Senate Standing Committee

for the Scrutiny of Bills

The work of the committee in 2015

October 2016

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Preface

This report discusses the work of the Senate Standing Committee for the Scrutiny of Bills during 2015. It gives an account of the operation of the committee during that year, including examples of the kinds of issues that arose under each of the five criteria against which the committee tests the legislation it scrutinises.

Chapter 1

Introduction

Background

1.1 Since 1981, the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament in relation to:

- undue trespass on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

Committee establishment

1.2 The Scrutiny of Bills Committee was first established by a resolution of the Senate on 19 November 1981, following a report of the Senate's Constitutional and Legal Affairs Committee (tabled in November 1978). That report recommended the establishment of a new parliamentary committee to highlight provisions in bills which potentially affected individuals by interfering with their rights or by subjecting them to the exercise of an undue delegation of power.

1.3 The government of the day had considerable misgivings about this proposal, seeing it as having the potential to 'interfere' in the legislative process. Nevertheless, on the motion of Liberal Senator Alan Missen and Labor Senator Michael Tate, the committee was established on a trial basis in November 1981, was constituted on a discrete basis under a sessional order in May 1982 and became a permanent feature of the Senate committee system on 17 March 1987.

Committee membership

1.4 Senate standing order 24(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members—three senators from the government party or parties and three from non-government parties (as nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators). In accordance with standing orders 24(4) and 24(5) the chair of the committee is a member of the opposition, and the deputy chair is a government member.

1.5 Members of the committee during 2015 were:

Chair and Deputy Chairs

Senator Helen Polley (Chair)	ALP, Tasmania	12.11.13 - onwards
Senator John Williams (Deputy Chair)	NATS, New South Wales	01.07.14 - onwards

Members

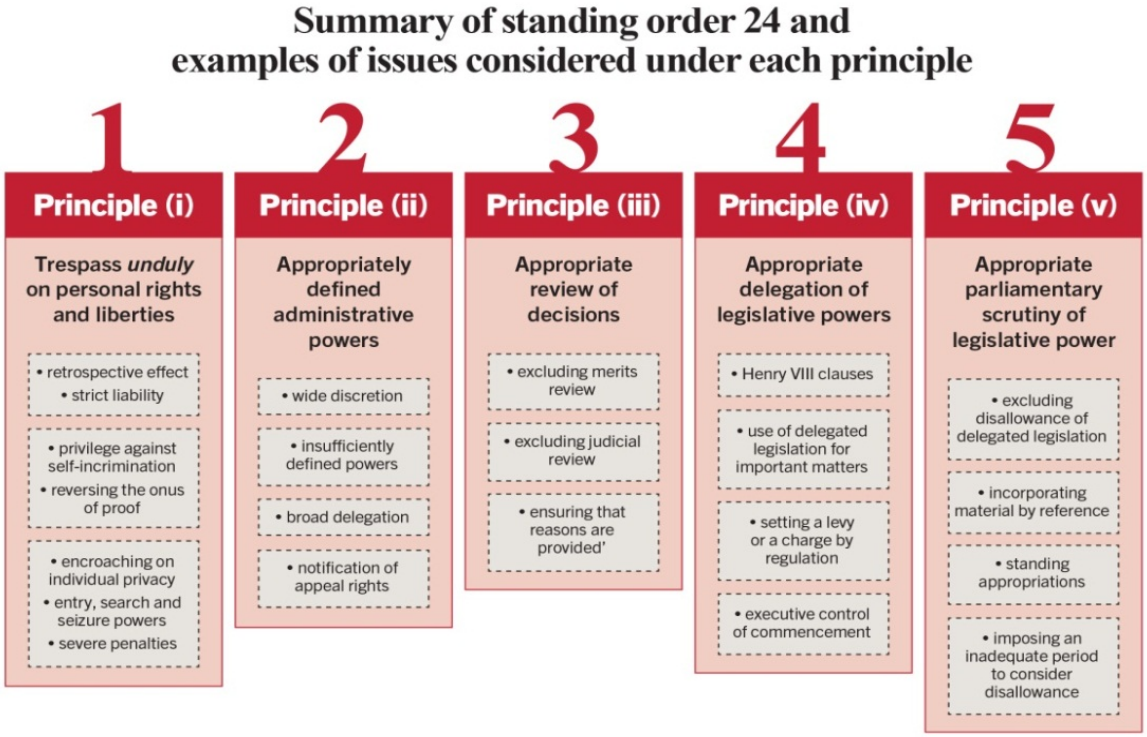
Senator Cory Bernardi	LP, South Australia	13.11.13 - onwards
Senator Katy Gallagher	ALP, Australian Capital Territory	26.03.15 - 12.11.15
Senator the Hon Bill Heffernan	LP, New South Wales	01.07.14 - onwards
Senator the Hon Joseph Ludwig	ALP, Queensland	12.11.15 - onwards
Senator the Hon Kate Lundy	ALP, Australian Capital Territory	12.11.13 - 24.03.15
Senator Rachel Siewert	AG, Western Australia	12.11.13 - onwards

The committee's scrutiny principles

1.6 As noted above, the scope of the committee's interest in bills, and amendments to bills, is established by the principles outlined in Senate standing order 24(1)(a). Over the years the committee has primarily taken a case-by-case approach to articulating issues of concern and then communicating them through its correspondence with ministers and through its regular publications.

1.7 When applying each principle there are a number of well-established matters that the committee considers to be of concern. Therefore, when it is developing comments on the provisions of each new bill that comes before it for consideration, the committee takes its previous views on these matters into account, though it does not consider that it is constrained by them.

1.8 Some of the long-standing matters of concern identified by the committee over the years by reference to individual criteria are included in the diagram below and outlined in more detail in Appendix 1.



The committee's mode of operation

1.9 As noted above, the committee examines all bills that come before the Parliament against the five principles set out in Senate standing order 24(1)(a)[1] and usually meets each sitting week to consider them. The committee's long-standing approach is that it operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the scrutiny principles. The policy content of the bill provides context for its scrutiny, but is not a primary consideration for the committee. In addition, while the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24(1)(a) it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

1.10 In undertaking its work the committee is supported by a secretariat comprised of a secretary, a principal research officer and a legislative research officer. The committee also obtains advice from a legal adviser who is appointed by the committee with the approval of the President of the Senate. The committee enjoyed the assistance of Associate Professor Leighton McDonald during this period.

1 The five principles are discussed in detail in Appendix 1, with specific case studies in chapter 3.

The committee's workflow

1.11 The committee's usual process for undertaking its work is shaped by the process for the introduction into, and passage of bills through, the Parliament. (The main steps in the committee's work are outlined in the diagram on page 5.)

1.12 In the usual scrutiny process, after the introduction of bills into either the Senate or the House of Representatives, a copy of each bill, together with its explanatory memorandum and the minister's second reading speech, is provided to the committee's legal adviser. The legal adviser considers this material and provides a report indicating the level of compliance for each bill against the committee's scrutiny principles. The secretariat is also involved in examining the bills as well as parliamentary amendments to bills. The work undertaken by the legal adviser and the secretariat provides the foundation for the committee's consideration of the legislative proposals before the Parliament.

1.13 Where a concern is raised about possible inconsistency with scrutiny principles, the committee's usual approach is to write to the responsible minister or other proposer seeking further information or requesting that consideration be given to amending the relevant provision.

1.14 Once a response is received, the committee reconsiders the relevant provisions and provides a further view on its compliance with the relevant scrutiny principle or principles and reports this to the Senate.

Managing the committee's workload

1.15 The committee works to ensure that (wherever possible) its comments on bills are available to senators prior to passage of the bill, although the ability for the committee to provide its final comments on a particular bill prior to passage often depends on the legislative timeframe and timing of the minister's response.

1.16 The committee also reports on the responsiveness of ministers to its requests for information on a quarterly basis in the committee's report. The committee notes that generally ministers were timely in providing responses to the committee, which is essential to an effective scrutiny process. However, during 2015, 36 per cent of responses were not provided within the timeframe requested by the committee and overall seven per cent were provided more than a month late.

