

**Senate Standing Committee
for the Scrutiny of Bills**

Annual Report 2016

March 2017

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MEMBERSHIP OF THE COMMITTEE

Members - 44th Parliament during 2016

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator the Hon Bill Heffernan	LP, New South Wales
Senator the Hon Joseph Ludwig	ALP, Queensland
Senator Rachel Siewert	AG, Western Australia

Members - 45th Parliament during 2016

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi (1.9.16 – 12.9.16 and 5.12.16 – 15.2.17)	LP, South Australia
Senator Jonathon Duniam	LP, Tasmania
Senator Jane Hume (12.9.16 – 5.12.16 and 15.2.17 – present)	LP, Victoria
Senator Janet Rice	AG, Victoria
Senator Murray Watt	ALP, Queensland

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Preface

This report discusses the work of the Senate Standing Committee for the Scrutiny of Bills during 2016. 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 2016 were:

Chair

Senator Helen Polley	ALP, Tasmania	12.11.13 onwards (Chair from 11.02.14)
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Deputy Chair

Senator John Williams	NATS, New South Wales	01.07.14 onwards
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Members

Senator Cory Bernardi	LP, South Australia	13.11.13 – 12.09.16 and 28.11.16 onwards ¹
Senator Jonathon Duniam	LP, Tasmania	01.09.16 onwards
Senator the Hon Bill Heffernan	LP, New South Wales	01.07.14 – 09.05.16
Senator Jane Hume	LP, Victoria	12.09.16 – 28.11.16 ²
Senator the Hon Joseph Ludwig	ALP, Queensland	12.11.15 – 09.05.16
Senator Janet Rice	AG, Victoria	01.09.16 onwards
Senator Rachel Siewert	AG, Western Australia	22.09.08 – 09.05.16
Senator Murray Watt	ALP, Queensland	01.09.16 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.

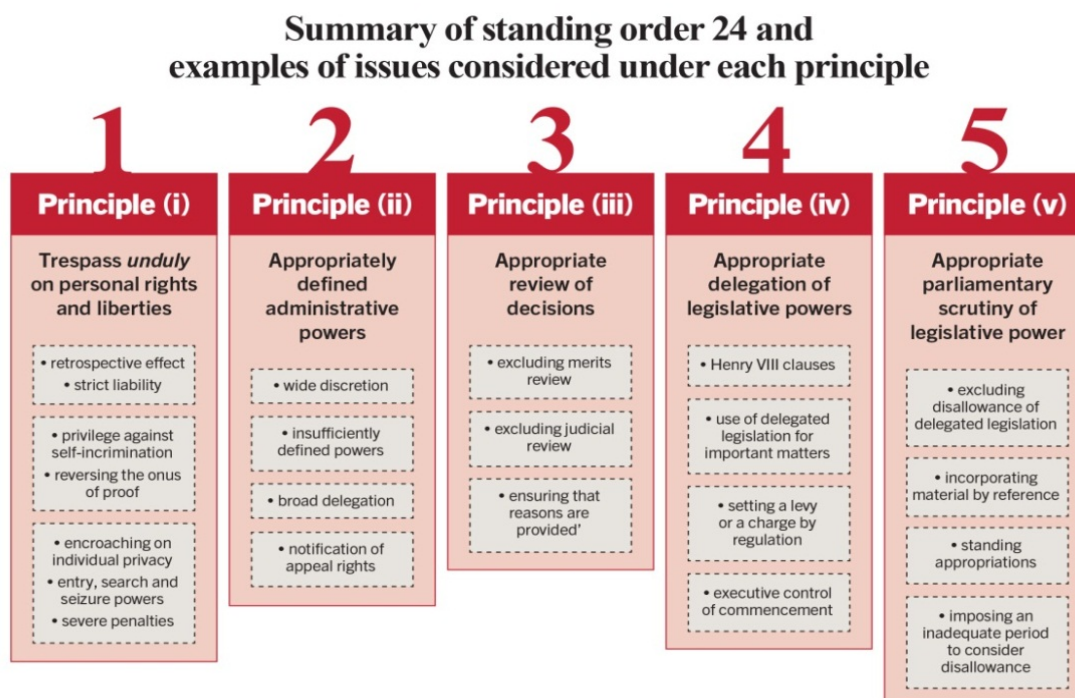
1.7 When applying each principle there are a number of well-established matters that the committee considers to be of concern. Therefore, when it is developing comments on the provisions of each new bill that comes before it for consideration,

¹ Senator Bernardi ceased being a member of the committee on 7 February 2017.

² Senator Hume was re-appointed to the committee on 15 February 2017.

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)³ 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

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

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.

