



8 February 2018

## Introduction

This newsletter highlights key aspects of the work of the Senate Scrutiny of Bills Committee and the Senate Regulations and Ordinances Committee. It has a particular focus on information that may be useful while bills are under consideration and legislative instruments are subject to disallowance, and seeks to raise awareness about the committees' scrutiny principles (see Senate Standing Orders 23 and 24).

For more detail and discussion of these matters see the committees' [Scrutiny Digests](#) and [Delegated legislation monitors](#).

## New developments

- In addition to highlighting the work of the Senate Scrutiny of Bills Committee, *Scrutiny News* now includes key highlights from the work of the Senate Regulations and Ordinances Committee.

## Key scrutiny issues: Bills (*Scrutiny Digest No. 1 of 2018*)

### Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

- Significant penalties: the committee is seeking advice as to the appropriateness of applying significant custodial penalties to broadly drafted offences.
- Significant matters in delegated legislation: the committee is seeking advice as to why significant matters relating to disclosure obligations are to be left to delegated legislation.
- Presumption of innocence: the committee is seeking advice as to why an entry in a register is prima facie evidence of the information it contains (which could effectively reverse the burden of proof).

### Export Control Bill 2017

- Consultation prior to making delegated legislation: the bill leaves much of the detail regulating the export of goods to the rules, so the committee is seeking advice as to what consultation will occur prior to making the rules and whether consultation requirements should be included in the bill.
- Use of force: the committee is seeking advice as to the need for authorised officers and persons assisting to use force against things and what safeguards will ensure the appropriate use of power.
- Broad delegation of administrative powers: the committee is seeking advice as to the broad delegation of administrative powers to non-Commonwealth officers or bodies; 'persons assisting'; persons without any specified training, qualification or skill requirements; and any APS level employee.
- Broad discretionary power: the committee is seeking advice as to the appropriateness of conferring a broad discretionary power on the secretary to exempt persons from provisions of the bill.

- Merits review: the committee is seeking advice on why certain decisions are not subject to merits review and why limits are being placed on who can seek review of a decision.
- Criminal offences: the committee is seeking advice as to why all details of what constitutes an offence is left to the rules; the reversal of the burden of proof; and the appropriateness of an analyst's certificate constituting prima facie evidence of the information it contains.

### **Foreign Influence Transparency Scheme Bill 2017**

- Significant penalties: the committee is seeking advice as to the justification for imposing significant custodial penalties in relation to broad registration obligations.
- Criminal offences: the committee is seeking advice as to the appropriateness of reversing the evidential burden of proof for matters that do not appear to be peculiarly within the knowledge of the defendant and for applying absolute liability to an element of an offence.
- Significant matters in delegated legislation: the committee is seeking advice as to the appropriateness of allowing disclosure requirements and additional purposes for which scheme information can be communicated to be prescribed by delegated legislation (rules).
- Broad delegation of administrative powers: the committee is seeking advice as to the necessity of allowing the delegation of coercive information gathering powers to Executive Level 2 employees.

### **National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017**

- Broad scope of offence provisions: the committee is seeking advice as to the breadth of a number of offences which are subject to significant custodial penalties.
- Criminal offences: the committee is seeking advice as to the appropriateness of reversing the evidential burden of proof for matters that do not appear to be peculiarly within the knowledge of the defendant and whether secrecy provisions might prevent a public official from discharging an evidential burden of proof and leaves to the Senate the appropriateness of applying strict liability to whether information or articles have a security classification.
- Right to liberty: presumption against bail: the committee is seeking advice as to the appropriateness of imposing a presumption against bail.

## **Key scrutiny issues: Legislative instruments** (*Delegated legislation monitor 1 of 2018*)

### **Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 6)**

- Parliamentary oversight: the committee is seeking advice as to the circumstances leading to the incorrect version of the instrument being registered and tabled in Parliament, and the appropriateness of using an administrative process to make substantive changes to a legislative instrument after its tabling in Parliament.
- Effect of drafting error: the committee is seeking advice as to whether any persons were disadvantaged by an error which substantially reduced a private health benefit payable for prostheses between 28 September and 23 November 2017.

### **Marriage Regulations 2017**

- Classification of legislative instruments: the committee is seeking further advice as to whether certain instruments would play a role in determining the compliance of marriage celebrants with obligations under the Marriage Act and, if so, the justification for declaring these instruments not to be legislative in character (and therefore not subject to parliamentary oversight).

## My Health Records (National Application) Rules 2017

- *Matters more appropriate for parliamentary enactment*: the committee draws to the attention of the Senate the application of the 'opt-out' model of the My Health Records system to all healthcare recipients in Australia, via legislative instrument.

## Other bills commented on (Scrutiny Digest No. 1 of 2018)

- **Broadcasting Legislation Amendment (Digital Radio) Bill 2017**: the committee is seeking advice concerning the removal of specific consultation requirements on ACMA.
- **Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017**: the committee is seeking advice regarding the broad delegation of administrative powers to any ACMA staff member and a provision granting immunity from civil liability.
- **Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017**: the committee is seeking advice as to a broad delegation of administrative powers to any ACMA staff member; ACMA's power to determine which of its decisions are reviewable; and a broad power for ACMA to exempt entities from the rules.
- **Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017**: the committee is seeking advice as to why grant criteria is left to non-statutory guidelines.
- **Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017**: the committee is seeking advice as to the reversal of the evidential burden of proof and why significant matters are left to non-statutory guidelines.
- **Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017**: the committee is seeking advice as to a reverse evidential burden of proof; why the power to issue infringement notices can be delegated to any ACMA staff member; and the apparent exclusion of merits review.
- **Family Law Amendment (Parenting Management Hearings) Bill 2017**: the committee is seeking advice as to a number of no-invalidity clauses and the reversal of the evidential burden of proof.
- **Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017**: the committee is seeking advice as to the setting of the amount of a charge via delegated legislation.
- **Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017**: the committee is seeking advice as to the retrospective application of amendments.
- **National Broadcasters Legislation Amendment (Enhanced Transparency) Bill 2017**: the committee notes its privacy concerns with requiring the publication of the names and salaries of certain ABC and SBS employees and leaves this to the Senate as a whole.
- **Security of Critical Infrastructure Bill 2017**: the committee is seeking justification for allowing the rules to amend the operation of primary legislation; and a reversal of the evidential burden of proof.
- **Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017**: the committee is seeking justification for allowing an instrument to amend the operation of primary legislation; and a reversal of the evidential burden of proof.
- **Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017**: the committee leaves to the Senate the appropriateness of not providing a mechanism for appeals and excluding judicial review under the ADJR Act in relation to non-superannuation financial disputes.

## Other legislative instruments commented on (Delegated legislation monitor 1 of 2018)

- The Regulations and Ordinances committee commented on 40 legislative instruments registered on the Federal Register of Legislation between 15 November 2017 and 8 January 2018. The committee sought further advice in relation to one instrument, and concluded its interest in nine instruments, on which the committee had previously commented.
- All legislative instruments subject to a notice of motion for disallowance in either House of Parliament are listed in the [Disallowance Alert](#).

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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) and the Senate Regulations and Ordinances Committee (Chair: Senator John Williams and Deputy Chair: Senator Gavin Marshall).

For any comments or questions, please contact:

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