Committee's Work Flow

BILLS and explanatory memoranda are **INTRODUCED** into the Parliament

AMENDMENTS can be proposed by the Parliament

Bills and amendments are **EXAMINED** by the **LEGAL ADVISER** and **SECRETARIAT** against the five principles described in Senate standing order 24

The secretariat prepares a **DRAFT *ALERT DIGEST*** based on the legal adviser's report. *Alert Digests* include the initial comments made by the committee about a bill or amendment. The **COMMITTEE CONSIDERS** the draft *Alert Digest*, usually at its meeting on the Wednesday of each Senate sitting week

The committee's ***ALERT DIGEST*** is then **TABLED IN THE SENATE**, usually on the Wednesday afternoon of a Senate sitting week

Where scrutiny concerns are raised (in an *Alert Digest*), the committee **WRITES TO THE RELEVANT MINISTER, MEMBER OR SENATOR** responsible for the bill or amendment, inviting them to respond to the committee's concerns

The secretariat prepares a **DRAFT *REPORT*** containing correspondence received from a Minister, Member or Senator responding to any concern raised in an *Alert Digest*. The **COMMITTEE CONSIDERS** the draft *Report*, usually at its meeting on the Wednesday of each Senate sitting week

The committee's ***REPORT*** is **TABLED IN THE SENATE**, usually on the Wednesday afternoon of a Senate sitting week

Committee publications and resources

1.17 The committee regularly publishes two documents: its Alert Digest and its Report, which can be accessed online from the committee's website once they have been presented to the Senate.[2]

Alert Digest

1.18 On the basis of the legal adviser's report and the secretariat's examination of bills and any amendments, the secretariat prepares a draft Alert Digest which is considered by the committee at its regular meeting on the Wednesday morning of each Senate sitting week. The Alert Digest contains a brief outline of each of the bills introduced in the previous week, as well as any comments the committee wishes to make. Comments are identified by reference to the relevant principle in standing order 24. The Alert Digest is usually tabled in the Senate on the Wednesday afternoon of each sitting week.

1.19 When concerns are raised by the committee and outlined in an Alert Digest, the process noted above in relation to the committee's workflow is followed: correspondence is forwarded to the minister or proposer responsible for the bill inviting him or her to respond to the committee's concerns. Ministers generally seek advice from their department before responding.

Reports

1.20 When a minister or other proposer responds to a concern raised in an Alert Digest, the secretariat produces a draft Report for the committee's consideration. A draft Report contains the relevant extract from the Alert Digest, the text of the minister's response, and any further comments the committee may wish to make. Draft Reports are also considered at the committee's regular meetings, and, once agreed, are presented to the Senate at the same time as the Alert Digest for that week.

1.21 The committee generally requests that any response from a minister be received in sufficient time for it to be scrutinised and circulated to members for consideration before the next committee meeting. As noted above, the committee aims to report to the Senate prior to the Senate's detailed consideration of bills so that its views can be taken into account before passage.

Scrutiny News

1.22 The committee secretariat prepares a brief *Scrutiny News* publication each sitting week which is sent to all senators, their staff and committee office staff. *Scrutiny News* highlights recent comments drawn from material in the committee's Alert Digest and Report, with a particular focus on information that may be useful when bills are debated and to raise awareness about the committee's scrutiny principles. In 2015, the committee also began publishing *Scrutiny News* on the committee's website.

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2 The committee's website is available at http://www.aph.gov.au/senate_scrutiny.

Interaction with other legislative scrutiny committees

1.23 The Scrutiny of Bills Committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The work of the three committees is complementary in many respects. The committee therefore monitors the work of the two other legislative scrutiny committees—the Senate Regulations and Ordinances Committee and the Parliamentary Joint Committee on Human Rights—and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

1.24 Examples of the committee's interaction with the other legislative scrutiny committees during 2015 are provided below:

- The committee worked closely with the Regulations and Ordinances Committee and drew a number of provisions of bills to its attention during 2015. For example, in its *Seventh Report of 2015* the committee drew its final comments in relation to a delegation of legislative power in the Australian Small Business and Family Enterprise Ombudsman Bill 2015 to the attention of the Regulations and Ordinances Committee. (The relevant clause provided for the making of 'rules' (delegated legislation), but the provision was not accompanied by the standard restrictions on the types of matters (such as the creation of offences) which should not be provided for in 'rules').[3]
- In considering the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, the Parliamentary Joint Committee on Human Rights (the PJCHR) noted this committee's work and referred to the committee's comments in relation to:
  - circumstances in which exercise of force may be used by authorised officers; and
  - Parliamentary scrutiny of training and qualification requirements.[4]

1.25 The committee will continue to work closely with the Regulations and Ordinances Committee and the PJCHR, where appropriate, in the future.

Structure of the report

1.26 The structure of this report is:

- Chapter 1 provides general background information about the committee, the committee's mode of operation and the committee's interaction with other legislative scrutiny committees;
- Chapter 2 provides information about the work of the committee during 2015, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills;

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3 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015,* 12 August 2015, pp 524–525.

4 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament,* pp 88 and 100.

- Chapter 3 outlines some more detailed case studies of the committee's work during 2015; and
- Appendix 1 outlines the application of each of the committee's scrutiny principles in detail (including relevant examples from the committee's scrutiny of bills during 2015).

Acknowledgements

1.27 The committee wishes to acknowledge the work and assistance of its legal adviser Associate Professor Leighton McDonald.

1.28 The committee also wishes to acknowledge the assistance of ministers and other proposers of bills, departments and agencies during the reporting period. Their responsiveness to the committee is critical to the legislative process as it ensures that the committee can perform its scrutiny function effectively.

Chapter 2

Work of the committee in 2015

2.1 This chapter provides information about the work of the committee during 2015, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills.

Statistics

2.2 Each year the committee usually analyses between 200 and 250 bills. The table below sets out the bills scrutinised by the committee during 2015.

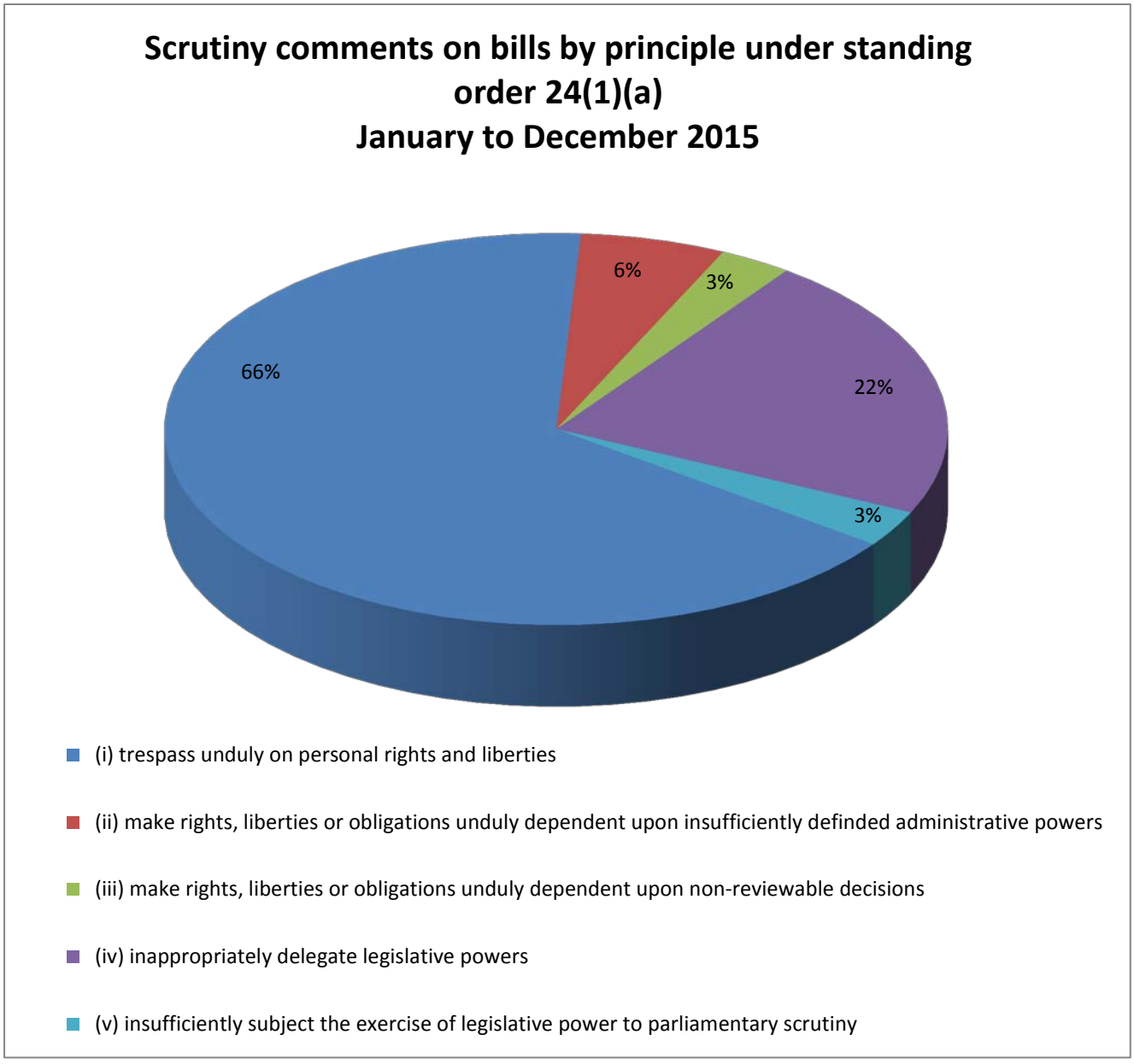
2.3 The table also outlines statistics in relation to the number of bills and amendments for which the committee had comments.

