

Senate Standing Committee
for the
Scrutiny of Bills

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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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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

Broadcasting Legislation Amendment (Media Reform) Bill 2016

Introduced into the House of Representatives on 2 March 2016

Portfolio: Communications

Background

This bill amends the *Broadcasting Services Act 1992* to:

- repeal two media ownership and control rules; and
- introduce new local programming obligations for regional commercial television broadcasting licensees where a change in control, known as a trigger event, results in a licence forming part of a group of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the Australian population.

The committee has no comment on this bill.

Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2016

Introduced into the Senate on 2 March 2016

By: Senator Rhiannon

Background

This bill amends the *Commonwealth Electoral Act 1918* to:

- reduce the disclosure threshold from ‘more than \$10,000’ (indexed to the Consumer Price Index annually) to \$1,000 (non-indexed);
- require people who make gifts at or above the threshold to candidates and members of groups during the election disclosure period to furnish a return within 8 weeks of polling day;
- require people who make gifts, agents of registered political parties, the financial controller of an associated entity, or people if they fall within the relevant provision, who have incurred political expenditure to furnish a return within 8 weeks after 31 December and 30 June each year;
- prevent ‘donation splitting’ by ensuring that for the purposes of the \$1,000 disclosure threshold, related political parties are treated as the one entity;
- make unlawful the receipt of a gift of foreign property by political parties, candidates and members of a Senate group;
- extend the ban on anonymous gifts to encompass all anonymous gifts except where the gift is \$50 or less and received at a ‘general public activity’ or a ‘private event’ as defined;
- provide for the recovery of the financial value of gifts of foreign property that are not returned, anonymous gifts that are not returned and undisclosed gifts; and
- introduce new offences and penalties related to these new measures and increase the penalties for existing offence provisions.

The committee has no comment on this bill.

Ethical Cosmetics Bill 2016

Introduced into the House of Representatives on 29 February 2016

By: Ms O'Neil

Background

This bill amends the *Industrial Chemicals (Notification and Assessment) Act 1989* to ban live animal testing for cosmetics and live animal testing for substances if the dominant purpose of testing was for the substance's use in a cosmetic.

Commencement

Item 2

Item 2 provides that Schedule 1 is to commence three years after the bill receives the Royal Assent.

Where there is a delay in commencement of legislation longer than six months the committee's long-standing view is that it is appropriate for the explanatory memorandum to outline the reasons for the proposed approach. (This is discussed in Office of Parliamentary Counsel Drafting Direction No. 1.3 in the context of commencement by Proclamation (paragraphs 21 to 35) and other deferred commencements (paragraph 36)).

The explanatory memorandum notes (at paragraph 18) that the purpose of the significantly delayed commencement is to provide 'a transitional period for entities affected by [the] bill.'

In light of the explanation provided the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as whole.

The committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Delegation of legislative power

Schedule 1, item 1, proposed sections 81B and 81C

Proposed section 81C provides that the ‘dominant purpose of testing that is conducted on a live animal at a particular time is to be worked out in accordance with rules’ that must be made by the Director. The issue of ‘dominant purpose’ is included as an element of the offence in subsection 81B(2): that ‘the dominant purpose of the testing relates to the substance’s use in a cosmetic’. A question therefore arises as to why it is appropriate that the content of an offence be determined by reference to a legislative instrument rather than being included in the primary legislation.

The committee seeks the Member’s advice as to why it is appropriate to include this significant matter in delegated legislation.

Pending the Member’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.

Flags Amendment (Protecting Australian Flags) Bill 2016

Introduced into the House of Representatives on 29 February 2016

By: Mr Christensen

Background

This bill amends the *Flags Act 1953* to make it a criminal offence to wilfully destroy or otherwise mutilate the Australian National Flag.

Freedom of speech

General comment

The statement of compatibility asserts that this bill does not engage any applicable rights and freedoms. However, criminalisation of flag burning, on the basis that it will, for example, cause offence may be considered to diminish a person's freedom of speech.

The committee therefore seeks the Member's further advice as to whether the criminalisation of flag burning may be considered to trespass unduly on personal rights and liberties.

Pending the Member's reply, 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.

Law and Justice Legislation Amendment (Northern Territory Local Court) Bill 2016

Introduced into the House of Representatives on 3 March 2016

Portfolio: Attorney-General

Background

This bill makes consequential amendments to Commonwealth legislation arising from the enactment of the *Local Court Act 2015* of the Northern Territory.

The committee has no comment on this bill.

Migration Amendment (Free the Children) Bill 2016

Introduced into the Senate on 2 March 2016

By: Senator Hanson-Young

Background

This bill amends the *Migration Act 1958* (the Act) to seek to place children detained under the Act, along with their immediate family members or guardians, in community residential housing for any requisite period of detention instead of being held in immigration detention facilities.