The committee's workflow

1.11 The committee's usual process for undertaking its work is shaped by the process for the 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 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 timeliness in providing responses to the committee is essential to an effective scrutiny process. However, during 2016, 44 per cent of responses were not provided within the timeframe requested by the committee and overall four per cent were provided more than a month late.

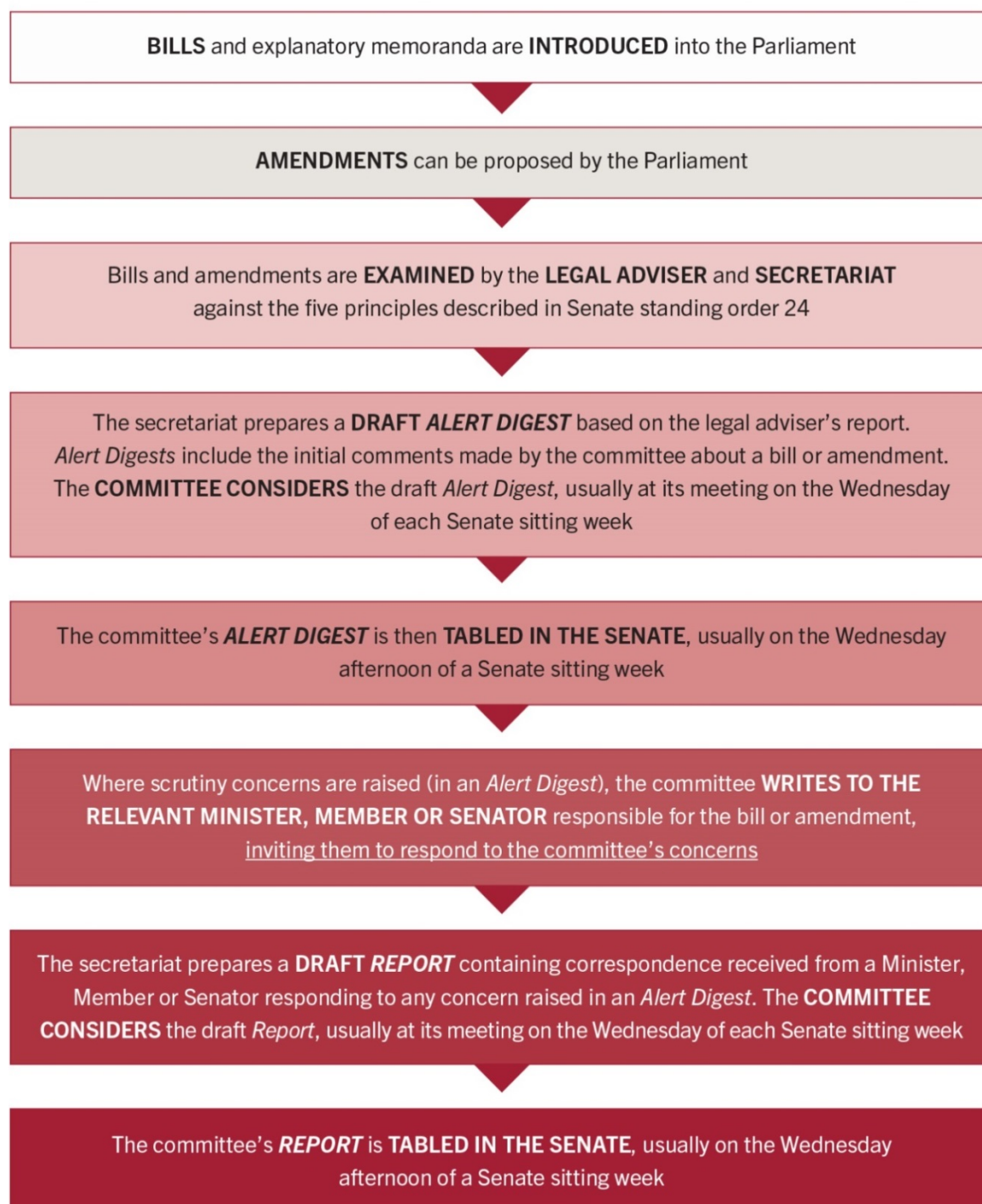
Temporary order relating to ministerial responsiveness

1.17 During the year, the committee noted the upward trend of responses not received within the requested timeframe. On 29 November 2016 the Senate agreed to an order proposed by the Chair on behalf of the committee, which temporarily amends Standing Order 24 (to operate from the first sitting day in 2017 to March 2018). The temporary order allows any senator to question a minister about why the

minister has not provided a timely response to the committee's request for information in relation to a bill.