2.4 The committee commented on 87 bills in 2015, this compares to 90 bills in 2014. In relation to amendments to bills, the committee commented on 21 amendments (or groups of amendments) in 2015, compared to 10 in 2014.

Year	Bills considered	Bills commented on	Amendments to bills considered	Amendments to bills commented on	Digests tabled	Reports tabled
2015	223	87	49	21	14	14

2.5 The chart below provides a breakdown of the committee's comments on bills by principle.

2.6 The chart shows, consistent with previous practice, that the most common principle upon which the committee commented in 2015 was principle (i) relating to possible undue trespass on personal rights and liberties (66 per cent). This compares with 42 per cent for the same principle during 2014.



Impact of the committee's work in 2015

2.7 The work of the committee in scrutinising bills against the five principles outlined above assists and improves parliamentary consideration of legislation in a number of important ways, including:

- amendments to legislation;
- improved explanatory material;
- more informed consideration of issues in legislation committee reports;
- more informed debate in the Senate and committees; and
- more comprehensive Bills Digests.

2.8 As noted above, since the committee's establishment over 30 years ago it has developed a consistent position in relation to several long-standing matters of concern. While it is not easily quantifiable, it is expected that the committee's consistent

commentary has had an impact on the number of bills introduced to Parliament that raise these type of scrutiny concerns.

Impact prior to the introduction of bills into the Parliament

2.9 While difficult to quantify, it is clear that prior to the introduction of bills into the Parliament the Scrutiny of Bills Committee has an 'unseen influence' on the development of bills through the legislative drafting process. Legislative drafters often refer to the reports and long-standing scrutiny concerns of the committee when they are advising instructing departments and agencies and therefore many provisions that may have been of concern under the committee's scrutiny principles may not be included in the final text of bills that come before the Parliament.[1]

2.10 Underpinning this 'unseen influence' is formal guidance available to agencies and departments as part of the legislative drafting process. The *Legislation Handbook*,[2] *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,[3] and *OPC Drafting Directions*[4] all draw attention to long-standing scrutiny concerns of the committee to ensure that these concerns are considered as part of the legislative drafting process. The long-standing concerns relate to a large number of matters, including:

- retrospectivity;
- absolute and strict liability offences;
- excessive delegation of legislative power;
- entry, search and seizure powers; and
- penalty provisions.

2.11 In relation to the adequacy of explanatory memoranda accompanying bills, OPC Drafting Direction 4.1 advises legislative drafters to:

> …alert your instructors to any requested provisions that are likely to be of interest to the [Scrutiny of Bills] Committee, and advise your instructors to set out clearly in the explanatory memorandum the reasons for such provisions.[5]

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1 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 4th ed, 2012, p. 167.

2 *Legislation Handbook*, Department of the Prime Minister and Cabinet, May 2000, available at https://www.dpmc.gov.au/sites/default/files/publications/Legislation_Handbook.pdf.

3 *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Attorney-General's Department, available at https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

4 OPC Drafting Directions Series, Office of Parliamentary Counsel, available at https://www.opc.gov.au/about/draft_directions.htm.

5 OPC Drafting Direction 4.1, *Dealing with instructors*, 29 February 2016, p. 3.

New Drafting Direction 3.5A

2.12 In 2015 the Office of Parliamentary Counsel issued Drafting Direction 3.5A dealing with regulatory powers for the first time. This Drafting Direction relates to the triggering in Commonwealth legislation of monitoring and investigation powers contained in the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). Part 2 of the Regulatory Powers Act creates a framework for monitoring whether legislative provisions are being complied with (monitoring powers) and Part 3 creates a framework for gathering material that relates to the contravention of offence and civil penalty provisions (investigation powers).

2.13 Under the Regulatory Powers Act, if a thing is found in the course of executing a monitoring or investigation warrant that may be evidence of the contravention of a 'related provision' it may be possible to secure or seize the thing to prevent it from being concealed or destroyed. The Drafting Direction notes that if a definition of 'related provision' in a triggering bill is too broad this 'may attract criticism from the Senate Scrutiny of Bills Committee'.[6]

2.14 The Drafting Direction also notes that where a provision authorises a person executing a monitoring or investigation warrant to use force the provision should be justified in the explanatory memorandum and that if such a justification is not provided this may attract adverse comment from the Scrutiny of Bills Committee.[7]

Amendments to legislation

2.15 One of the most noticeable outcomes of the committee's scrutiny of bills is amendments to legislation that arise from the committee's work. Amendments may be moved by any senator directly in response to the committee's comments, or as a result of a recommendation of a Senate legislation committee which, in turn, explicitly drew on this committee's comments. Alternatively, amendments which reflect the committee's comments can be moved by a senator without any direct acknowledgment of the committee's work, or there may have been a cumulative impact if a similar point was also made in another forum (such as a legislation committee inquiry)—it is therefore difficult to gauge with complete accuracy the impact that the committee has in terms of amendments to legislation.[8]

2.16 However, it is clear that some amendments are moved which directly address the committee's concerns in relation to particular matters. For example, in 2015 government amendments were moved in relation to the following bills:

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6 OPC Drafting Direction 3.5A, *Regulatory powers*, February 2015, pp 5 and 9.

7 OPC Drafting Direction 3.5A, *Regulatory powers*, February 2015, pp 7 and 10.

8 An example of such an amendment was the removal of schedule 5 from the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 on 19 August 2015. This amendment addressed the committee's concerns in relation to the proposed introduction of an additional form of secondary criminal liability for being 'knowingly concerned' in the commission of an offence. This example is discussed in further detail at pages 19-20.

- Business Services Wage Assessment Tool Payment Scheme Bill 2014—this amendment responded to the committee's concerns about the extent of the minister's power to make rules (delegated legislation). The amendment clarified that certain significant matters (such as the creation of an offence or civil penalty) may not be addressed by the rules.[9]
- Tribunals Amalgamation Bill 2014—this amendment addressed the committee's concern that the rights of appellants may be diminished by a proposal in the bill to allow the determination of second reviews of social services matters to be conducted on the papers without the consent of the parties.[10]

Improved explanatory material

2.17 The committee regularly requests that additional information be included in explanatory memoranda to ensure that provisions of bills on which the committee has commented are adequately explained.

2.18 The committee's intention in requesting that important information be included in explanatory memoranda is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill.

2.19 In addition, the committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions.

2.20 In relation to the scrutiny process, a comprehensive explanatory memorandum can provide the foundation for avoiding adverse scrutiny committee comment because whether or not a provision is of concern often depends on the context and circumstances. An explanatory memorandum should demonstrate that the proposed policy approach reflects an informed choice that is appropriately justified.

2.21 In the amendments section of the each Alert Digest the committee provides commentary on updated explanatory material. Two examples of explanatory memoranda that were revised during 2015 in response to the committee's comments are outlined below.

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

2.22 On 12 August 2015 a replacement explanatory memorandum for this bill was tabled in the House of Representatives. The replacement explanatory memorandum included information which the committee had requested in its *Fifth Report of 2015* relating to:

- the imposition of a legal burden of proof on the defendant in proposed new subsection 270.7A(4) of the *Criminal Code*; and

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9 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2015*, 12 August 2015, p. 46.