The committee has no comment on this bill.

Primary Industries Levies and Charges Collection Amendment Bill 2016

Introduced into the House of Representatives on 3 March 2016

Portfolio: Agriculture and Water Resources

Background

This bill amends *Primary Industries Levies and Charges Collection Act 1991* to:

- allow the Department of Agriculture and Water Resources to provide levy and charge payer (levy payer) information to the rural research and development corporations (RDCs) for the purpose of developing levy payer registers;
- remove the legislative impediment to the development of levy payer registers;
- allow an authorised person to provide levy payer contact information, and details of the levy paid or payable, to an eligible recipient;
- define an eligible recipient as an RDC or the Australian Bureau of Statistics;
- set out the purposes for which the information provided to the eligible recipient can be used;
- allow the Secretary to provide, by legislative instrument, for other information relating to the production or processing of a commodity to be given to an eligible recipient; and
- not permit secondary disclosure of information included in a levy payer register, except in limited circumstances and where expressly permitted by the Secretary in writing.

The bill also makes consequential amendments to the *Australian Meat and Live-stock Industry Act 1997*, the *Dairy Produce Act 1986* and the *National Residue Survey Administration Act 1992*.

The committee has no comment on this bill

Registration of Deaths Abroad Amendment Bill 2016

Introduced into the House of Representatives on 2 March 2016

Portfolio: Foreign Affairs and Trade

Background

This bill amends *Registration of Deaths Abroad Act 1984* (the Act) to:

- correct an anomaly in the Act to allow the ‘Registrar of Deaths Abroad’ to register deaths in prescribed circumstances;
- provide the Foreign Minister with the flexibility to appoint any State or Territory Registrar as the Registrar;
- validate the prior appointment of the ACT Registrar-General as the Registrar and any previous registrations of deaths under the Act;
- allow the Registrar to register deaths that could have been registered under the law of a State or Territory, where the State or Territory concerned has provided notice that it will not register a death; and
- remove any references to ‘registering officers’ from the Act, to ensure that only the Registrar can register deaths under the Act.

The committee has no comment on this bill.

Regulatory Powers (Standardisation Reform) Bill 2016

Introduced into the House of Representatives on 2 March 2016

Portfolio: Attorney-General

Background

This bill amends 15 Commonwealth Acts in order to implement the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) by repealing current provisions providing for regulatory regimes in those Acts.

The bill also makes minor amendments to the Regulatory Powers Act to clarify the operation of certain provisions and remove unreasonable administrative burdens on agencies exercising regulatory powers.

Privacy

Schedule 1, item 2, new paragraph 22(1)(b)

This provision relates to the ability to secure evidence of a contravention in the context of exercising monitoring powers. It is described (at paragraph 15 of the statement of compatibility) as ‘correcting a drafting error’ by ‘making it clear that the [existing] power to secure things applies to both the core provisions in relation to which monitoring powers are being exercised, as well as any related provisions.’

The statement of compatibility (at pp 4–6) includes a justification for the proposed approach, which will result in an increased impact on the right to privacy. The explanatory material notes constraints on the exercise of the power, which include that authorisation is only provided after a warrant is obtained and a warrant will be limited to operating for 24 hours.

In light of the explanation provided in the statement of compatibility (pp 4–6) the committee draws this matter to the attention of Senators and leaves it to the consideration of 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.

Reversal of burden of proof

Various provisions, including schedule 7, new subsection 129(4)

The statement of compatibility describes the effect of provisions on the operation of section 96 of the Regulatory Powers Act that will reverse the burden of proof for specified civil penalty provisions as follows:

145. Schedule 7 also modifies the operation of section 96 of the Regulatory Powers Act, and reverses the burden of proof for certain civil penalty provisions. This amendment preserves current arrangements under the GEMS Act, which are repealed by Schedule 7. Section 96 of the Regulatory Powers Act provides that, in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, a person bears an evidential burden where that person wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating the civil penalty provision.
146. New subsection 129(4) of the GEMS Act modifies the operation of section 96 of the Regulatory Powers Act, and provides that that section does not apply in relation to proceedings for a civil penalty order for a contravention of a civil penalty provision under Part 3 of the GEMS Act. This modification is necessary, as the civil penalty provisions in Part 3 of the GEMS Act provide that the person wishing to rely on certain exceptions or exemptions has the burden of proof for those matters, while the person seeking the civil penalty order has the burden in relation to other matters. The matters for which the person seeking to rely on the exceptions or exemptions has the burden of proof are primarily matters that are solely within the knowledge of that person (for example, where the matter relates to second-hand products). Turning off section 96 of the Regulatory Powers Act preserves the effect of these burden provisions in the GEMS Act. As new subsection 129(4) of the GEMS Act only relates to proceedings for a civil penalty order, and the civil penalty provisions are not criminal in nature, the right to be presumed innocent is not engaged.