1.18 Further information about the implementation and operation of the order will be provided in the committee's 2017 annual report.

Committee's Work Flow



Committee publications and resources

1.19 From the committee's establishment until the end of 2016 the committee published its scrutiny comments in two documents, the Alert Digest and Report, which can both be accessed online from the committee's website.⁴

Alert Digest

1.20 On the basis of the legal adviser's report and the secretariat's examination of bills and parliamentary amendments, the secretariat prepared a draft Alert Digest which was considered by the committee at its regular meeting on the Wednesday morning of each Senate sitting week. The Alert Digest contained a brief outline of each of the bills introduced in the previous week, as well as any comments the committee wished to make. Comments were identified by reference to the relevant principles in standing order 24. The Alert Digest was presented in the Senate on the Wednesday afternoon of each sitting week.

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

Reports

1.22 When a minister or other proposer responded to a concern raised in an Alert Digest, the secretariat produced a draft Report for the committee's consideration. A draft Report contained the relevant extract from the Alert Digest, the text of the minister's response, and any further comments the committee wished to make. Draft Reports were also considered at the committee's regular meetings, and, once agreed, were tabled to the Senate at the same time as the Alert Digest for that week.

1.23 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

1.24 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

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

when bills are debated and to raise awareness about the committee's scrutiny principles.

Change to reporting format from 2017

1.25 At the end of 2016 the committee agreed that, commencing from the first sitting week in 2017, it would publish its scrutiny comments on bills, including responses received on matters previously considered by the committee, in a single report, known as the Scrutiny Digest.

Interaction with other legislative scrutiny committees

1.26 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.

1.27 The committee regularly draws provisions of bills which authorise a significant delegation of legislative power to the attention of the Regulations and Ordinances Committee. When the committee draws such provisions to the attention of the Regulations and Ordinances Committee, that committee will consider the Scrutiny of Bills Committee's comments as part of their examination of any legislative instruments made under the relevant authorising provision.

1.28 For example, in 2013 the Scrutiny of Bills Committee sought an explanation from the Minister for Mental Health and Ageing as to why important matters relating to the accreditation of care services were not included in the primary legislation. The minister responded indicating that these matters, such as method of calculation of fees, would be included in a disallowable legislative instrument and therefore be subject to Parliamentary oversight.⁵

1.29 In 2016 a legislative instrument was made which removed the details of how these fees are calculated from the existing legislative instrument. Thus, rather than these matters being included in delegated legislation, they would be left to be specified by the Chief Executive Officer of the relevant agency. At the conclusion of its examination of this instrument the Regulations and Ordinances Committee remained concerned about the absence of a justification for removing from a disallowable legislative instrument the process for calculating and indexing fees and therefore drew it to the attention of this committee.⁶

5 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2013*, 19 June 2013, pp 185–187.

6 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor No. 8 of 2016*, 9 November 2016, pp 98–101.

1.30 The committee will continue to work closely with the Regulations and Ordinances Committee and the Parliamentary Joint Committee on Human Rights where appropriate in the future.

Acknowledgements

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

1.32 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 2016

2.1 This chapter provides information about the work of the committee during 2016, 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 around 200 to 250 bills. The table below sets out the bills scrutinised by the committee from 2014 to 2016. Due to the federal election in 2016 the numbers of bills considered by the committee in this year was slightly lower than in previous years.

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

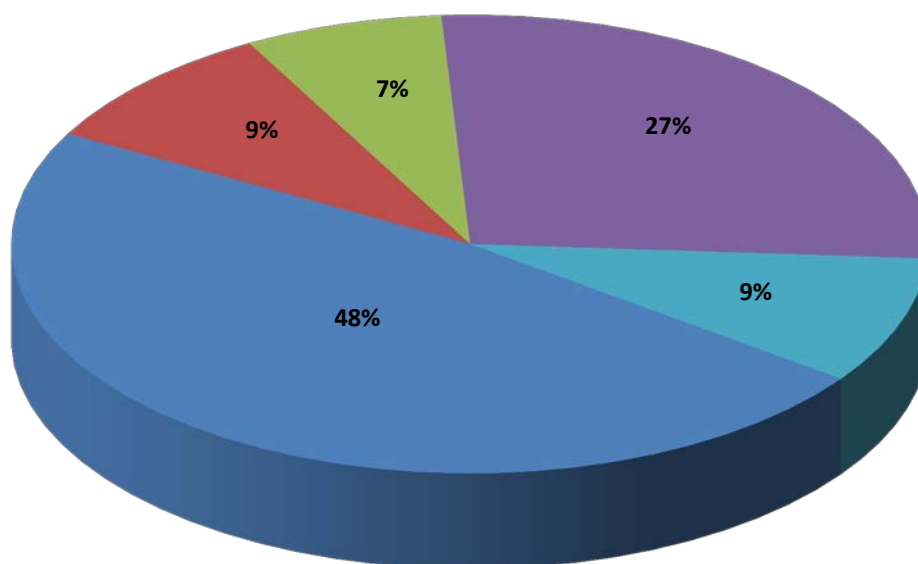
2.4 The committee commented on 81 bills in 2016, this compares to 87 bills in 2015 and 90 in 2014. In relation to amendments to bills, the committee commented on 12 amendments (or groups of amendments) in 2016, compared to 21 in 2015 and 10 in 2014.