10 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 6 of 2015*, 17 June 2015, pp 66-67.

- the proposed reintroduction of 'knowingly concerned' as an additional form of secondary criminal liability.[11]

Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014

2.23 On 5 March 2015 a replacement explanatory memorandum for this bill was tabled in the Senate. The replacement explanatory memorandum included information which the committee had requested in its *Second Report of 2015*. The additional information related to the abrogation of the privilege against self-incrimination.[12]

Use in legislation committee reports

2.24 The committee routinely forwards its comments on bills to Senate legislation committees so that these committees may take the Scrutiny of Bills Committee's comments into consideration during their inquiries into particular bills. This practice is reflected in standing order 25(2A) which provides that:

> The legislation committees, when examining bills or draft bills, shall take into account any comments on the bills published by the Standing Committee for the Scrutiny of Bills.

2.25 Two examples of the consideration of this committee's comments in legislation committee reports during 2015 are outlined below.

Biosecurity Bill 2014

2.26 On 17 March 2015 the Rural and Regional Affairs and Transport Legislation Committee tabled its report in relation to the provisions of the Biosecurity Bill 2014 and related bills. The Rural and Regional Affairs and Transport Legislation Committee considered a number of matters commented on by this committee in its report, including:

- penalty levels for some of the proposed offences and civil penalties;[13] and
- strict liability offences.[14]

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

2.27 On 16 June 2015 the Legal and Constitutional Affairs Legislation Committee tabled its report in relation to the provisions of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015. The Legal and Constitutional

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11 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2015*, 19 August 2015, p. 9.

12 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 3 of 2015*, 18 March 2015, p. 45.

13 Senate Rural and Regional Affairs and Transport Legislation Committee, *Biosecurity Bill 2014 and related Bills [Provisions]*, March 2015, p. 35.

14 Senate Rural and Regional Affairs and Transport Legislation Committee, *Biosecurity Bill 2014 and related Bills [Provisions]*, March 2015, p. 33.

Affairs Committee considered matters commented on by this committee in its report, including:

- reversal of the burden of proof in relation to forced marriages;[15] and
- the proposed reintroduction of 'knowingly concerned' as an additional form of secondary criminal liability.[16]

Use in submissions to parliamentary committee inquiries

2.28 The committee's comments on bills are referred to in submissions made to other parliamentary committees conducting inquiries into particular bills.

2.29 For example, the following organisations referred to the committee's comments in relation to the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 in their submissions to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the bill:

- Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, University of New South Wales (submission 8); and
- Refugee and Immigration Legal Centre (submission 124).

Debate in the Senate and committees

2.30 The committee's comments on bills are regularly referred to in debate in the Senate. For example, there was extensive discussion of the committee's comments during consideration of the following bills:

- Asian Infrastructure Investment Bank Bill 2015;[17]
- Australian Citizenship Amendment (Allegiance to Australia) Bill 2015;[18] and
- Migration Amendment (Charging for a Migration Outcome) Bill 2015.[19]

2.31 In addition, the committee's comments are also regularly referred to during committee hearings into particular bills.

2.32 For example, during a hearing of the Education and Employment Legislation Committee into the Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 the committee questioned the department about the inclusion of a broad discretionary power in the bill—an issue outlined by this committee in its *Twelfth Report of 2015*. (The relevant provision would allow the

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15 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 [Provisions]*, June 2015, pp 4–5.

16 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 [Provisions]*, June 2015, pp 5–6. This example is discussed in further detail at pages 19-20.

17 *Senate Hansard*, 15 September 2015, pp 6784–6786 and 6864–6865.

18 *Senate Hansard*, 1 December 2015, pp 9479–9480.

19 *Senate Hansard*, 24 November 2015, pp 8823–8824.

Secretary to determine what constitutes 'inappropriate behaviour' by a job seeker at an appointment.)[20]

Use in Bills Digests

2.33 The Parliamentary Library prepares Bills Digests to assist senators, members and others in understanding the key matters in many bills introduced into the Parliament. These Bills Digests regularly canvass issues raised by the Scrutiny of Bills Committee thereby enabling interested senators and members to understand key issues raised by this committee.

2.34 The committee's comments were considered in some detail in many Bills Digests during 2015 including, for example, in relation to the following ten bills:

- Airports Amendment Bill 2015;
- Australian Border Force Bill 2015;
- Australian Defence Force Superannuation Bill 2015;
- Australian Immunisation Register Bill 2015;
- Counter-Terrorism Legislation Amendment Bill (No. 1) 2015;
- Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015;
- Migration Amendment (Charging for a Migration Outcome) Bill 2015;
- Passports Legislation Amendment (Integrity) Bill 2015;
- Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015; and
- Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015.

20 Senate Education and Employment Legislation Committee, *Committee Hansard*, Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015, 13 November 2015, pp 42–43.

Chapter 3

Case studies

3.1 Case studies which provide examples of the committee's work help to illustrate:

- the committee's approach to its scrutiny role;
- the committee's role in identifying matters of concern as assessed against the scrutiny principles outlined in standing order 24(1)(a) and obtaining relevant information which informs the legislative process; and
- the committee's role in providing the foundation for amendments to provisions and improvements to the content of explanatory material.

3.2 This chapter includes examples of the committee's work during 2015 involving each principle. The case studies include instances of significant legislation considered during the year and highlight issues of continuing interest into the future, including:

- scrutiny of section 96 grants to the States;
- uncertainty in the application of criminal offences;
- broad discretionary powers, particularly where the powers are apt to adversely affect individual rights;
- failure to provide for effective judicial review; and
- provisions which allow core elements of a legislative scheme to be established by delegated legislation.

Appropriation bills and scrutiny of section 96 grants to the States

SCRUTINY SNAPSHOT: The committee will continue to take an interest in parliamentary scrutiny of section 96 grants to the States and will draw this matter to the attention of the Senate where appropriate in the future.

Standing order 24(1)(a)(iv) – inappropriately delegate legislative powers
Standing order 24(1)(a)(v) – insufficiently subject the exercise of legislative power to parliamentary scrutiny

3.3 In 2015 the Scrutiny of Bills Committee commented on a standard provision in appropriation bills which deals with the Parliament's power under section 96 of the

Constitution to provide financial assistance to the States.[1] Section 96 states that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.' However, a standard provision in the regular appropriation bills delegates this power to the Minister. Specifically, the Minister may determine:

- conditions under which payments to the States may be made; and
- the amount and timing of the payments.[2]

3.4 Importantly, the relevant provision also provides that the above ministerial determinations are not legislative instruments and are therefore not subject to the tabling and disallowance provisions of the *Legislation Act 2003* (Cth) or scrutiny by the Regulations and Ordinances Committee. The committee therefore noted that this standard provision is relevant to the committee's role in reporting on whether a bill:

- delegates legislative powers inappropriately (Senate standing order 24(1)(a)(iv)); and
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny (Senate standing order 24(1)(a)(v)).

3.5 During the year the committee highlighted the fact that the power to make grants to the States and to determine terms and conditions attaching to them is conferred on the *Parliament* by section 96 of the Constitution. Noting the terms of section 96 and the role of Senators in representing the people of their State or Territory, the committee therefore requested that additional explanatory material be included in future explanatory memoranda to assist Senators in scrutinising these payments. In particular, the committee requested:

- additional explanatory material in relation to operation of the standard provision;[3] and
- the inclusion of detailed information about the particular purposes for which money is sought to be appropriated for payments to State, Territory and local governments.[4]

3.6 As a result of the committee's request, further information explaining the operation of this standard provision has been included in explanatory memoranda

1 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, 12 August 2015, pp 511–516; and *Ninth Report of 2015*, 9 September 2015, pp 611–614.

2 See, for example, Appropriation Bill (No. 4) 2014-2015 (Cth) cl 14.

3 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, 12 August 2015, p. 516

4 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2015*, 9 September 2015, p. 613.

accompanying recent appropriation bills.[5] The committee's work in this area has also informed debate on appropriation bills in the Senate.[6]

3.7 **The committee noted that it will continue to take an interest in parliamentary scrutiny of section 96 grants to the States and will draw this matter to the attention of the Senate where appropriate in the future.**

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

SCRUTINY SNAPSHOT: The committee will continue to draw attention to provisions which may give rise to uncertainty in the application of criminal offences.