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence beyond reasonable doubt. The accused is not required to prove anything ('innocent until proven guilty'). However, provisions in some legislation reverse this onus and require the person charged with an offence to prove, or disprove, a matter to establish their innocence. This can include placing an evidential burden on the defendant in relation to an available defence or 'exception'.

The explanatory memorandum suggests that because this provision (and others) relate to civil penalties, the 'right to be presumed innocent is not engaged' and the approach does not compromise Article 14(2) of the *International Covenant on Civil and Political Rights* (e.g. pp 26 and 64).

However, the principles that the Scrutiny of Bills Committee assesses proposed legislation against are not limited to the scope of international human rights law, and in assessing provisions for possible trespass on personal rights and liberties the committee considers whether the reversal of the burden of proof is appropriate in both civil and criminal matters. The committee looks to the explanatory memorandum for a detailed justification for provisions that reverse the onus of proof and is particularly interested in whether:

- the matter is peculiarly within the knowledge of the defendant, or
- it would be significantly more difficult or costly for the prosecution to disprove the matter than for the defendant to establish it.

Explanatory material should directly address these matters and others outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The committee therefore seeks the Attorney-General's further advice as to the justification for reversing the burden of proof in relation to this provision and the other instances in which this approach is taken in the bill.

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.

Restoring Territory Rights (Dying with Dignity) Bill 2016

Introduced into the Senate on 1 March 2016

By: Senators Di Natale and Gallagher

Background

This bill repeals the *Euthanasia Laws Act 1997* and amends certain territory legislation to restore legislative powers concerning euthanasia.

The committee has no comment on this bill.

Social Security Amendment (Diabetes Support) Bill 2016

Introduced into the Senate on 3 March 2016

By: Senator Muir

Background

This bill amends the *Social Security Act 1991* to provide individuals diagnosed with Type 1 Diabetes Mellitus access to required medication and peripheral devices regardless of their geographic location or social status.

The committee has no comment on this bill.

Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016

Introduced into the Senate on 2 March 2016

Portfolio: Social Services

Background

This bill amends the *Child Support (Registration and Collection) Act 1988*, the *A New Tax System (Family Assistance)(Administration) Act 1999*, the *Social Security Act 1991* and the *Student Assistance Act 1973* to:

- introduce departure prohibition orders to prevent debtors from leaving the country; and
- remove the current six year limitation on the recovery of social welfare debts that would otherwise be non-recoverable.

Freedom of movement

Merits review

Schedule 1, item 2, proposed section 102A

Section 102B makes it an offence to depart from Australia if a departure order in respect of the person is in force and the person has not been granted a departure authorisation certificate. Proposed section 102A empowers the Secretary to make a departure prohibition order if a person owes a debt to the Commonwealth under Part 4, there are no satisfactory arrangements for its recovery in place and the Secretary believes on reasonable grounds that it is desirable to make the order for the purpose of ensuring that the person does not travel to a foreign country without paying the debt or there being satisfactory arrangements in place for it to be paid.

Proposed section 102H provides for circumstances where the Secretary must issue a departure authorisation certificate. Subsection 102H(3) provides that a departure authorisation certificate must be issued if the person has given security under section 102J for the person's return to Australia or if the Secretary is satisfied that the certificate should be issued on humanitarian grounds or that refusing to issue the certificate will be detrimental to Australia's interests.

Although the statement of compatibility (at p. 3) states that a person's rights to freedom of movement are 'enshrined in the capacity of the person to travel under a departure authorisation certificate on humanitarian grounds' it should be noted that the question of whether such grounds are established may be contestable and establishing these questions depends on the Secretary's 'satisfaction'. On the other hand, section 102R provides that an application for review of a decision of the Secretary under section 102H may be made to the Administrative Appeals Tribunal.

Although section 102N provides that an appeal from a decision to make a departure prohibition order may be made to the Federal Court of Australia or Federal Circuit Court of Australia, this is expressly made subject to Chapter III of the Constitution (and would, in any event, necessarily be read as subject to the Constitution). The result is that the appeal would be limited to questions about the legality of the decision rather than enabling the court to question the merits of the original decision. This means that the court would not be in a position to substitute its judgment for the Secretary's even if it thought the decision was not the correct or preferable decision on the established facts.

