



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS

16 October 2015 (drawing on material in the committee's *Alert Digest Nos. 10 and 11 of 2015 and Tenth and Eleventh Reports 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

- **Education Legislation Amendment (Overseas Debt Recovery) Bill 2015** ([Alert Digest No. 11 of 2015](#))
 - ❖ Privacy: The bill provides that a taxation officer may disclose personal information to a foreign government agency or associated entity for the purposes of contacting the person with a view to recovering outstanding student loans. The committee noted scrutiny concerns that relate to privacy, but in light of the detailed explanation left the matter to the Senate.
- **Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015** ([Eleventh Report of 2015](#))
 - ❖ Limitation on standing to seek judicial review: The committee expressed its continuing scrutiny concern that the practical effect of this bill is to limit the availability of judicial review in the absence of sufficient justification for that outcome.
- **Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015** ([Eleventh Report of 2015](#))
 - ❖ Delegation of legislative power: This bill will allow regulations to specify (1) what actions constitute a 'significant action' or a 'notifiable action' and (2) important exemptions to the operation of the Act.
 - In relation to the first set of regulation-making powers, the committee noted the significant consequences that may apply when an action is declared to be a 'significant action' or a 'notifiable action' (including civil and criminal penalties and orders requiring the disposal of an interest) and is therefore seeking further advice from the Treasurer (including examples of situations where it would be necessary to utilise these proposed regulation-making powers rather than bringing forward an amendment to the primary legislation and whether the disallowance process for these regulations can be amended to increase Parliamentary oversight).
 - In relation to the second regulation-making power, the committee noted that a desire to reduce the complexity of the primary legislation (by moving all exemptions to the regulations) is commendable, however this, of itself, is not sufficient justification for reducing Parliamentary scrutiny by providing for important matters to be included in regulations. The committee draws this delegation of legislative power to the attention of Senators and leaves the matter to the Senate as a whole.
- **Health Legislation Amendment (eHealth) Bill 2015** ([Alert Digest No. 11 of 2015](#))

- ❖ Delegation of legislative power: The bill is seeking to delegate significant powers to the Minister which will include the power to initiate the change from the current **opt-in** My Health Record system to an **opt-out** system; and also to facilitate trials for an opt-out system. It is suggested a general change to an opt-out system is central to the regulatory design of the system and is a choice which is appropriately made by the Parliament rather than delegated to a Minister. The committee has therefore sought further advice from the Minister as to why the proposed approach is appropriate.
 - ❖ Delegation of legislative power and privacy: The bill also allows prescribed entities to collect, use and disclose identifying information and healthcare identifiers for limited purposes relating to healthcare or support for health issues. The committee noted scrutiny concerns that relate to privacy, but in light of the detailed explanation left this matter to the Senate.
 - ❖ Various matters: The committee has also sought advice about the justification for placing an evidential burden on the defendant in relation to the use or disclosure of a healthcare identifier; whether material being incorporated by reference will be readily and freely available; and the need for delegated legislation to modify the operation of primary legislation (Henry VIII clause).
- **Migration Amendment (Charging for a Migration Outcome) Bill 2015** ([Alert Digest No. 11 of 2015](#))
 - ❖ Various matters: The committee is seeking the Minister's advice in relation to:
 - the availability of merits review for decisions to cancel a visa where the visa holder has engaged in 'payment for visas' activity;
 - provisions which will abrogate the privilege against self-incrimination by allowing information that is required to be given by a person to be used in criminal or civil proceedings against the person in relation to an alleged contravention of a 'payment for visas' provision;
 - provisions which place an evidential burden on the defendant; and
 - provisions which will impose significant strict liability penalties (240 penalty units: \$43,200 for individuals and \$216,000 for bodies corporate).
 - **Migration Amendment (Regional Processing Arrangements) Bill 2015** ([Eleventh Report of 2015](#))
 - ❖ Retrospectivity: This bill amended the Migration Act to provide statutory authority (with effect from 18 August 2012) in relation to Australia's regional processing arrangements. The committee noted that although particular actions may be declared unlawful in the absence of these amendments, from a scrutiny perspective this is not sufficient to justify retrospective validation given that retrospectivity significantly undermines the rule of law. This concern is exacerbated by the significant breadth of the power validated by the bill, which includes 'exercising restraint over the liberty of a person'.
 - **Migration and Maritime Powers Amendment Bill (No. 1) 2015** ([Alert Digest No. 11 of 2015](#))
 - ❖ Retrospectivity: Amendments which commenced on 25 September 2014 sought to prevent a person making a further protection visa application in specific circumstances. However, the provisions as drafted were not effective as intended and this bill again seeks to instate a statutory bar on applications in these circumstances and seeks to apply the provisions retrospectively from 25 September 2014. From a scrutiny perspective, retrospectively aligning the law with prior intentions significantly undermines the rule of law, particularly when the consequences for affected individuals are significant. In general, individuals should be entitled to rely on the current law to determine their rights. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law. The committee is therefore seeking further advice from the Minister, including addressing the importance of limiting retrospective commencement to cases where this can be seen to further, rather than diminish, the rule of law.

Other bills for which advice is being sought from the Minister or proposer

The Senate Scrutiny of Bills Committee is also seeking advice from the relevant Minister or proposer in relation to provisions of other bills (responses will be considered and tabled in the committee's future *Reports*), including:

- **Aviation Transport Security Amendment (Cargo) Bill 2015:** whether the power to make regulations authorising the opening, deconsolidation or unpacking of cargo can be expressly limited to the intended purpose of detecting explosives ([Alert Digest No. 11 of 2015](#));
- **Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015:** whether any material incorporated as existing from time-to-time will be readily and freely available ([Alert Digest No. 11 of 2015](#)); and
- **Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015:** whether consideration has been given to including in the bill the matters that must be considered when deciding whether a job seeker has acted in an appropriate manner at an appointment (rather than leaving this to delegated legislation or the discretion of the Secretary) ([Alert Digest No. 10 of 2015](#)).

Other comments and other responses received

- **Australian Immunisation Register Bill 2015:** The committee welcomed the Minister's advice that she would specify the persons or persons to whom protected information could be released, however the committee noted that it would assist if such a limitation were included in the bill itself. ([Eleventh Report of 2015](#))
- **Medical Research Future Fund Bill 2015:** The Minister advised that disallowance of the Australian Medical Research and Innovation *Strategy and Priorities* would affect the board's ability to carry out its responsibilities with full independence and might cause funding uncertainty. The committee noted this advice and made no further comment. ([Tenth Report of 2015](#))
- **Social Services Legislation Amendment (No. 2) Bill 2015:** The committee welcomed government amendments to this bill which ensure that measures in the bill do not operate retrospectively ([Alert Digest No. 10 of 2015](#))
- **Social Services Legislation Amendment (Youth Employment) Bill 2015:** The committee restated previous comments about the delegation of legislative power in this bill relating to determining the existence of a 'personal financial crisis'. ([Alert Digest No. 11 of 2015](#))
- **Superannuation Legislation Amendment (Trustee Governance) Bill 2015:** The explanatory memorandum included a detailed and useful explanation for the application of strict liability. ([Alert Digest No. 11 of 2015](#))
- **Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015:** The Minister advised that 'the Bill is not expected to have an adverse impact on taxpayers'. The committee noted this information would have been helpful in the explanatory memorandum. ([Eleventh Report of 2015](#))
- **Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015:** The bill seeks to apply 2015-2016 Budget measures retrospectively, but as the bill has been introduced within six months the approach is within the scope of Senate Resolution 44. ([Alert Digest No. 11 of 2015](#))

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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