Standing order 24(1)(a)(i) – trespass unduly on personal rights and liberties

3.8 Schedule 5 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 sought to introduce an additional form of secondary criminal liability for being 'knowingly concerned' in the commission of an offence. This would mean that where persons are knowingly and intentionally involved in the commission of an offence, they would be liable for the offence.

3.9 This form of secondary criminal liability was previously included in the *Crimes Act 1914*, but the concept was not included in the model criminal code in 1992 on account of its uncertainty and open-ended nature.[7] Given this, the committee sought the Minister's advice about the scope, application and justification for the proposed approach.[8]

3.10 The Minister provided a detailed response which included:

- background information about the use of the concept of 'knowingly concerned' in the criminal law; and
- perceived difficulties with existing approaches to secondary criminal liability (aiding, abetting, counselling or procuring).[9]

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5 See comments on Appropriation Bill (No. 4) 2015-2016 in Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2016*, 24 February 2016, pp 10–11.

6 See, for example, Commonwealth, *Parliamentary Debates*, Senate, 23 June 2015, pp 4265–4267.

7 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: General Principles of Criminal Responsibility* (Final Report, December 1992) i.

8 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 4 of 2015*, 25 March 2015, pp 10–11.

9 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, pp 328–329.

3.11 In light of this detailed response the committee drew this matter to the attention of Senators and left the question of whether the proposed approach was appropriate to the Senate as a whole.

3.12 The committee also requested that further key information be included in the explanatory memorandum to assist in the interpretation of these provisions. On 12 August 2015 the Minister presented a replacement explanatory memorandum which contained the additional information that the committee had requested.[10]

3.13 The Legal and Constitutional Affairs Legislation Committee conducted an inquiry into the bill and this committee's comments on the bill, as well as the Minister's response, were referenced extensively in the report.[11]

3.14 In addition, during the Legal and Constitutional Affairs Committee's public hearing on the bill several questions referencing this committee's comments were asked of the Australian Human Rights Commission, the Commonwealth Director of Public Prosecutions and the Law Council of Australia.[12]

3.15 The Parliamentary Library in its *Bills Digest No. 1, 2015-16* also utilised the committee's comments and the Minister's response in relation to the proposed introduction of being 'knowingly concerned' in the commission of an offence as an additional form of secondary criminal liability.[13]

3.16 On 19 August 2015 the Senate agreed to an amendment which removed schedule 5 (which proposed to insert the concept of being 'knowingly concerned') from the bill. On 10 November 2015 the House of Representatives agreed to the amendment and the bill was passed.[14] The committee noted this amendment in its *Alert Digest No. 9 of 2015*.[15]

3.17 **The committee will continue to draw attention to provisions which may give rise to uncertainty in the application of criminal offences in the future**.

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10 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2015,* 19 August 2015, p. 9.

11 Senate Legal and Constitutional Affairs Legislation Committee, *Report on Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 [Provisions]*, June 2015, pp 5–6 and 9.

12 *Hansard,* Senate Legal and Constitutional Affairs Legislation Committee, Crimes Legislation Amendment, (Powers, Offences and Other Measures) Bill 2015, 20 May 2015, pp 7, 22 and 29.

13 Parliamentary Library, *Bills Digest No. 1, 2015-16,* Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, p. 6.

14 *Journals of the Senate*, 19 August 2015, pp 2986–2987; and *Journals of the Senate*, 10 November 2015, p. 3341.

15 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2015,* 9 September 2015, p. 24.

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

SCRUTINY SNAPSHOT: The committee will continue to draw attention to bills which contain broad discretionary powers, particularly where the powers are apt to adversely affect individual rights.

Standing order 24(1)(a)(ii) – insufficiently defined administrative powers

3.18 This bill significantly broadened the power of the Minister or officer of the department to collect personal identifiers (such as fingerprints, a photograph of a person's face, an audio or video recording of a person, an iris scan or a person's signature). The committee noted that in the past, personal identifiers could only be collected in specified circumstances, and raised concerns about the introduction of a broad discretionary power which would instead allow for the collection of this sensitive personal information where any link to the purposes of the Migration Act or Regulations could be demonstrated.[16]

3.19 The committee also raised specific concerns about:

- the lack of safeguards provided in relation to a provision which would allow government officials to require that personal identifiers be provided in 'another way'; and
- provisions that remove certain limits that apply to the collection of personal identifiers from children and incapable persons who are unable to give consent.

Insufficient safeguards

3.20 The bill also sought to allow the executive to determine further ways to collect personal identifiers without any legislative oversight by providing a new power for the Minister or an officer to require personal identifiers to be provided in 'another way' (thereby providing the Minister or an officer with flexibility about how a person is to provide personal identifiers when required to do so). The statement of compatibility accompanying the bill accepted that this would allow the system of safeguards and legislative instruments, which currently govern the collection of personal identifiers, to be bypassed where the Minister or an officer authorises a different method of collection.

3.21 In light of these issues, the committee sought the Minister's advice as to the rationale for the proposed approach. In particular, the committee noted:

- the lack of limits on the specification of further ways to collect personal identifiers;
- the lack of Parliamentary oversight of the important policy issues that the specification of further methods of collection may entail; and

16 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, pp 384–391.

- that the implementation of the use of new ways to collect personal identifiers could be achieved through the use of a targeted amendment which included appropriate safeguards.

3.22 While the committee prefers the inclusion of important matters such as this in primary legislation, in the absence of such an approach the committee sought advice from the Minister as to whether the bill could be amended to at least require legislative authority for future arrangements to be established by regulation.[17]

3.23 The Minister advised the committee that the current approach was inflexible and that the use of regulations would limit the ability of the department to effectively utilise new and emerging biometrics technology and respond quickly to new and unprecedented threats.

3.24 The committee was not persuaded that the use of regulations to provide for future arrangements would limit flexibility in this way. In fact, the committee noted that speed and flexibility are often cited to the committee as reasons for the use of delegated legislation for matters that would otherwise be appropriately included in primary legislation, and also that the use of regulations would appropriately provide for some level of Parliamentary scrutiny.

3.25 **The committee concluded that it was of the view that the scope of the power to provide for 'another way' for the collection of personal identifiers was broad and it was therefore highly desirable for the bill to provide that authorisation of new methods for the collection of personal identifiers should be established by regulation. The committee drew this view to the attention of Senators and left the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole**.[18]

Impact on minors and incapable persons

3.26 Items 52 and 53 in the bill sought to remove certain limits that applied to the collection of personal identifiers from minors and incapable persons. These limits include a requirement to obtain consent and a requirement for a parent, guardian or independent person to be present during the collection of personal identifiers. The committee therefore sought the Minister's advice as to whether consideration had been given to including more detail in the bill about what matters must be addressed and considered in exercising this broad discretionary power in the context of minors and incapable persons. In this regard, the committee noted that leaving such requirements to policy does not enable Parliament to assess whether the limitations on rights have been adequately justified.

3.27 The Minister provided an initial response and suggested that there were difficulties with the existing requirement for consent. For example, it was suggested

17 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, pp 392–396.

18 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2015*, 17 June 2015, p. 484, and Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, 12 August 2015, p. 550.

that refusal by a parent, guardian or independent person during the collection of personal identifiers process could be disruptive.[19]

3.28 However, the committee remained of the view that it would be preferable to include more detail in the bill to guide the exercise of this broad power in the context of minors and incapable persons. The committee sought further advice from the Minister as to whether the bill could be amended to include:

- a requirement for the department to take reasonable steps to ensure that a parent/guardian or independent person could be present with a minor or incapable person during a process in which the collection of personal identifiers is sought and completed; and
- a requirement that the department:
  - (a) publicly report on the number of instances in which personal identifiers are collected from minors and incapable persons without consent or the presence of a parent, guardian or independent person; and
  - (b) provide periodic reports to the Ombudsman in relation to the use of the collection power in these circumstances.[20]

3.29 **In relation to there being a legislative requirement for the department to take reasonable steps to ensure the presence of a suitable person present with a minor or incapable person, the Minister indicated that the Department will 'specify in policy the circumstances where reasonable steps would be taken to ensure that a parent or guardian is present during the collection of personal identifiers'.[21]**

3.30 **The committee noted the intended policy arrangements, but remained of the view that it is preferable to include a legislative requirement for the department to take reasonable steps to ensure that a parent or guardian be present with a minor or incapable person during the collection of personal identifiers unless there are reasonable grounds to believe that this would undermine the purpose of the legislation.**

3.31 **In relation to the committee's requests about reporting requirements, the Minister committed to record and publish statistics about the collection of personal identifiers from minor and incapable persons without consent or the presence of a parent, guardian or independent person, and also provide this information to the Ombudsman.**[22]

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19 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, pp 398-399.

