



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS

16 November 2017 (drawing on material in the committee's *Scrutiny Digest No. 13 of 2017*)

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 or considered by other Senate committees 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 *Scrutiny Digests*. An index to all committee comments is available [here](#).

Key scrutiny issues ([Scrutiny Digest No.13 of 2017](#))

- **Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017**
 - ❖ Significant matters in delegated legislation: the committee is seeking advice as to why significant matters regarding the establishment of a redress scheme is to be left to delegated legislation (including enabling the rules to prescribe when a person is not eligible for redress and when an institution is not to be held responsible).
 - ❖ Broad discretionary power: the bill empowers the Operator of the scheme to disclose protected information to any person and for any purpose so long as the Operator considers it is in the public interest to do so. The committee is seeking advice as to why there is no guidance in the primary legislation as to the exercise of this power.
 - ❖ Limitation on review rights: the committee is seeking advice as to why an internal reviewer will only be able to have regard to information and documents available to the original decision-maker and the justification for excluding external merits review, and leaves to the Senate the appropriateness of excluding judicial review.
 - ❖ Broad delegation of administrative powers: the committee is seeking advice as to why it is necessary to allow much of the Operator's powers and functions to be delegated to an APS employee at any level and to allow independent decision-makers to be appointed without any guidance as to their skills, training or experience.
- **Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017**
 - ❖ Limitation on judicial discretion: the committee leaves to the Senate the appropriateness of removing judicial discretion in the sentencing of certain offenders (in relation to mandatory minimum sentences and limiting suspended sentences).
 - ❖ Presumption against bail: the committee leaves to the Senate the appropriateness of imposing a presumption against bail, rather than specifying matters a bail authority must have regard to.
 - ❖ Procedural fairness: the committee considers it would be appropriate for the bill to be amended to require that, where it would not prejudice national security, an affected person be provided with an overview of any relevant information relating to parole decisions and otherwise leaves to the Senate the appropriateness of giving the Attorney-General a broad discretionary power not to give reasons for why parole is refused.

- **Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017**

- ❖ *Undue trespass on personal rights and liberties*: the committee leaves to the Senate the appropriateness of empowering the Minister, by legislative instrument, to prohibit 'things' (e.g. mobile phones) in immigration detention facilities, and to enable authorised persons to search, screen or strip-search a detainee or their personal effects, regardless of the level of risk posed by different detainees.
- ❖ *Significant matters in delegated legislation*: the committee notes that the legislative instrument prohibiting such 'things' will not be subject to disallowance and is seeking the Minister's justification as to the appropriateness of exempting such an instrument from the usual parliamentary disallowance process.
- ❖ *Broad delegation of administrative powers*: the committee considers it would be appropriate for the bill to be amended to, at a minimum, require that those authorised to exercise coercive search powers in immigration detention facilities possess specified skills, training or experience and otherwise leaves to the Senate the appropriateness of conferring coercive search power on non-government employees.

- **Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017**

- ❖ *Retrospective application*: the committee leaves to the Senate the appropriateness of retrospectively applying amendments which widen the scope of the property that can be restrained, frozen or forfeited under proceeds of crime legislation.

- **Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017**

- ❖ *Delegated legislation not subject to disallowance*: The committee leaves to the Senate the appropriateness of allowing the authorisation of an external dispute resolution scheme via notifiable instrument, which is not subject to disallowance.
- ❖ *Exclusion of judicial review and appeal rights*: The committee is seeking further advice regarding the effect of excluding judicial review of decisions and determinations made by the proposed Australian Financial Complaints Authority (AFCA), and otherwise leaves to the Senate the appropriateness of not providing judicial review or an appeal mechanism in relation to non-superannuation financial disputes.
- ❖ *Privacy*: The committee leaves to the Senate the appropriateness of enabling personal and confidential information to be disclosed to AFCA, a non-government body, without any specific safeguards in the bill to maintain the confidentiality of this information.
- ❖ *Significant matters in delegated legislation*: The committee leaves to the Senate the appropriateness of setting out requirements in delegated legislation where breach of those requirements would constitute an offence.

Other bills commented on ([Scrutiny Digest No.13 of 2017](#))

- **Bankruptcy Amendment (Enterprise Incentives) Bill 2017**: the committee is seeking advice as to the appropriateness of making an offence subject to up to six months imprisonment where strict liability applies.
- **Defence Legislation Amendment (Instrument Making) Bill 2017**: the committee leaves to the Senate the appropriateness of leaving the appointment, procedures and powers of Defence Force inquiries to delegated legislation; allowing 'other persons' to assist in the exercise of potentially coercive powers; and empowering authorised persons to use force against persons.
- **Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017**: the committee is seeking advice in relation to the protection of personal information; the authorisation to issue infringement notices; the exclusion of aspects of the natural justice hearing rule and of merits review for certain decisions; and reversing the evidential burden of proof.

- **Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017:** the committee is seeking further advice as to whether the retrospective application of a provision would have any effect on cases currently before the courts.
- **Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017:** the committee is seeking advice as to the justification for reversing the evidential burden of proof; removing a person's right to bring a cause of action against certain body corporates; and abrogating the privilege against self-incrimination.
- **Investigation and Prosecution Measures Bill 2017:** the committee received advice that the retrospective validation of regulations would not have any detrimental effect on any individual.
- **Migration Amendment (Skilling Australians Fund) Bill 2017:** The committee is seeking advice as to why it is proposed to delegate the power to impose a penalty via regulations without setting an upper limit on the penalty.
- **National Health Amendment (Pharmaceutical Benefits—Budget and Other Measures) Bill 2017:** the committee is seeking advice as to why it is necessary to give the Minister a broad discretionary power to apply statutory price reductions by way of written or notifiable instrument.
- **National Integrity Commission:** the committee is seeking advice as to limitations on fair hearing rights and legal professional privilege; the creation of new offences; the abrogation of the privilege against self-incrimination; and search and arrest powers.
- **Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017:** the committee received advice as to the justification for restricting review rights with respect to the registration of provisionally registered goods.
- **Therapeutic Goods (Charges) Amendment Bill 2017:** the committee leaves to the Senate the appropriateness of allowing regulations to determine the amount of a charge without including in the bill any guidance as to the method of calculation or maximum amount.
- **Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017:** the committee is seeking advice in relation to the reversal of the evidential burden of proof; abrogation of the privilege against self-incrimination; and the limitation on fair hearing rights and legal professional privilege.
- **Treasury Laws Amendment (Banking Measures No. 1) Bill 2017:** the committee is seeking advice as to the incorporation by reference of external documents and the inclusion of a no-invalidity clause with respect to consultation obligations prior to making a rule.
- **Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017:** the committee leaves to the Senate the appropriateness of strict liability offences; the reversal of the evidential burden of proof; and the creation of additional defences via delegated legislation.
- **Treasury Laws Amendment (National Housing and Homelessness Agreement) Bill 2017:** the committee leaves to the Senate the appropriateness of exempting ministerial determinations from disallowance, and is seeking advice as to the appropriateness of amending the bill to include legislative guidance as to applicable terms and conditions.

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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