



Department of the Senate

## Senate Scrutiny of Bills Committee

# NEWS

**12 November 2015** (drawing on material in the committee's *Alert Digest No. 12 of 2015* and *Twelfth 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 Crime Commission Amendment (Criminology Research) Bill 2015** ([Alert Digest No. 12 of 2015](#))
  - ❖ *Privacy*: the bill includes a power to disclose and publish criminological research in certain circumstances. This research could include personal information, but as safeguards are in place the committee has left the general question of whether the approach is appropriate to the Senate. However, it is unclear why the jurisdiction of the Information Commissioner, who is empowered to investigate breaches of the Privacy Act (and has relevant specialised expertise), should not be extended to investigate breaches of the disclosure regime that applies to the ACC. The committee has sought advice about this issue.
- **Crimes Legislation Amendment (Harming Australians) Bill 2015** ([Alert Digest No. 12 of 2015](#))
  - ❖ *Retrospectivity*: the bill extends the retrospective application of murder and manslaughter offences so that they will apply to conduct occurring overseas prior to 1 October 2002. While retrospective criminal offences are a significant matter, the bill includes safeguards and limitations and the statement of compatibility contains a detailed justification for the proposed approach. The committee draws the matter to the attention of Senators and leaves it to the Senate as a whole.
- **Health Legislation Amendment (eHealth) Bill 2015** ([Twelfth Report 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. From a scrutiny perspective, a general change to a national 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 sought further information and the Minister provided a detailed response supporting the proposed approach. While the committee acknowledged the Minister's advice, because of the significance of a change to a national opt-out system, it remains of the view that this is a matter more appropriate for parliamentary enactment and that it not appropriate for it to be delegated.
  - ❖ *Delegation of legislative power – transitional arrangements*: the committee sought advice about the need for delegated legislation to modify the operation of primary legislation (a *Henry VIII clause*) and the Minister provided useful information in relation to the intended use of the power for unforeseen and unintended consequences. In relation to delegated powers for transitional purposes, the committee is interested in whether a time-limit (sunset clause) can be applied and is seeking advice about this from the Minister.

- ❖ Various matters: the committee also sought advice about (1) the justification for placing an evidential burden on the defendant in relation to the use or disclosure of a healthcare identifier and (2) whether material being incorporated by reference will be readily and freely available. The Minister replied (1) noting that the matters are peculiarly within the knowledge of the defendant and (2) provided more information about the material likely to be incorporated into delegated legislation and how it will be made readily and freely available. The committee requested that the key points be included in the explanatory memorandum.
- **Migration Amendment (Charging for a Migration Outcome) Bill 2015** ([Twelfth Report of 2015](#))
  - ❖ Various matters: the committee sought the Minister's advice and received a response 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. The Minister advised that his personal decisions will not be reviewable, but that decisions made by a departmental delegate in certain circumstances will be subject to merits review. The committee noted its concern that further broad discretionary powers that are not subject to merits review are being introduced into the legislation;
    - ❖ 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 civil (and certain criminal) proceedings against the person. The Minister advised that the privilege against self-incrimination is being removed in relation to (1) civil penalty proceedings relating to an alleged contravention of a 'payment for visas' provision and (2) criminal offences relating to the provision of false or misleading information (but will remain in relation to other criminal proceedings). The committee remains concerned about the removal of this privilege, which is usually considered to be a key component of a fair trial (especially in light of the high civil penalties which apply);
    - ❖ provisions which place an evidential burden on the defendant – while the Minister advised that the relevant information is 'best within the knowledge of the defendant' it remains unclear how these matters are peculiarly within the knowledge of 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 (Complementary Protection and Other Measures) Bill 2015** ([Alert Digest No. 12 of 2015](#))
  - ❖ Merits review: the bill includes a provision that expands the circumstances in which a person can be declared 'an excluded person', which then restricts access to seek merits review in the Administrative Appeals Tribunal. In light of the limited utility of judicial review in the context of broad discretionary powers, the committee has sought more detailed advice as to the justification for excluding merits review.
- **Migration and Maritime Powers Amendment Bill (No. 1) Bill 2015** ([Twelfth Report 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 Minister advised that his department is not aware of anyone who would be negatively affected by the approach and asserted that the amendment is technical and does not amount to a change in the law. The committee noted that there is no expected detriment, however, also noted it has a different view about whether the amendment is merely technical: under Australia's constitutional arrangements, the courts are charged with interpreting legislation as it currently stands. For this reason amendments

which have retrospective effect are not aptly characterised as merely clarifying the status quo. The committee has drawn this matter to the attention of the Senate.

- ❖ In addition, as requested the Minister provided additional information about the approach proposed in Sch 2 item 22, but it did not appear to clearly address the question of potential unfairness. The committee noted its continuing concern.

- **Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015** ([Twelfth Report of 2015](#))

- ❖ *Broad discretionary power/delegation of legislative power*: the bill will allow the suspension of payments and the application of penalties if a job seeker acts in an inappropriate manner during an appointment. Guidance in relation to the application of this broad discretionary power is not included in the bill. The committee noted that a desire to reduce the complexity of the primary legislation is not, of itself, sufficient justification for including important matters in delegated legislation. The committee also noted that it would welcome an amendment which *requires* the Secretary to make a legislative instrument which details matters that must be considered when deciding whether a job seeker has acted in an inappropriate manner because without such an instrument the Secretary has a very broadly framed power to determine what constitutes relevant behaviour.

## **Other bills for which advice is being sought from the Minister or proposer or about which comments were made**

([Alert Digest No. 12 of 2015](#))

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:

- **Criminal Code Amendment (Private Sexual Material) Bill 2015**: The committee has sought advice about the justification for placing an evidential burden onto the defendant.
- **High Speed Rail Planning Authority Bill 2015**: The committee has sought advice about the wording for a provision creating a power to make rules (delegated legislation).
- **Migration Amendment (Mandatory Reporting) Bill 2015**: The committee noted the imposition of an evidential burden on defendants, but it is consistent with the Attorney-General's *Guide to Framing Commonwealth Offences*.
- **Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015**: The committee noted some retrospective commencement, but it is within the scope of Senate Resolution No. 44.

## **Other responses received** ([Twelfth Report of 2015](#))

- **Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015**: The committee had sought advice about provisions which incorporate material by reference. The committee thanked the Minister for making commitments in relation to the availability of incorporated materials and drew the issue to the attention of the Regulations and Ordinances Committee.

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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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