20 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, pp 396–400.

21 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, 12 August 2015, p. 556.

22 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2015*, 17 June 2015, p. 490.

Committee consideration of amendments to the bill

3.32 The committee welcomed a government amendment, which provided that nothing in the *Migration Act 1958* authorised the Minister or an officer to require a person to provide a personal identifier in a cruel, inhuman or degrading way, or in a way that failed to treat the person with humanity and respect for human dignity.[23]

Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

SCRUTINY SNAPSHOT: The committee will continue to draw attention to provisions that explicitly or otherwise exclude, or fail to provide for, effective judicial review.

Standing order 24(1)(a)(iii) – unduly dependent upon non-reviewable decisions

3.33 This bill proposed to repeal section 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). Section 487 enables individuals who are Australian citizens or residents, and organisations or associations established in Australia to seek judicial review if, in the two years prior to the decision they seek to challenge, they have engaged in a series of environmental conservation or research activities in Australia. Whereas, under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), only persons who are 'persons aggrieved' by a government decision have standing to seek judicial review of that decision.

3.34 The committee noted that the proposed amendment would result in standing to bring proceedings for judicial review in relation to decisions under the EPBC Act being restricted to the general standing requirement under the ADJR Act, and that therefore the availability of judicial review would be limited.

3.35 The committee also noted that restrictive standing rules pose particular problems in the area of environmental decision-making because environmental regulation often raises matters of general rather than individual concern. As a result, restrictive standing rules may therefore mean that such decisions are, in practice, beyond effective judicial review to ensure that the decisions comply with the law. From a scrutiny perspective, it was a matter of concern that the introduction of more restrictive standing rules may result in the inability of the courts to undertake their constitutional role (i.e. to ensure that Commonwealth decision-makers comply with the law).

3.36 The committee made further comment that the proposed amendment may not eliminate litigation in any event because the relevant case law lacks clear principles for determining when environmental NGOs (non-government organisations) will be

23 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2015*, 19 August 2015, p. 10.

accorded standing under the general law and under the 'person aggrieved' test of the ADJR Act. As a result, the committee reported that the amendment may simply refocus litigation away from the question of whether there has been a breach of legal requirements towards the question of standing.

3.37 The committee also commented that the explanatory memorandum did not include any detailed justification for the proposed amendment, and in particular noted that the Report of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) which stated that section 487 had 'created no difficulties and should be maintained'.[24] Noting all of the above, the committee sought detailed advice from the Minister as to why this limitation on the availability of judicial review of decisions under the EPBC Act was justified.

3.38 The Minister responded by explaining that the purpose of the bill was to bring the arrangements for standing to make a judicial review application under the EPBC Act into line with the standard arrangements for permitting judicial review challenges to Commonwealth administrative decisions.

3.39 The committee noted that the Minister's response **had not directly addressed the specific scrutiny issues which it had raised and expressed its continuing scrutiny concern that the practical effect of the bill was to limit the availability of judicial review in the absence of sufficient justification for that outcome.**[25]

3.40 The Parliamentary Library in its *Bills Digest No. 37, 2015-16* utilised the committee's comments and the Minister's response in commentary relating to the limitation on standing to seek judicial review in the bill.[26]

3.41 The Senate Environment and Communications Legislation Committee conducted an inquiry into the bill and considered the committee's concerns as part of its inquiry.

3.42 On 17 April 2016 the bill lapsed due to the prorogation of the Parliament.

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24 Report of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009), p. 261.

25 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015*, 14 October 2015, p. 654–657.

26 Parliamentary Library, *Bills Digest No. 37, 2015-16*, Environment Protection and Biodiversity Conservation amendment (Standing) Bill 2015, pp 14-15.

Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014

SCRUTINY SNAPSHOT: The committee's preference is that important matters should be included in primary legislation to allow full Parliamentary involvement in, and scrutiny of, significant issues. The committee will be particularly concerned where the core elements of a scheme apt to adversely affect individual rights are left to be determined by delegated legislation.

Standing order 24(1)(a)(iv) – inappropriately delegate legislative powers

3.43 This bill amended the *Telecommunications (Interception and Access) Act 1979* and the *Telecommunications Act 1997* to introduce a statutory obligation on telecommunications service providers to retain defined telecommunications data for two years.

3.44 The committee commented on a number of issues arising in the bill, including (among other things):

- inappropriate delegations of legislative power in relation to the definition of the scope of data, expanding the categories of services that the data retention obligations apply to, and expanding the meaning of 'criminal law-enforcement agency' and 'enforcement agency'; and
- the effectiveness of proposed oversight arrangements.

Inappropriate delegation of legislative power

3.45 The committee noted that the bill did not contain a clear definition of the specific types of data that were covered by the data retention scheme (i.e. the 'data set'); instead, the types of data that must be collected could be specified by a regulation, pursuant to paragraph 187A(1)(a) of the bill.

3.46 The explanatory memorandum justified the delegation of legislative power on the basis that this was necessary to ensure that data retention obligations remained 'sufficiently flexible to adapt to rapid and significant future changes in communications technology'.

3.47 However, the committee commented that it considered paragraph 187A(1)(a) to be an inappropriate delegation of legislative power. The committee accepted that regulation-making powers are in some cases justified by the necessity to build in scope for flexible regulatory responses to changing circumstances, but the committee noted that whether this scheme—which was highly intrusive of individual privacy—should be applied in a new technological context was a matter which would raise significant question of policy.[27] **The committee stated that it generally expects that**

27 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, p. 116.

significant matters will be in primary legislation—they are not appropriately delegated by the Parliament to the executive government.

3.48 Therefore, the committee recommended that consideration should be given to amending the bill to provide that this important matter would be dealt with in the primary legislation rather than allowing for expansion of the scope of obligations by delegated legislation.

3.49 The committee also sought advice from Attorney-General as to the rationale for the proposed approach in light of the above comments, including more detailed information about the appropriateness of this delegation of power and whether the disallowance process could be amended to provide for increased Parliamentary oversight.

3.50 The Attorney-General responded stating that the proposed approach in the bill allowed for technical detail, conventionally reserved for regulations, to be adjusted expeditiously in response to technological change.

3.51 Following consideration of the Attorney-General's advice, **the committee noted that the 'data set' was a core element of the proposed scheme and therefore reiterated that the types of data to be retained should be set out in the primary legislation to allow for full Parliamentary scrutiny**.

3.52 If this was not agreed to, the committee recommended that the bill be amended to ensure that any regulation setting out the types of data to be retained under the scheme would not come into effect until the regulation had been positively approved by each House of the Parliament (see, for example, s 10B of the *Health Insurance Act 1973*). At a minimum, the committee considered that such regulations should not come into effect until after the disallowance period has expired.[28]

3.53 The committee also noted that:

- the category of telecommunications and internet service providers that would be subject to the data retention obligations could be expanded by regulation, pursuant to subparagraph 187A(3)(b)(iii) of the bill; and
- the bill empowered the Minister to declare, by legislative instrument, further authorities or bodies to be a 'criminal enforcement agency' or 'enforcement agency' thereby enabling those agencies to access collected data.

3.54 **The committee also considered these matters to be core elements of the proposed scheme and therefore concluded that they should be set out in the primary legislation to allow full Parliamentary scrutiny.**[29]

3.55 The committee drew all of these matters to the attention of the Regulations and Ordinances Committee for information.

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28 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, p. 118.

29 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 119–120 and 123–126.

3.56 The Law Council of Australia stated in its submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiry into the bill that it agreed with the scrutiny committee's conclusion on subparagraph 187A(3)(b)(iii) that it was an inappropriate delegation of power.[30]

Oversight arrangements—Ombudsman and Inspector-General of Intelligence and Security

3.57 The committee welcomed measures in the bill designed to avoid unlawful and arbitrary interference with the right to privacy, such as the reduction in the number and range of agencies which can access telecommunications data and the extension of the remit of the Ombudsman to oversee agencies' compliance with the framework for access to, and use of, telecommunications data under Chapter 4 of the *Telecommunications (Interception and Access) Act 1979*.