Year	Bills considered	Bills commented on	Amendments to bills considered	Amendments to bills commented on	Digests tabled	Reports tabled
2014	255	90	36	10	18	19
2015	223	87	49	21	14	14
2016	192	81	24	12	10	10

2.5 The chart on page 2 provides a breakdown of the committee's comments on bills by principle.

2.6 The chart shows, consistent with previous years, that the most common principle upon which the committee commented in 2016 was principle (i) relating to possible undue trespass on personal rights and liberties (48 per cent). However, this was smaller than in 2015 (when possible trespass on personal rights and liberties took up 66 per cent of the committee's comments). As a result, the proportion of committee comments relating to the other four scrutiny principles, particularly inappropriate delegation of legislative power, increased significantly in 2016 (from 34 per cent in 2015 to 52 per cent in 2016).

**Scrutiny comments on bills by principle under standing
order 24(1)(a)
January to December 2016**



- (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
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny

Impact of the committee's work in 2016

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 Parliamentary Library Bills Digests.

2.8 As noted above, since the committee's establishment over 35 years ago it has developed a consistent position in relation to several long-standing matters of concern. It may be expected that the committee's consistent commentary has had a positive impact on the number of bills introduced into the 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:

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 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, 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.

...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

2.12 In 2016 OPC revised the following drafting directions which draw attention to long-standing scrutiny concerns of the committee:

- Drafting Direction No. 3.8—Subordinate instruments; and
- Drafting Direction 3.12—Provisions that make the Commonwealth liable to make a payment (this Drafting Direction includes guidance about the committee's expectations in relation to standing appropriations).

Amendments to legislation

2.13 One of the most noticeable outcomes of the committee's scrutiny of bills is amendments to legislation arising 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.

2.14 However, it is clear that some amendments are moved which directly address the committee's concerns in relation to particular matters. For example, in 2016 the following government amendments were moved to the National Cancer Screening Register Bill 2016 in response to the committee's comments about the privacy implications of the bill:

- removal of a provision which allowed 'prescribed bodies' to collect, make a record of, disclose or otherwise use protected information for the purposes of the Register; and
- an amendment ensuring that the Privacy Commissioner is consulted, and a requirement for the Minister to have regard to any submission made by the Privacy Commissioner, as a result of the consultation prior to the making of rules which would allow further classes of information to be included on the Register.⁶

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

6 Further details about the committee's consideration of the National Cancer Screening Register Bill 2016 can be found at paragraphs 3.22–3.42.

Improved explanatory material

2.15 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. 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.

2.16 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.

2.17 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.

2.18 In the amendments section of each Alert Digest the committee provided commentary on updated explanatory material. Five examples of additional information included in explanatory memoranda in 2016 in response to the committee's comments are outlined below:

- Australian Crime Commission Amendment (National Policing Information) Bill 2015 (privacy concerns in relation to national coordinated criminal history checks);⁷
- Corporations Amendment (Crowd-sourced Funding) Bill 2016 (delegation of legislative power in relation to the new crowd-sourced funding regime);⁸
- Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 (privacy implications of sharing personal information held by AUSTRAC and AusCheck);⁹
- Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (retrospective application and effect in various sections of the bill);¹⁰ and

7 Senate Standing Committee for the Scrutiny of Bills, *Third Report of 2016*, 2 March 2016, pp 130–135, *Alert Digest No. 5 of 2016*, 3 May 2016, p. 29.

8 Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2016*, 24 February 2016, pp 64–72 and Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 10 of 2016*, 30 November 2016, pp 2–3.

9 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2016*, 3 February 2016, pp 10–15, *Alert Digest No. 3 of 2016*, 2 March 2016, p. 8.

- Omnibus Repeal Day (Spring 2015) Bill 2015 (additional material to facilitate Parliamentary scrutiny by enabling Senators and others to quickly determine which measures in the bill were new measures that had not yet been considered by the Parliament).¹¹

Use in legislation committee reports

2.19 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.

