



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS



10 November 2016 (drawing on material in the committee's *Alert Digest No. 8 of 2016* and *Eighth Report of 2016*)

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

● Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 ([Eighth Report of 2016](#))

- ❖ Use of 'secret evidence': The Attorney-General provided further advice on various matters, particularly in relation to the proposal to allow evidence to be admitted which has not been fully disclosed to a person who may be subject to a control order (a 'controlee'):
 - 'Sufficient information': The Attorney-General advised that in some instances a controlee may only be provided with 'sufficient information' about the allegations against them *after* restrictions are placed on communication with the special advocate. The committee considers this will give limited opportunity for the controlee to give proper instructions, and does not appear to appropriately balance the protection of national security information with the controlee's right to procedural fairness;
 - Special advocates: the committee made the following comments:
 - Commencement of special advocate scheme delayed for up to 12 months: The Attorney-General advised there is an urgent need to establish the secret evidence provisions but more time is needed to establish the special advocate scheme. The committee considers delaying the special advocate scheme significantly undermines the adequacy of the special advocate scheme in ameliorating the unfairness of the secret evidence provisions.
 - Appointment of special advocate left to the discretion of the court: The Attorney-General advised this is intended to give the court flexibility; however, if a special advocate is not appointed when secret evidence is relied on, a controlee may be left with no mechanism to challenge the evidence against them. The committee considers this significantly diminishes the adequacy of the special advocate scheme in ameliorating the unfairness of the secret evidence provisions.
 - Court can prohibit/restrict communication between a special advocate and controlee before sensitive national security information has been disclosed: The Attorney-General advised there may be circumstances where the special advocate has acquired sensitive information before it is officially disclosed to them, but restrictions on communication is likely to occur only in exceptional circumstances. The committee sought further advice as to whether the provision could be amended to require the court to consider whether the risk of disclosure could be mitigated in any other way and whether the court could appoint a new special advocate to enable proper communication between the advocate and controlee.
 - Details regarding the appointment and terms and conditions of special advocates not provided for in the primary legislation: The Attorney-General advised these matters are subject to ongoing consideration and so will be included in regulations. The appointment

process and the terms and conditions of special advocates, particularly around conflict of interest and immunity, are fundamental questions that go to whether special advocates are, and appear to be, impartial and likely to be effective. The committee considers it is important for Senators to know these details when assessing the adequacy of the special advocate scheme in ameliorating the unfairness of the secret evidence provisions.

- **Fairer Paid Parental Leave Bill 2016** ([Alert Digest No. 8 of 2016](#))
 - ❖ *Retrospective effect*: The commencement provisions of the bill mean that proposed changes to the paid parental leave scheme could commence shortly after the Act becomes law. There may be a question of fairness whether those who are pregnant should have their entitlement to parental leave pay removed after they have already made decisions regarding work and care based on the existing entitlements. The committee has sought advice from the Minister as to the justification for this approach.
- **Migration Amendment (Visa Revalidation and Other Measures) Bill 2016** ([Alert Digest No. 8 of 2016](#))
 - ❖ *Inappropriately defined administrative power*: The bill enables the Minister to require persons holding certain types of visa to complete a revalidation check, which will consider whether there is any 'adverse information' relating to the person. The committee has sought advice as to why there is no definition of 'adverse information' in the bill and why the revalidation check is not tied to whether the person still meets the criteria for the grant of the visa;
 - ❖ *Delegation of legislative power*: The bill provides that the Minister may require a person holding a visa 'of a prescribed kind' to complete a revalidation check. The committee has sought advice on why there is no limit on the type of visa that could be prescribed. The bill also gives the Minister the power to make a legislative instrument determining that a specified class of persons must complete the revalidation check. The committee has sought advice as to why this instrument is not subject to disallowance.
- **Narcotic Drugs Legislation Amendment Bill 2016** ([Eighth Report of 2016](#))
 - ❖ *Delegation of legislative power—incorporating external material into the law*: The bill will allow international pharmaceutical quality and safety standards to be incorporated into the law, however these standards are only available to the public if a fee is paid. The committee noted that the terms of the law should be readily and freely available to all and has requested further advice as to whether the standards incorporated into the law can be made freely available to the public.
- **Privacy Amendment (Re-identification Offence) Bill 2016** ([Alert Digest No. 8 of 2016](#))
 - ❖ *Retrospective offences*: The bill makes new offences relating to the re-identification of de-identified information operate from 29 September 2016 (the date of the Attorney-General's announcement relating to the bill); making the offences retrospective. The committee has sought advice as to the appropriateness of making these offences retrospective.
- **Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016** ([Eighth Report of 2016](#))
 - ❖ *Delegation of legislative power—Taxation Commissioner's remedial power*: The bill will allow the Taxation Commissioner to modify the operation of Acts passed by the Parliament in certain circumstances. The committee remains concerned that this power may be too broad and considers there is scope for further legislative guidance to constrain the use of this power. The committee also noted that it would be appropriate to include more specific consultation requirements in the bill and suggested that a review into the operation of this power should be mandatory.
- **VET Student Loans (Charges) Bill 2016** ([Alert Digest No. 8 of 2016](#))
 - ❖ *Delegation of legislative power—setting level of charge by regulation*: The bill provides for the imposition of a charge on 'approved course providers', however the amount of charge to be payable is to be prescribed by the regulations. The committee has sought advice as to whether the bill can be amended to provide greater legislative guidance as to how the charge amount is to be determined and to limit the amount that may be imposed.

