Parliament's power to authorise the expenditure of Commonwealth money for the purposes of industry, innovation, science and research programs. The committee has sought the Minister's advice in relation to the rationale for this approach and possible amendments to improve parliamentary scrutiny.
 - ❖ Parliamentary scrutiny of section 96 grants to the States: this bill delegates to the Executive the Parliament's power under section 96 of the Constitution to determine terms and conditions on grants to the States. The committee is seeking the Minister's advice as to whether the relevant agreements with the States can be tabled in the Senate and published on the internet.
- **Narcotic Drugs Legislation Amendment Bill 2016** ([Alert Digest No. 7 of 2016](#))
 - ❖ Trespass on personal rights and liberties: The committee has sought advice as to why it is necessary to exclude the natural justice hearing rule in relation to the disclosure of sensitive law enforcement information and justification as to reversing the evidential burden of proof.
 - ❖ Delegation of legislative powers and parliamentary oversight: The committee has sought advice as to why the definition of a 'law enforcement agency' can be extended by regulation and why it is necessary to allow delegated legislation to incorporate external material as in force from time to time.
- **Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016** ([Alert Digest No. 7 of 2016](#))
 - ❖ Delegation of legislative power: this bill will allow the Commissioner of Taxation, in certain circumstances, to modify the operation of taxation legislation after it has been passed by the Parliament. The committee has sought the Minister's advice in relation to matters arising from this significant delegation of legislative power.

Other bills commented on in the Alert Digest ([Alert Digest No. 7 of 2016](#)):

- **Australian Crime Commission Amendment (Criminology Research) Bill 2016**: The committee considers it appropriate for the Information Commissioner to be given jurisdiction to investigate any privacy breaches of the proposed disclosure regime.
- **Budget Savings (Omnibus) Bill 2016**: The committee has sought advice as to whether any detriment might be suffered by retrospectively validating past aged care classification decisions.
- **Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016**: The committee noted the bill would allow delegated legislation to amend primary legislation passed by the Parliament, and the imposition of high penalties for strict liability offences, but in light of the information provided left these matters to the Senate.
- **Marriage Legislation Amendment Bill 2016 and Marriage Legislation Amendment Bill 2016 (No. 2)**: The committee noted the bill would allow regulations to amend primary legislation passed by the Parliament and the possibility for retrospective commencement of the regulations, but in light of the explanation provided left the matter to the Senate.
- **Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016**: The committee has sought advice as to whether the application of the bill to agreements entered into before the Act commences could cause any detriment to any parties to those agreements.

Other responses received ([Seventh Report of 2016](#))

- **National Cancer Screening Register Bill 2016:** the committee has noted that not allowing individuals to elect to have their personal information removed from the proposed National Cancer Screening Register represents a significant impact on the privacy interests of those individuals, and welcomed amendments made that addressed other aspects of the committee's scrutiny concerns.

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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