2.20 Two examples of the consideration of this committee's comments in legislation committee reports during 2016 are outlined below.

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

2.21 On 28 November 2016 the Legal and Constitutional Affairs Legislation Committee tabled its report in relation to the provisions of the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016. The Legal and Constitutional Affairs Legislation Committee considered a number of matters commented on by this committee in its report, including:

- inappropriately defined administrative powers—uncertainty for visa holders as a result of the absence of a definition of 'adverse information';
- delegation of legislative power—no limitation on the types of visa that may be prescribed in the regulations as being subject to the revalidation check regime and providing that certain legislative instruments are not subject to parliamentary disallowance; and
- availability of merits review for certain decisions.¹²

Omnibus Repeal Day (Spring 2015) Bill 2015

2.22 On 3 February 2016 the Finance and Public Administration Legislation Committee tabled its report in relation to the provisions of the Omnibus Repeal Day

10 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2016*, 3 February 2016, pp 18–26. *Alert Digest No. 3 of 2016*, 2 March 2016, pp 8–9.

11 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2016*, 24 February 2016, p 90.

12 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 [Provisions]*, November 2016, p. 5.

(Spring 2015) Bill 2015. The Finance and Public Administration Legislation Committee report included significant use of this committee's comments concerning:

- the development of guidelines about what type of matters may be included in Omnibus Repeal Day bills;
- the need for explanatory memoranda to identify whether measures are new or previously introduced to assist parliamentary scrutiny;
- repeal of requirements for consultation prior to the making of delegated legislation; and
- disclosure of certain protected social security information for the purpose of research, statistical analysis or policy development.¹³

Debate in the Senate and committees

2.23 The committee's comments on bills are regularly referred to in debate in the Senate. For example, the committee's comments were discussed in 2016 during consideration of the following bills:

- Counter-Terrorism Legislation Amendment Bill 2016;¹⁴
- Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015;¹⁵
- Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016;¹⁶
- Narcotic Drugs Amendment Bill 2016;¹⁷ and
- Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015.¹⁸

Use in Parliamentary Library Bills Digests

2.24 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.

2.25 The committee's comments were considered in some detail in many Bills Digests during 2016 including, for example, in relation to the following bills:

13 Senate Finance and Public Administration Legislation Committee, *Omnibus Repeal Day (Spring 2015) Bill 2015 [Provisions]*, February 2016, pp 2–4 and 6.

14 *Senate Hansard*, 9 November 2016, pp 2277 and 2279.

15 *Senate Hansard*, 22 February 2016, pp 744 and 749.

16 *Senate Hansard*, 1 December 2016, p. 3899.

17 *Senate Hansard*, 10 November 2016, p. 2473.

18 *Senate Hansard*, 3 March 2016, p 1709.

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- Australian Crime Commission Amendment (Criminology Research) Bill 2016;
 - Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013;
 - Building and Construction Industry (Improving Productivity) Bill 2013;
 - Counter-Terrorism Legislation Amendment Bill (No. 1) 2016;
 - Criminal Code Amendment (Firearms Trafficking) Bill 2016;
 - Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016;
 - Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016;
 - Migration Amendment (Visa Revalidation and Other Measures) Bill 2016;
 - Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016;
 - Transport Security Amendment (Serious or Organised Crime) Bill 2016;
 - VET Student Loans Bill 2016; and
 - VET Student Loans (Charges) Bill 2016.

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 2016 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:

- delegation of significant administrative powers to a wide class of persons;
- entry and search powers without consent or warrant;
- inappropriate delegation of legislative power;
- insufficiently defined administrative powers; and
- privacy.

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

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

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

3.3 This bill amended the *Migration Act 1958* (Migration Act) to introduce a new revalidation check framework for visas.

3.4 The committee sought advice from the Minister on a number of matters including:

- use of delegated legislation for important matters (concerns relating to there being no limitation on the types of visa that may be prescribed in the regulations as being subject to the revalidation check regime);

- exemptions from the usual disallowance process (concerns relating to why a legislative instrument setting out a specified class of persons who are to complete revalidation checks would not be subject to disallowance in the Parliament); and
- availability of merits review.

Insufficiently defined administrative powers—definition of 'adverse information'

3.5 A significant issue raised by the committee was the absence of a statutory definition of 'adverse information' for the purpose of the new visa revalidation regime.

3.6 Proposed subsection 96A set out the definition of a 'revalidation check' as meaning a check as to whether there is any adverse information relating to a person who holds a visa. The committee noted that what constituted 'adverse information' was not defined in the bill.

