

**Senate Standing Committee**  
**for the**  
**Scrutiny of Bills**

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## Terms of Reference

### Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.



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#### **Senate Standing Legislation Committee Inquiries**

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.





# **Higher Education and Research Reform Amendment Bill 2014**

Introduced into the House of Representatives on 28 August 2014

Portfolio: Education

## **Background**

This bill amends various Acts relating to higher education and research.

Schedule 1 reduces subsidies for new students at universities by an average of 20 per cent and deregulates fees for Commonwealth supported students by removing the current maximum student contribution amounts.

Schedule 2 requires providers with 500 or more equivalent full time Commonwealth supported students to establish a new Commonwealth Scholarship Scheme to support disadvantaged students.

Schedule 3 replaces the current CPI indexation of HELP loans with the 10 year Government bond rate.

Schedule 4 establishes a new minimum repayment threshold for HELP loans.

Schedule 5 allows providers to charge Research Training Scheme students capped tuition fees.

Schedule 6 removes the current lifetime limits on VET FEE-HELP loans and the VET FEE-HELP loan fee.

Schedule 7 discontinues the HECS-HELP benefit from 2015.

Schedule 8 replaces the current Higher Education Grants Index (HEGI) with the Consumer Price Index (CPI) from 1 January 2016.

Schedule 9 updates the name of the University of Ballarat to Federation University Australia.

Schedule 10 allows certain New Zealand citizens who are Special Category Visa holders to be eligible for HELP assistance from 1 January 2015.

## **Delayed Commencement Clause 2**

As detailed in the explanatory memorandum (at p. 13), most of the changes proposed by this bill have delayed commencement dates:

*Matters to commence on 1 January 2015:*

- Schedule 10

*Matters to commence on 1 July 2015:*

- Schedule 7

*Matters to commence on 1 January 2016:*

- Schedules 1, 2 and 3
- Parts 2, 3 and 4 of Schedule 5
- Schedule 6
- Schedule 8

*Matters to commence on 1 July 2016:*

- Schedule 4

The explanatory memorandum does not give an explanation for the delayed commencement of these provisions. Nevertheless, given the nature of the changes to the regulation of the higher education sector proposed in the bill, it may be accepted that delayed commencement is appropriate to enable affected persons to prepare for the proposed new regulatory environment. Moreover, the committee notes that the bill itself provides for fixed commencement dates.

*In the circumstances, the committee makes no further comment on this provision.*

## **Delegation of legislative power**

**Schedule 1, item 62, proposed new subsection 41-10(2)**

**Schedule 1, item 67, proposed new subsection 46-15(3)**

Part 2-3 of the *Higher Education Support Act 2003* concerns grants payable to higher education providers and other eligible bodies for a variety of purposes.

Item 62 of this bill repeals and substitutes section 41-10 which deals with which bodies corporate are eligible for Part 2-3 grants. Proposed new subsection 41-10(2) provides that the ‘Other Grants Guidelines’ may prescribe matters that relate to eligibility to receive a grant for the purposes specified in subsection 41-10(1) and, if they do so, a grant can only be awarded in accordance with these Guidelines.

Similarly, item 67 of the bill repeals and substitutes section 46-15 (which concerns the eligibility of higher education providers to receive grants for certain existing Commonwealth scholarships). Proposed new subsection 46-15(3) provides that the ‘Commonwealth Scholarship Guidelines’ may prescribe matters relating to eligibility for grants under subsections 46-15(1) and (2) and, if they do so, providers can only receive grants in accordance with the Guidelines.

As the explanatory memorandum does not indicate why the eligibility requirements for these important categories of grants cannot be provided for in the bill, **the committee seeks advice from the Minister as to the justification for the proposed approach.**

*Pending the Minister’s reply, the committee draws Senators’ attention to the provisions as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.*

### **Delegation of legislative power**

#### **Schedule 2, item 1, proposed subsection 36-75(4)**

This proposed subsection provides that a provider’s ‘eligible amount’ (i.e. the amount to be used for the new Commonwealth scholarship scheme introduced by this Schedule) is either 20 per cent of the provider’s eligible revenue for the financial year or ‘if a lower percentage is prescribed by the Commonwealth Grant Scheme Guidelines—that lower percentage’.

The explanatory memorandum (at p. 62) merely repeats the effect of this provision. Reductions in eligible amounts in accordance with any Commonwealth Grant Scheme Guidelines may involve significant policy choices, which arguably should be determined by the Parliament. **The committee therefore seeks advice from the Minister as to the justification for leaving important material to delegated legislation rather than incorporating (or proposing to incorporate it) into primary legislation.**

*Pending the Minister's reply, the committee draws Senators' attention to the provision as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## **Mining Subsidies Legislation Amendment (Raising Revenue) Bill 2014**

Introduced into the Senate on 27 August 2014

By: Senator Milne

### **Background**

This bill seeks to abolish the following subsidies for mining companies from 1 January 2015:

- the diesel fuel rebate for the mining industry;
- the accelerated asset depreciation for aircraft and vehicles; and
- immediate deduction for exploration and prospecting expenses.