Other bills commented on in the Alert Digest ([Alert Digest No. 8 of 2016](#))

- **Australian Postal Corporation (Unsolicited Political Communications) Bill 2016:** The committee noted it would have been useful if a more detailed justification had been provided as to how the bill is compatible with the right to freedom of political communication.
- **Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2016:** The committee is seeking advice in relation to penalties and reversal of the burden of proof.
- **Criminal Code Amendment (Private Sexual Material) Bill 2016:** The committee refers Senators to previous comments made in relation to this bill and thanks the sponsors of the bill for including additional information in the explanatory memorandum.
- **Criminal Code Amendment (War Crimes) Bill 2016:** The committee is seeking advice on the rationale for reversing the evidential burden of proof.
- **Foreign Acquisitions and Takeovers Amendment (Strategic Assets) Bill 2016:** The committee is seeking advice in relation to a significant delegation of legislative power and procedural fairness.
- **Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016:** The committee is seeking advice in relation to the justification for applying the amendments in this bill to property or wealth acquired *before* the commencement of the bill.
- **National Cancer Screening Register Bill 2016:** The committee welcomed several government amendments which addressed comments that the committee had previously made in relation to privacy matters.
- **Privacy Amendment (Notifiable Data Breaches) Bill 2016:** The committee noted there are a number of exceptions in the bill to the mandatory data breach notification provisions and although these impact the right to privacy there is a detailed discussion in the explanatory memorandum.
- **Seafarers and Other Legislation Amendment Bill 2016:** The committee is seeking advice in relation to the rationale for including a power to exempt the employment of people on particular vessels from the operation of certain legislation.
- **Seafarers Safety and Compensation Levies Collection Bill 2016:** The committee is seeking advice in relation to provisions which abrogate the privilege against self-incrimination and reverse the evidential burden of proof.
- **Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016:** The committee is seeking advice in relation to the retrospective application of certain amendments.
- **VET Student Loans Bill 2016:** The committee is seeking advice in relation to vicarious liability, merits review, absolute liability offences, the delegation of legislative and administrative power, and the introduction of an infringement notice scheme.

Other responses received ([Eighth Report of 2016](#))

- **Appropriation Bill (No. 2) 2016-2017:** The committee welcomed an undertaking from the Finance Minister that his department would give consideration to including additional information in relation to section 96 grants to the States in future Budget documentation.
- **Budget Savings (Omnibus) Bill 2016:** The committee noted that this bill has already passed, although the committee took the opportunity to reiterate its view that where omnibus bills containing new and previously introduced measures are introduced in the future the explanatory memorandum accompanying such bills should identify whether each proposed measure is new or previously introduced.
- **Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016:** In light of the detailed advice provided by the Minister confirming that the retrospective application of certain amendments would not cause any party detriment, the committee made no further comment.

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:

Ms Anita Coles, Acting Secretary, Senate Scrutiny of Bills Committee T: 02 6277 3050 E: scrutiny.sen@aph.gov.au.