3.7 The committee sought the Minister's advice as to why the bill did not contain a definition of 'adverse information' as the committee considered that this would give visa holders more certainty as to the type of information that may be taken into account when a revalidation check is undertaken.

3.8 The Minister responded, advising that revalidation checks were not intended to be a full reassessment of a visa holder's ability to meet the original requirements for grant of the visa. In not defining adverse information, the bill would provide flexibility for the Minister to consider information relating to the visa holder's ongoing compliance with the conditions of their visa, general conditions in the visa holder's home country, as well as any new grounds for visa cancellation which are introduced in the future.

3.9 The committee noted the Minister's explanation, however considered that the drafting of the provision in regards to 'adverse information' was overly vague and therefore provided little certainty to visa holders (whose visas could be cancelled on grounds unrelated to whether they meet the criteria for the grant of the visa) and also limited scope for parliamentary scrutiny as there is nothing on the face of the bill to clarify to the Parliament what is meant by 'adverse information'.¹ The committee drew these concerns to the attention of Senators and left consideration of the matter to the Senate as a whole.

1 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2016*, 30 November 2016, pp 650–652.

3.10 The Senate Legal and Constitutional Affairs Legislation Committee conducted an inquiry into the provisions of the bill and this committee's comments on the bill, were referenced in the report.²

3.11 The Parliamentary Library in its *Bills Digest No. 51, 2016-17* also referenced the committee's comments about revalidation check requirements relating to 'adverse information'.³

Narcotic Drugs Amendment Bill 2016

SCRUTINY SNAPSHOT: The committee will continue to draw attention to bills which authorise the use of coercive or intrusive powers such as entry and search powers without consent or a warrant or which allow for the delegation of significant administrative powers to an inappropriately broad range of people.

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

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

3.12 This bill amended the *Narcotic Drugs Act 1967* (the ND Act) to establish a licensing and permit scheme for the cultivation, production and manufacture of cannabis for medicinal and scientific purposes. The bill provided authorised inspectors with monitoring, inspection and enforcement powers in relation to the administration of the new medicinal cannabis scheme.

Entry and search powers without consent or warrant

3.13 The bill provided that inspectors may enter licensed premises without consent or a warrant. Such inspectors were authorised to monitor the cultivation, production or manufacture of cannabis plants or resin, check whether the cultivation, production or manufacture was being carried out as authorised by the licence, and take samples of any thing and remove and test such samples.

3.14 The committee accepted that although entry and search powers without consent or a warrant are inconsistent with the general principles in the *Guide to Framing Commonwealth Offences* (the Guide),⁴ it was arguable in this instance that the proposed approach in this bill fell within an exception for 'exceptional circumstances'. In this committee's *Inquiry into Entry and Search Provisions in*

2 Senate Legal and Constitutional Affairs Legislation Committee, *Report on Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 [Provisions]*, November 2016, p. 5.

3 Parliamentary Library, *Bills Digest No. 51, 2016-17*, Migration Amendment (Visa Revalidation and Other Measures) Bill 2016, p. 10

4 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 85–86.

Commonwealth Legislation the committee stated that legislation should authorise entry without consent or warrant only in 'situations of emergency, serious danger to public health, or where national security is involved'.⁵ The Guide states that:

Where these powers are provided for, senior executive authorisation should be required and rigorous reporting requirements should be imposed. This helps to ensure a sufficient level of accountability is maintained.⁶

3.15 The committee therefore sought the Minister's advice as to what authorisation will be needed before entry without consent or warrant can take place, what reporting requirements will apply and whether there will be a requirement for guidelines for the use of the powers to be made.

3.16 The Minister advised the committee that guidelines and procedures for monitoring and investigations were being prepared to cover matters such as frequency of monitoring and inspections, whether they will be 'announced' or 'unannounced', how information and other evidence are to be collected and the authorised persons who would be carrying out the inspections.

3.17 The committee concluded that, given the significance of these intrusive powers, the making of guidelines to regulate the exercise of the powers (as well as public reporting on the use of the powers) should be required by legislation.⁷

Delegation of significant administrative powers

3.18 In relation to who may be appointed to carry out the monitoring powers referred to above, the bill provided that the Secretary may, in writing, appoint any of the following persons as an authorised inspector:

- an APS employee or an officer or employee of a Commonwealth agency;
- an officer or employee of an agency of a State or Territory that has functions relating to health, agriculture or law enforcement.

3.19 Noting the intrusive nature of the monitoring powers the committee sought the Minister's advice as to whether consideration had been given to including a legislative requirement for authorised inspectors to hold appropriate qualifications and experience.