*The committee has no comment on this bill.*

## **National Security Legislation Amendment Bill (No. 1) 2014**

Introduced into the Senate on 16 July 2014

Portfolio: Attorney-General

### **Background**

This bill amends the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) and the *Intelligence Services Act 2001* (the IS Act) to implement the Government's response to recommendations in Chapter 4 of the Parliamentary Joint Committee on Intelligence and Security's *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (tabled in June 2013) relating to reforms of the legislation governing the Australian Intelligence Community.

Schedule 1 amends ASIO's statutory employment framework.

Schedule 2 amends ASIO's warrant based intelligence collection powers, including in relation to computer access warrants, surveillance devices and warrants against an identified person of security concern.

Schedule 3 provides ASIO employees and affiliates with certain protection from criminal and civil liability in authorised covert intelligence operations (referred to as 'special intelligence operations').

Schedule 4 amends the statutory framework for ASIO's co-operative and information-sharing activities.

Schedule 5 amends the IS Act to enable the Australian Secret Intelligence Service (ASIS) to undertake a new function of co-operating with ASIO in relation to the production of intelligence on Australian persons in limited circumstances. This schedule will also:

- create a new ground of ministerial authorisation in relation to the protection of ASIS's operational security;
- allow ASIS to train certain individuals in the use of weapons and self-defence techniques;
- extend immunity for IS Act agencies for actions taken in relation to an overseas activity of an agency; and

- provide a limited exception for the use of a weapon or self-defence technique in a controlled environment.

Schedule 6 amends secrecy offences in the IS Act and ASIO Act in relation to unauthorised communication of intelligence-related information.

Schedule 7 provides for the renaming of the Defence Imagery and Geospatial Organisation (DIGO) as the Australian Geospatial Intelligence Organisation (AGO) and the Defence Signals Directorate (DSD) and the Australian Signals Directorate (ASD).

### **Insufficiently defined administrative power—delegation to ‘a person’**

#### **Schedule 1, item 5**

This item repeals current section 16 of the ASIO Act, which enables the Director-General to delegate any of his or her powers relating to the management of the staff of ASIO or the financial management powers provided under the ASIO Act to ‘an officer of the Organisation’. The proposed replacement provision makes two key changes to the power of delegation:

- (1) to describe the delegable powers by reference to powers, functions or duties that relate to the management of ‘ASIO employees or ASIO affiliates’, rather than by reference to staff of ASIO, and
- (2) to provide that the powers may be delegated to ‘any person’, rather than to ‘an officer of the Organisation’.

The first change is justified by reference to item 1 of Schedule 1 which introduces new definitions of categories of persons who work within or for ASIO, namely, an ASIO affiliate and ASIO employee. ASIO affiliates are persons who perform functions or services for ASIO in accordance with a contract, agreement or other arrangement. These amendments are said to ‘both streamline and provide consistency in relation to the use of descriptors in the Act’ (explanatory memorandum, p. 36). In the circumstances, the committee has no further comment in relation to this aspect of the proposed replacement power of delegation in replacement section 16.

In relation to the second change to be introduced by item 5 of Schedule 1, the committee consistently draws attention to legislation which allows significant and wide-ranging powers to be delegated to 'a person'. Generally, the committee prefers to see limits on the categories of persons to whom significant powers may be delegated (the committee usually expects that delegates will be confined to members of the Senior Executive Service or to the holders of nominated offices unless there is a strong justification for a broader approach).

The explanatory memorandum (p. 38) briefly addresses this issue:

Providing for the delegation of the particular powers, functions or duties covered by new section 16 to 'any person' is consistent with the operational requirements of the Organisation and the exercise of other powers across the ASIO Act.

The committee notes that this explanation of the need for such a broad power of delegation does not enable the committee to properly consider its appropriateness. The operational requirements necessitating the power remain unexplained. It is not clear why the delegation of powers and functions relating to the general management of employees and affiliates and the financial management of the organisation cannot be subject to some limitations.

**The committee therefore seeks more detailed advice from the Attorney-General as to why departure from this well established principle as proposed in the bill is appropriate in the circumstances. In this respect it is noted that the existing provision already casts the power to delegate in very broad terms, that is, to 'an officer of the Organisation'. The committee's consideration of the new provision would likely be assisted examples of the sorts of delegations that would be appropriately authorised by the proposed new power of delegation, but are not possible under the terms of the existing provision.**

*Pending the Attorney-General's reply the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.*



**Undue trespass on personal rights and liberties—privacy**  
**Delegation of legislative power—broad delegation**  
**Schedule 1, item 6, proposed paragraphs 18(2)(e) and (f)**

Section 18 of the ASIO Act provides that the Director-General or a person acting with the limits of authority conferred on the person by the Director-General may communicate intelligence or information on behalf of the organisation. Subsection 18(2) currently establishes an offence for a person to communicate information which has come to the knowledge or into the possession of the person by reason of the person being or having been an officer or employee of the organisation or having entered into any contract, agreement or arrangement with the organisation.

