



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS

15 June 2015 (drawing on material in the committee's *Alert Digest No.5 of 2015* and *Fifth Report of 2015*)

Introduction

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

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

Key scrutiny issues

- **Australian Citizenship and Other Legislation Amendment Bill 2015** ([Fifth Report of 2015](#))
 - ❖ Delegation of legislative power: New subsection 54(2) provides that the Citizenship Regulations may confer on the Minister the power to make legislative instruments. The committee noted that it appeared unusual for primary legislation to provide for the making of a regulation which, in turn provides a minister with a wide power to make further delegated legislation for unspecified purposes. The committee sought further advice from the Minister. The Minister responded that it would be unnecessary to limit the Minister's power to make further delegated legislation to specified matters because section 13 of the Legislative Instruments Act means that any future instrument made under the regulations would be read so as not to exceed the authorising powers in the Act and Regulations. The committee reiterated its view that it is appropriate to explicitly constrain a power to the purposes for which it is directly intended, rather than leaving it to be assessed against the broader scope of the bill in general.
- **Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015** ([Fifth Report of 2015](#))
 - ❖ Trespass on personal rights and liberties: The committee sought further advice from the Minister in relation to the following three provisions:
 - Schedule 4, item 3 – which has the effect of creating a presumption that a person under the age of 16 does not understand the nature and effect of a marriage ceremony. This means that a **defendant bears a legal burden of proof** to establish the contrary on the balance of probabilities. The committee sought advice as to why an *evidential* burden of proof was considered insufficient. The committee, as a matter of general principle, remains concerned about the application of legal burdens but in the circumstances draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.
 - Schedule 5 – which seeks to reintroduce a form of secondary criminal liability. This means that 'where persons are knowingly and intentionally involved in the commission of an offence, they will be liable for the offence'. The committee noted that the a decision was previously taken not to include this approach (i.e. a **'knowingly concerned' form of criminal liability**) as part of the Model Criminal Code on account of its uncertainty and open-ended nature. The committee therefore sought the Minister's advice about the scope, application and justification for the proposed approach. The Minister provided a detailed response, which the committee requested be included in the explanatory memorandum. The committee draws this matter to the attention

of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

- Schedule 14 – which provides for the **retrospective application** of certain amendments to the Proceeds of Crimes Act (the POC Act). For example, the amended definition of 'related offence' (see items 3 and 4) may apply to related offences that occurred prior to the commencement of the measures. As the definition of 'related offence' is relevant to the question of whether a restraining order under the POC Act can continue to operate, the committee noted that this amendment could potentially have an adverse effect on the rights of a person subject to an existing restraining order. The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

- **Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015** ([Fifth Report of 2015](#))

- ❖ Reasonable force powers: The purpose of this bill is to empower an 'authorised officer' to use reasonable force in an immigration detention facility. The committee sought detailed advice from the Minister in relation to the justification for these broadly framed powers. At a general level the committee considers that the broad and uncertain scope of these powers gives rise to a significant risk that they may be used in a manner which constitutes an undue trespass on personal rights and liberties. The committee draws its concerns to the attention of Senators and leaves the matter to the consideration of the Senate as a whole.

- ❖ Lack of principles in the bill to guide the exercise of force: Given the broad terms in which the reasonable force power is conferred, the use of force may be authorised in a wide range of circumstances. The committee sought the Minister's advice as to why principles to guide the exercise of the reasonable force power is left to policy, rather than being included in the bill itself. The committee reiterated its expectation that safeguards associated with any broadly framed coercive power should be contained in the primary legislation. The committee noted the Minister's advice that the safeguards in departmental policies and procedures are intended to ensure that the use of force will, among other things, only be used as a measure of last resort, only be used for the shortest amount of time possible, must not include cruel, inhumane or degrading treatment and must not be used for the purposes of punishment. In light of the breadth of the authorisation to use force, the committee expressed the view that these safeguards are of central importance to the balance struck between the objectives of the legislation and the rights of detainees and should therefore be included in the primary legislation. The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

- ❖ In relation to this bill, the committee also noted that:

- it remains concerned about the conferral of police-like powers on non-government employees (i.e. employees of service providers contracted to manage immigration detention facilities), particularly noting the lack of Parliamentary scrutiny of training and qualification requirements;
- while the bill formalises the avenue of making a complaint to the Department in relation to the use of these powers, it does not appear that the complaints mechanism will function as a significant additional accountability measure because there is no indication that the complaints mechanism will result in the availability of any additional remedy that would not otherwise be available to detainees;
- the immunity from civil and criminal action (which will apply if the reasonable force power is used in good faith) may be too broadly framed and it remains unclear why the ordinary protections afforded by the law (including the common law) should not continue to apply;
- it is not clear in practical terms, what the availability of judicial review under section 75(v) of the Constitution would achieve for a detainee who was subject to the use of force that exceeded an authorised officer's powers.

- **Migration Amendment (Strengthening Biometrics Integrity) Bill 2015** ([Fifth Report of 2015](#))

- ❖ Broad discretionary power: The central purpose of this bill is to significantly broaden the powers of an officer to collect personal identifiers (such a fingerprints, a photograph of a person's face, an audio or

video recording of a person, an iris scan or a person's signature). Instead of the current situation where personal identifiers can only be collected in specified circumstances, the bill proposes to introduce a broad discretionary power as the legal foundation for the collection of this type of personal information. The committee received a detailed response from the Minister outlining the rationale for the approach; however the committee remained concerned about the introduction of this broad discretionary power. The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

❖ In relation to this bill, the committee also noted that:

- paragraph 257A(5)(b) (which provides a new power for the Minister or an officer to require that personal identifiers be provided in 'another way') will allow the executive to determine further ways to collect personal identifiers without any Parliamentary oversight (while noting that the committee would prefer important matters such as this to be included in primary legislation, the committee has sought further advice from the Minister as to whether the bill can be amended to require legislative authority for future arrangements to be established by regulation).
- items 52 and 53, in effect, remove certain limits that currently apply to the collection of personal identifiers from minors and incapable persons (the committee has sought further advice from the Minister as to whether the bill could be amended to include public reporting requirements, and a requirement for the Department to take reasonable steps to ensure that a parent/guardian or independent person can be present with a minor or incapable person during the collection of personal identifiers).

Other responses received ([Fifth Report of 2015](#))

- Australian Border Force Bill 2015;
- Australian River Co. Limited Bill 2015;
- Biosecurity Bill 2014;
- Defence Trade Controls Amendment Bill 2014;
- Enhancing Online Safety for Children Bill 2014; and
- Fair Work (Registered Organisations) Amendment Bill 20143 [No. 2].

Other bills about which the committee has commented

([Alert Digest No. 5 of 2015](#))

Detailed comments made by the committee are available in its Alert Digest No. 5 of 2015 about the following bills:

- **Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014:** the committee had outlined its concerns about key aspects of the scheme being provided for in delegated legislation, and welcomed the amendments that change the approach to include these important matters in primary legislation instead. However, the committee also notes the significant new measure to allow the Minister to make declarations about these issues which can be in effect for up to 40 sitting days.
- **Migration Amendment (Protection and Other Measures) Bill 2014:** the committee thanked the Minister for tabling an addendum that adds information to the explanatory memorandum as requested by the committee.

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

For any comments or questions, please contact:

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