3.58 In relation to the extension of the Ombudsman's remit, the committee noted that the efficacy of the increased oversight would depend upon the Ombudsman being appropriately resourced to undertake its increased oversight responsibilities and that, more generally, a similar case may be made in relation to oversight of intelligence agencies by the Inspector-General of Intelligence and Security (IGIS).

3.59 The committee therefore sought the Attorney-General's advice in relation to whether any additional funding or resources would be provided to the Ombudsman and/or the IGIS to ensure that they are able to conduct their important oversight responsibilities effectively.

3.60 The Attorney-General responded stating that the government would increase the budget of the Office of the IGIS to support its role in oversighting the proposed reforms. The committee welcomed this and the government's commitment to working with the Office of the IGIS to ensure continued independent oversight.

3.61 **In relation the Ombudsman, the committee restated its view that the efficacy of the increased oversight by that office will depend upon the Ombudsman being appropriately resourced to undertake the increased oversight responsibilities.**[31]

Committee consideration of amendments to the bill

3.62 The committee noted that 74 government amendments to the bill sought to implement the recommendations made by the Parliamentary Joint Committee on Intelligence and Security in its report on the bill.

3.63 As noted above, the committee concluded that certain aspects of the data retention scheme (i.e. the list of agencies able to access data retained under the scheme, the types of data to be retained and the types of service providers that are

30 PJCIS Inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, Law Council of Australia, *Submission 128*, p. 9.

31 Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2015*, 4 March 2015, pp 213–216.

subject to the data retention obligations) should be provided for in the primary legislation.

3.64 The committee welcomed the fact that the government amendments meant that the above aspects of the scheme would be provided for in the primary legislation. However, the committee noted that the amendments also allowed the Minister to make declarations (which can come into force immediately) in relation to the above matters. These declarations cease to be in force after 40 sitting days of either House of Parliament after the declaration comes into force.

3.65 **The committee noted that the ability of the Minister to make declarations which are able to come into force immediately (even where they are time-limited) constituted a significant delegation of legislative power in relation to these important aspects of the data retention scheme. This is because the declaration power allow significant changes to the scheme to be made (and to come into force) without *prior* parliamentary oversight. However, the committee noted that the bill (incorporating the relevant amendments) had already passed both Houses of the Parliament and therefore made no further comment in relation to this matter.**[32]

Senator Helen Polley
Chair

32 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 5 of 2015*, 13 May 2015, pp 30–31.

Appendix 1

The committee’s scrutiny principles in detail

Provisions which *trespass unduly* upon personal rights and liberties

Application of criterion set out in standing order 24(1)(a)(i)

The committee is required to report on whether the provisions of proposed legislation could '*trespass unduly* on personal rights and liberties' (emphasis added). For example, a bill might raise issues relating to:

- having a retrospective and adverse effect on those to whom it applies, sometimes from the date of a media announcement (in these instances known as 'legislation by press release');
- abrogating the privilege against self-incrimination (the right people have at common law to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved);
- reversing the common law onus of proof (requiring a person to prove their innocence when legal proceedings are taken against them);
- imposing strict or absolute liability as an element of fault for an offence;
- authorising search and seizure without the need to obtain a judicial warrant;
- privacy, including the confidentiality of professional communications with a person's legal advisers;
- equipping officers with oppressive powers, especially for use against a vulnerable group of people; or
- taking away Parliament's right to obtain information from the executive.

These are categories that have arisen for consideration during most parliaments and are ones with which the committee is very familiar. However, standing order 24(1)(a)(i) may also apply in other circumstances and the committee is alert to identifying any new matters that may be considered inconsistent with the intent of the principle. More detail about matters that give rise to scrutiny concern and examples are discussed below.

Retrospectivity

Legislation has retrospective effect when it makes a law apply to an act or omission that took place *before* the legislation itself was enacted. Criticism of this practice is longstanding. For example, in 1651 Thomas Hobbes in *Leviathan* observed that 'No law, made after a Fact done, can make it a Crime', and also that 'Harme inflicted for a Fact done before there was a Law that forbad it, is not Punishment, but an act of

Hostility'.[1] This view was expounded upon further in 1765 by Sir William Blackstone in his *Commentaries*. He referred to the problem of making laws, but not publicly notifying those subject to them and then went on to say:

> There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.[2]

The committee endorses the view that retrospective legislation is of concern where it will, or might, have a detrimental effect on people. The committee will comment adversely in these circumstances. Where proposed legislation will have retrospective effect the committee expects that the explanatory memorandum should set out in detail the reasons retrospectivity is sought. The justification should include a statement of whether any person will or might be adversely affected and, if so, the number of people involved and the extent to which their interests are likely to be affected.

For examples, see the committee's comments concerning the:

- Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 *(Fifth Report of 2015)*;
- Law Enforcement Legislation Amendment (Powers) Bill 2015 *(Sixth Report of 2015)*; and
- Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015 *(Eleventh Report of 2015)*.

Abrogation of the privilege against self-incrimination

At common law, a person can decline to answer a question on the ground that their reply might tend to incriminate them. Legislation that interferes with this common law entitlement trespasses on personal rights and liberties and causes the committee considerable concern. However, the committee is also conscious of a government's need to have sufficient information to enable it to properly carry out its duties for the community. The committee accepts that in some circumstances good administration might necessitate access to information that can only be obtained, or can best be obtained, by forcing a person to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence.

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1 Hobbes, T. *Leviathan*, as referred to in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 687 (Toohey J).

2 Blackstone, W. *Commentaries on the Laws of England*, Book 1 (1965, Clarendon Press, Oxford), pp 45–46 as referred to in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 534 (Mason CJ).

The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a provision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.

One of the factors the committee considers is the subsequent use that may be made of any incriminating disclosures. The committee generally holds to the view that it is relevant to take into account whether the proposed legislation balances the harm of abrogating the privilege by including a prohibition against any direct or indirect uses of the information beyond the purpose for which it is being obtained.

To date the only exception to this that the committee generally finds acceptable is that a forced disclosure should only be available for use in criminal proceedings when they are proceedings for giving false or misleading information in the disclosure the person has been compelled to make. The committee's experience is that the importance of the availability of these use and derivative use immunities are generally understood and they are usually included bills that seek to abrogate the privilege against self-incrimination.

For examples see the committee's comments concerning the:

- Biosecurity Bill 2014 *(Alert Digest No. 2 of 2015);* and
- Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 *(Alert Digest No. 4 of 2015).*

Reversal of the onus of proof

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence; the accused is not required to prove anything. Provisions in some legislation reverse this onus and require the person charged with an offence to prove, or disprove, a matter in order to establish his or her innocence or at least identify evidence that suggests a reasonable possibility that the matter exists or does not exist.

The committee usually comments adversely on a bill that places the onus on an accused person to disprove one or more elements of the offence with which he or she is charged, unless the explanatory memorandum clearly and adequately justifies the rationale for the approach, particularly by reference to the principles outlined in its comments on this issue recorded in the committee's Alert Digests and in the Commonwealth *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011),[3] which states in relation to a provision which reverses the onus of proof (often drafted, in effect, as a defence):

> However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence.
>
> Creating a defence is also more readily justified if:
>
> - the matter in question is not central to the question of culpability for the offence;

3 Released by the Commonwealth Attorney-General and available at http://www.ag.gov.au/.

- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.[4]

For example, see the committee's comments concerning the:

- Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 *(Fifth Report of 2015)*.

Strict and absolute liability offences

The committee draws the Senate's attention to provisions that create offences of strict or absolute liability and expects that where a bill creates such an offence the reasons for its imposition will be set out in the explanatory memorandum that accompanies the bill.

An offence is one of **strict liability** where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. A person charged with a strict liability offence is able to invoke a defence of mistake of fact.

An offence of **absolute liability** also provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. However, in the case of absolute liability offences, the defence of mistake of fact is not available.

For examples, see the committee's comments concerning the:

- Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 *(Alert Digest No. 9 of 2015)*;
- Migration Amendment (Charging for a Migration Outcome) Bill 2015 *(Twelfth Report of 2015)*; and
- Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 *(Sixth Report of 2015)*.