3.20 The Minister advised the committee that it was intended that only APS officers and State and Territory officers with appropriate technical qualifications in

5 Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2000, Entry and Search Provisions in Commonwealth Legislation*, 6 April 2000, p. 75.

6 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 86.

7 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2016*, 3 May 2016, pp 376–379.

auditing and monitoring manufacturing premises and lands used for cultivation of cannabis would be appointed by the Secretary as authorised inspectors.

3.21 The committee noted this intention, but concluded that it remained concerned that the bill itself did not include a requirement for inspectors to have appropriate qualifications and experience.

National Cancer Screening Register Bill 2016

SCRUTINY SNAPSHOT: The committee will continue to draw attention to bills which raise privacy concerns or contain significant delegations of legislative power.

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

Standing order 24(1)(a)(iv) – inappropriate delegation of legislative power

3.22 This bill creates the legislative framework for the establishment and ongoing management of a National Cancer Screening Register. Initially, the Register will include information associated with bowel and cervical cancer.

3.23 The committee commented on two issues arising in the bill in *Alert Digest No. 6 of 2016*:

- inappropriate delegation of legislative power; and
- privacy.

Inappropriate delegation of legislative power

3.24 The committee had concerns relating to the inappropriate delegation of legislative power in two provisions of the bill.

Subclause 11(g)

3.25 Clause 11 of the bill set out the information that may be included on the Register. This included:

- an individual's 'key information' (including name, address, contact details, date of birth, gender, cultural identity, etc.);
- information about screening tests undertaken; and
- cancer diagnoses.

3.26 However, subclause 11(g) allowed for the collection of further information of a kind prescribed in delegated legislation (rules).

3.27 The committee accepted that there may be a need for some flexibility in relation to the range of information to be collected and included on the Register. However, given this provision represented a significant delegation of legislative power and could have significant privacy implications for individuals, the committee sought the Minister's advice as to whether consideration had been given to including

in the bill a specific requirement to consult the Privacy Commissioner prior to the making of rules under subclause 11(g).⁸

3.28 The Minister agreed with the committee that the provision should be amended 'to include a specific requirement to consult the Privacy Commissioner prior to the making of the rules as a safeguard to ensure any new classes of information would not unreasonably interfere with individual's privacy'.⁹

3.29 The committee welcomed the Minister's undertaking to amend the bill and in light of the proposed amendment and the fact that any rules made under the provision would be subject to parliamentary scrutiny and disallowance, made no further comment. However, the committee also drew this provision to the attention of the Regulations and Ordinances Committee for information.

Subparagraph 17(3)(a)(iv)

3.30 Subclause 17(3) of the bill provided that only government officers, or persons engaged by the government, could use or disclose information contained on the Register. However, subparagraph 17(3)(a)(iv) further provided that a person could collect, make a record of, disclose or otherwise use protected information if that person was a 'prescribed body'. As a result, the category of persons who may be able to use or disclose information on the Register could be expanded by delegated legislation which is not subject to the full parliamentary scrutiny associated with the passage of primary legislation.

3.31 As there was no explanation for the inclusion of this provision in the explanatory materials accompanying the bill, the committee sought the Minister's advice to the rationale for, the necessity of, this provision.

3.32 The Minister advised the committee that:

On further consideration, it is unlikely that subparagraph 17(3)(a)(iv) would be required for prescribing other bodies who are authorised to collect, make a record of, disclose or use protected information or key information for the purposes of the Register in the future. Therefore, I agree that this provision be removed from the NCSR Bill.

I have instructed my Department to make the above amendments to the NCSR Bill and trust that the changes are sufficient to address the Committee's concerns.¹⁰

8 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 6 of 2016*, 14 September 2016, pp 24–25.

9 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2016*, 12 October 2016, p. 437.

10 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2016*, 12 October 2016, p. 438.

3.33 The committee welcomed the Minister's undertaking to amend the bill to remove subparagraph 17(3)(a)(iv) and made no further comment.

Privacy

3.34 In light of the potential impact of the bill on the privacy interests of individuals the committee sought the Minister's advice on the following privacy concerns:

- whether consideration had been given to framing the register as an opt-in initiative (for example, by allowing doctors and other health care professionals to include their patients on the register after receiving their consent), rather than requiring individuals to actively opt-out; and
- the rationale for not allowing individuals to elect to have all their information removed from the Register once they had opted out.