Especially given the significant impact on the right to freedom of movement constituted by the offence in section 102B (the operation of which depends on decisions made under sections 102A and 102H) and the potential breadth of operation of the provision it is unclear why merits review of the decision to make a departure prohibition order should not be available. **The committee therefore seeks the Minister's advice as to whether consideration has been given to providing for merits review of decisions made pursuant to section 102A.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions in breach of principle 1(a)(iii) of the committee's terms of reference.

Trespass on personal rights and liberties—privilege against self-incrimination

Schedule 1, item 2, proposed section 102T

In the context of authorising an officer of Customs or the Australian Federal Police to enforce a departure prohibition order the officer may require a person seeking to depart Australia to answer questions or produce documents relevant to the order. A person is not excused from responding on the basis that the information might tend to incriminate them, which abrogates the usual privilege against self-incrimination.

While the bill provides use and derivative use immunities (see subsection 102T(2)) the explanatory memorandum (see p. 10) does not provide a comprehensive justification for abrogating the privilege. **The committee therefore seeks the Minister’s further advice as to the rationale for seeking to abrogate the privilege against self-incrimination, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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.

Trespass on personal rights and liberties—reversal of the evidential burden of proof

Schedule 1, item 7, subsection 200S(4)

Schedule 1, item 14, subsection 43Y(4)

The effect of these items is that the defendant bears an evidential burden in relation to the matters specified.

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence beyond reasonable doubt. The accused is not required to prove anything (‘innocent until proven guilty’). However, provisions in some legislation (such as these) reverse this onus and require the person charged with an offence to prove, or disprove, a matter to establish their innocence. This can include placing an evidential burden on the defendant in relation to an available defence or ‘exception’.

The committee looks to the explanatory memorandum for a detailed justification for provisions that reverse the onus of proof. The committee is particularly interested in whether:

- the matter is peculiarly within the knowledge of the defendant, or
- it would be significantly more difficult or costly for the prosecution to disprove the matter than for the defendant to establish it.

Explanatory material should directly address these matters and others outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. **As the explanatory memorandum does not appear to include any discussion of these provisions, the committee seeks the Minister's advice as to the rationale for the proposed approach, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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.

Social Services Legislation Amendment (Interest Charge) Bill 2016

Introduced into the Senate on 2 March 2016

Portfolio: Social Services

Background

This bill provides for the application of a new annual interest charge to outstanding debts owed by former recipients of social welfare payments who have failed to enter into, or have not complied with, an acceptable repayment arrangement.

The committee has no comment on this bill.

Tax Laws Amendment (Tougher Penalties for Country-by-Country Reporting) Bill 2016

Introduced into the House of Representatives on 29 February 2016

By: Dr Leigh

Background

This bill amends the *Income Tax Assessment Act 1997* to:

- introduce a specific penalty regime for significant global entities with country-by-country reporting obligations; and
- authorise the Commissioner of Taxation to audit firms which fail to lodge their reports after the maximum financial penalty has been reached.

The committee has no comment on this bill.

Commentary on amendments to bills

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

[Digest 7/15 – Report 4/16]

On 30 November 2015 the House of Representatives agreed to two Government amendments, the Minister for Immigration and Border Protection (Mr Dutton) presented a supplementary explanatory memorandum and the bill was read a third time.

The committee draws Senators' attention to the comments on this bill in the committee's *Fourth Report of 2016* at pages 256-287. These comments take into account the significant changes that were made to the bill as a result of these government amendments.

Communications Legislation Amendment (Deregulation and Other Measures) Bill 2015

[Digest 1/16 – Report 2/16]

On 22 February 2016 the Senate agreed to one Opposition amendment and the bill was read a third time.

On 25 February 2016 the House of Representatives disagreed to the Senate amendment.

On 29 February 2016 the Minister for Finance (Senator Cormann) tabled an addendum to the explanatory memorandum.

The committee has no comment in relation to the amendment made by the Senate.

The committee thanks the Minister for Communications for providing the addendum to the explanatory memorandum which includes additional explanatory material as requested by the committee in its *Second Report of 2016* (see pages 59–63). The committee welcomes the inclusion of additional information in explanatory material accompanying bills as these documents are an important point of access

to understanding the law and, if needed, may be used as extrinsic material to assist with interpretation.

Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015

[Digest 1/16 – no comment]

On 3 March 2016 the House of Representatives agreed to five Government amendments, the Minister for Territories, Local Government and Major Projects (Mr Fletcher) presented a supplementary explanatory memorandum and the bill was read a third time.

The committee has no comment on these amendments or the additional explanatory material.

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 44th Parliament since the previous Alert Digest was tabled:

Nil

Other relevant appropriation clauses in bills

Nil