Powers of search and seizure without warrant

The committee consistently draws the Senate's attention to provisions that allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties. A provision giving such a power will be acceptable only when the circumstances and gravity of the matter justify it (and this information should be included in the explanatory memorandum).

For example see the committee's comments concerning the:

- Biosecurity Bill 2015 *(Fourth Report of 2015*).

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4 *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 50.

Insufficiently defined administrative powers

Application of criterion set out in standing order 24(1)(a)(ii)

Legislation may contain provisions which make rights and liberties unduly dependent upon insufficiently defined administrative powers. For example, a provision might:

- give administrators ill-defined and/or wide powers;
- delegate power to 'a person' without any further qualification as to who that person might be; or
- fail to provide for people to be notified of their rights of appeal against administrative decisions.

Ill-defined and wide powers

Since its establishment in 1981, the committee has drawn the Senate's attention to legislation that gives administrators seemingly ill-defined and wide powers. The committee sees a number of approaches that are of concern from year to year, though it is also always alert to identifying novel ways in which this issue may arise.

As is often the case, if a provision that is of interest to the committee is accompanied by a comprehensive explanation of the rationale for the approach in the explanatory memorandum, the committee is able to better understand the proposal and either make no further comment or leave the matter to the consideration of the Senate.

For examples, see the committee's comments concerning the:

- Enhancing Online Safety for Children Bill 2014 *(Second Report of 2015*; and
- Biosecurity Bill 2014 *(Fourth Report of 2015).*

Delegation of power to 'a person' or to a wide class of persons

The committee consistently draws attention to legislation that allows significant and wide-ranging powers to be delegated to anyone who fits an all-embracing description (such as 'a person') or which allows delegations to a relatively large class of persons with little or no specificity as to appropriate qualifications or attributes. Generally the committee prefers to see a limit set either on the sorts of powers that might be delegated or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where delegations are made the committee also expects that an explanation of why they are considered necessary should be included in the explanatory memorandum, especially if the delegation is broad.

For examples, see the committee's comments concerning the:

- Private Health Insurance (Prudential Supervision) Bill 2015 *(Seventh Report of 2015)*; and
- Australian Border Force Bill 2015 *(Fifth Report of 2015)*.

Undue dependence upon non-reviewable decisions

Application of criterion set out in standing order 24(1)(a)(iii)

Legislation may contain provisions which make 'rights, liberties or obligations unduly dependent upon non-reviewable decisions'. Relevantly, a bill may seek to:

- exclude review on the merits by an appropriate appeal tribunal;
- exclude judicial review of the legality of a decision; or
- provide that reasons need not be given for a decision.

Excluding merits and judicial review

The committee is of the view that, where a decision may have a substantial impact on a person's rights and interests, judicial review should generally be available to ensure that such decisions are lawfully made. Since its establishment, the committee has drawn attention to provisions that explicitly or otherwise exclude or fail to provide for effective judicial review.

The committee routinely draws attention to bills that seek to deny the opportunity for effective review. However, the committee also accepts that there are circumstances in which review is not, or may not be, necessary. The committed is assisted to come to this conclusion when the explanatory memorandum comprehensively and persuasively describes the rationale for the proposed approach.

For examples, see the committee's comments concerning the:

- Australian Small Business and Family Enterprise Ombudsman Bill 2015 *(Seventh Report of 2015)*;
- Migration Amendment (Charging for a Migration Outcome) Bill 2015 *(Twelfth Report of 2015)*; and
- Migration Amendment (Complementary Protection and Other Measures) Bill 2015 *(Fourteenth Report of 2015)*.

Inappropriate delegation of legislative power

Application of criterion set out in standing order 24(1)(a)(iv)

Legislation often includes the delegation of a power to make laws, giving delegates (usually a member or representative of the Executive Government) the authority to make regulations or other instruments that are not required to be considered and approved by Parliament before they take effect. The committee's task under this criterion is therefore to draw the Senate's attention to provisions that seek to delegate Parliament's power inappropriately. Examples of provisions that may inappropriately delegate legislative power include those which:

- enable subordinate legislation to amend an Act of Parliament (often called a 'Henry VIII' clause);
- provide that matters which are so important that they should be regulated by Parliament but are, in fact, to be dealt with by subordinate legislation;
- provide that a levy or a charge be set by regulation; or
- give to the Executive unfettered control over whether or when an Act passed by the Parliament should come into force.

Henry VIII clauses

A Henry VIII clause is an express provision which authorises the amendment of either the empowering Act, or any other primary legislation, by means of delegated legislation. Since its establishment, the committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Once again, a clear and helpful explanation in the explanatory memorandum can allow the committee to leave the matter to the Senate.

For examples, see the committee's comments concerning the:

- Health Legislation Amendment (eHealth) Bill 2015 *(Twelfth Report of 2015)*; and
- Governance of Australian Government Superannuation Schemes Legislation Amendment Bill 2015 *(Alert Digest No. 4 of 2015)*.

Determining important matters by delegated legislation

The committee also draws attention to provisions that inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. Significant matters should be undertaken directly by Parliament and not left to the subordinate legislation disallowance process.

For examples, see the committee's comments concerning the:

- Defence Legislation Amendment (Military Justice Enhancements-Inspector-General ADF) Bill 2014 *(Second Report of 2015);*
- Enhancing Online Safety for Children Bill 2014 *(Second and Fifth Reports of 2015)*; and
- Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 *(Alert Digest No. 9 of 2015).*

Setting the rate of a 'levy' by regulation

The committee has also consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation. This creates a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the committee expects that there will be some limits imposed on the exercise of this power. For example, the committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

Appropriate parliamentary scrutiny of legislative power

Application of criterion set out in standing order 24(1)(a)(v)

Whenever Parliament delegates power to legislate it should properly address the question of how much oversight to maintain over the exercise of that delegated power. Provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny include those which:

- provide a power to make delegated legislation that is not to be tabled in Parliament, or which is to be tabled, but is not disallowable;
- require delegated legislation to be tabled and disallowable, but with a disallowance period so short that Parliament may not be able to scrutinise it properly;
- provide that legislative instruments to be made under primary legislation may incorporate rules or standards of other bodies as in force from time to time; or

- enable a Minister or other person to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised, with no obligation that they be tabled in Parliament or subject to disallowance.

Not tabled or not subject to disallowance

When a provision specifies that an instrument is *not* a legislative instrument the committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where the provision is a substantive exemption, the committee expects to see a full explanation outlined in the explanatory memorandum justifying the need for the exemption.

For examples, see the committee's comments concerning the:

- Biosecurity Bill 2014 *(Alert Digest No. 2 of 2015).*

Incorporating material 'as in force from time to time'

The *Legislative Instruments Act 2003* includes a general rule which allows a legislative instrument, such as a regulation, to adopt or incorporate additional material and give it the force of law. The incorporated material applies in the form in which it exists *at the time of adoption* unless a provision in the relevant Act allows material to be incorporated 'as in force from time to time'. Typical wording included in bills to achieve this outcome provides that the relevant regulations may:

> …apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing as in force from time to time.

Allowing material to be incorporated 'as in force from time to time' is of concern from a scrutiny perspective because it:

- allows a change in legal obligations to be imposed without the Parliament's knowledge and without the opportunity for Parliament to scrutinise the variation;
- can create uncertainty in the law because those affected may not be aware that the law has changed; and
- those obliged to obey the law may have inadequate access to its terms, depending on the nature of the material being incorporated.

The committee expects that the explanatory memorandum for a bill that includes a provision which seeks to incorporate non-legislative material 'as in force from time to time' will clearly and comprehensively explain the necessity for this approach and indicate how the concerns outlined above will be met.

In some instances the committee noted that a bill sought to incorporate material 'as in force from time to time', but acknowledged that an appropriate explanation was provided in the explanatory memorandum.

For example, see the committee's comments concerning the:

- Carbon Farming Initiative Amendment Bill 2014 (*Eleventh Report of 2014*).

Standing Appropriations

In the committee's *Fourteenth Report of 2005*, the committee stated that:

> The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power. (p. 272)

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation in the period during which it applies.

For examples, see the committee's comments concerning the:

- Australian Defence Force Cover Bill 2015 *(Eighth Report of 2015)*.