Framing the Register as an opt-in initiative

3.35 In relation to whether consideration had been given to framing the register as an opt-in initiative rather than requiring individuals to actively opt-out the Minister advised the committee that an opt-out initiative was preferred as it would enable the Register to use a whole-of-population baseline and that existing cancer screening registers operate on an opt-out basis.¹¹

3.36 The committee noted the Minister's advice and left the question of whether the proposed approach to the protection of individuals' privacy interests is appropriate to the consideration of the Senate as a whole.¹²

Rationale for not allowing removal of data from the Register

3.37 The bill provided that where a person opts out of the Register further information would not be included on the Register, however information that has already been collected would remain on the Register even after the person opts out. The committee sought the Minister's advice as to the rationale for not allowing retrospective removal of data. The Minister advised the committee that once a person opts out of the Register the individual's retrospective screening history would remain in the database but be hidden from view to protect the person's privacy. The Minister also advised that retrospective deletion of individual's screening information from the Register could lead to inconsistent reporting and have a significant effect on the validity of conclusions drawn.¹³

11 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2016*, 12 October 2016, p. 435.

12 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2016*, 12 October 2016, p. 436.

13 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2016*, 12 October 2016, p. 435.

3.38 The committee noted the Minister's response, however, reiterated that the retention of personal information, in circumstances where a person would have preferred all information pertaining to them to be removed from the Register, represented a significant impact on the privacy interests of those individuals. The committee drew this view to the attention of Senators and left the question of whether the proposed approach to the protection of individuals' privacy interests is appropriate to the consideration of the Senate as a whole.¹⁴

Committee consideration of amendments to the bill

3.39 On 11 October 2016 the House of Representatives passed the following amendments relating to the committee's concerns:

- two government amendments which removed a provision which would have allowed further 'prescribed bodies' to use or disclose protected information; and
- one government amendment which introduced a requirement to consult the Privacy Commissioner prior to the making of delegated legislation which would allow further classes of information to be included on the Register (the amendment also required the Minister to have regard to any submission made by the Privacy Commissioner as a result of the consultation).

3.40 The committee welcomed these amendments in its *Alert Digest No. 8 of 2016*.¹⁵

3.41 On 13 October 2016 the committee's comments were also used in the Senate during the debate on the bill.¹⁶

3.42 The Senate Community Affairs Legislation Committee conducted an inquiry into the provisions of the bill and this committee's comments on the bill, were referenced in the report.¹⁷

Senator Helen Polley Chair

14 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2016*, 12 October 2016, p. 436.

15 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2016*, 9 November 2016, p. 63.

16 *Senate Hansard*, 13 October 2016, p. 1776.

17 Senate Community Affairs Legislation Committee, *Report on National Cancer Screening Register Bill 2016 [Provisions] and National Cancer Screening Register (Consequential and Transitional Provisions) Bill 2016 [Provisions]*, October 2016, pp 3–4.

Appendix 1

The committee's scrutiny principles in detail

Provisions which trespass unduly on 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 burden 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. The committee considers 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:

- Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016 (*Tenth Report of 2016*);
- Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (*Fourth Report of 2016*); and
- Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016 (*Ninth Report of 2016*).

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 require 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.

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:

- Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] (*Alert Digest No. 2 of 2016*);
- Narcotic Drugs Amendment Bill 2016 (*Fifth Report of 2016*); and
- Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016 (*Fifth Report of 2016*).

Reverse burden 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 burden 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 burden 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* which states in relation to a provision which reverses the burden 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;
- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.¹

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

- Corporations Amendment (Crowd-sourced Funding) Bill 2015 (*Second Report of 2016*); and
- Insolvency Law Reform Bill 2015 (*Second Report of 2016*).

1 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 50.

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:

- Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015 (*Fifth Report of 2016*);
- Narcotic Drugs Amendment Bill 2016 (*Fifth Report of 2016*); and
- VET Student Loans Bill 2016 (*Ninth Report of 2016*).

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:

- Building and Construction Industry (Improving Productivity) Bill 2013 (No. 2) (*Alert Digest No. 2 of 2016*); and
- Narcotic Drugs Amendment Bill 2016 (*Fifth Report of 2016*).

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 on 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:

- Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (*Tenth Report of 2016*); and
- VET Student Loans Bill 2016 (*Ninth Report of 2016*).

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:

- Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] (*Alert Digest No. 2 of 2016*); and
- Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 (*First Report of 2016*).

Undue dependence on 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 committee 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:

- Aged Care Legislation Amendment (Increasing Consumer Choice) Bill 2016 (*Third Report of 2016*);
- Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 (*First Report of 2016*); and
- Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016 (*Fifth Report of 2016*).

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:

- Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015 (*Fifth Report of 2016*); and
- Insolvency Law Reform Bill 2015 (*Alert Digest No. 1 of 2016*).

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 example, see the committee's comments concerning the:

- Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015 (*Fifth Report of 2016*).

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.

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:

- Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016 (*Alert Digest No. 7 of 2016*).

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.