This item replaces existing subsection 18(2) with a new provision. Proposed paragraph 18(2)(e) provides that the offence for unauthorised communication will not be made out if the communication was by a person within the limits of authority conferred on the person by the Director-General. Paragraph 18(2)(f) provides that the offence for unauthorised communication will not be made out if the communication was made with the approval of the Director-General or of a person having the authority of the Director-General to give such an approval.

The explanatory memorandum (p. 39) states that:

Allowing the Director-General to authorise any person to give approval for the communication of information is consistent with the operational requirements of the Organisation and the exercise of other powers across the ASIO Act [and that the authorisation] is conferred on the basis that the Director-General believes such a person should reasonably be able to exercise this power.

The ability of the Director-General to approve ‘a person’ to communicate information has the potential to adversely impact on privacy if it includes the release of personal information. **The committee therefore seeks more detailed advice from the Attorney-General as to the justification for this proposed approach, including whether consideration has been given to limitations being placed on the category of persons whom may be authorised to communicate information.**

*Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision as it may be considered to*

*trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

**Insufficiently defined administrative power—authorisation of a person to exercise significant powers**

**Schedule 1, item 9, proposed subsection 23(6), *Australian Security Intelligence Organisation Act 1979***

**Schedule 1, items 34 and 35, proposed subsection 90F(1) and proposed paragraph 90F(2)(b), *Australian Postal Corporation Act 1989***

Subsection 23(6) of the *Australian Security Intelligence Organisation Act 1979* currently provides that:

The Director-General, or a senior officer of the Organisation appointed by the Director-General in writing to be an authorising officer for the purposes of this subsection, may authorise, in writing, an officer or employee of the Organisation, or a class of such officers or employees, for the purposes of this section.

The powers that may be exercised under this section are significant powers to request information or documents from operators of aircraft or vessels (and failure to comply with a request is an offence). The effect of the proposed new subsection 23(6) in this bill is that the Director-General or a senior-position holder may instead authorise ‘a person, or a class of persons’ (rather than ‘an officer or employee of the Organisation’) to exercise such functions.

The explanatory memorandum (at p. 40) argues that the amendment is:

- necessary to accommodate the broad range of persons who could reasonably be expected to be authorised to exercise these powers; and
- reflects the operational requirements of the organisation and is consistent with the exercise of other powers across the ASIO Act.

Neither of these arguments is elaborated further though it is noted that the powers are conferred on the basis that the Director-General ‘believes such a person should reasonably be able to exercise that power’.

The committee notes that similar issues arise in relation to items 34 and 35 of Schedule 1 which propose amendments to subsection 90F(1) and paragraph 90F(2)(b) of the *Australian Postal Corporation Act 1989*.

It is a matter of concern to the committee that the legislation appears to contain no criteria or limitations on the class of persons who may be authorised to exercise these coercive powers. **The committee therefore seeks more detailed advice from the Attorney-General as to the justification for the proposed approach, including a more detailed elaboration of the above arguments.**

*Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.*

**Undue trespass on personal rights and liberties—authorisation of a person to exercise significant powers**

**Schedule 1, item 61, proposed new paragraph 7(2)(ad),  
*Telecommunications (Interception and Access) Act 1979***

This provision has the effect of extending to 'ASIO affiliates' an exception from the prohibition on the interception of a communication passing over a telecommunications system.

Item 1 of Schedule 1 of the bill inserts a definition of ASIO affiliate into the ASIO Act:

*ASIO affiliate* means a person performing functions or services for the Organisation in accordance with a contract, agreement or other arrangement, and includes a person engaged under section 85 and a person performing services under an agreement under section 87, but does not include the Director-General or an ASIO employee.

*ASIO affiliates* may thus include a broad range of persons and it is unclear whether the exception should appropriately apply to them given their qualifications (and it is not clear what will be required and how this will be determined) and the nature of their 'appointment'. The explanatory memorandum merely repeats the effect of the proposed amendment.

Similar issues also arise in relation to items that extend authority to *ASIO affiliates* in a number of significant areas, including:

- item 62 enlarges the category of person who may be authorised to exercise powers conferred by Part 2-2 warrants;
- item 63 extends authorisation to intercept communications on behalf of ASIO;
- item 67 allows ASIO affiliates to communicate foreign intelligence information to another person.
- item 69 extends to affiliates an exception to an offence relating to accessing stored communications;
- items 70, 71 and 72 will extend authorisation to ASIO affiliates relating to receiving, communicating, using or recording foreign intelligence; and
- items 73 and 74 will extend provisions to ASIO affiliates which permit the disclosure of information or documents to ASIO.

A key question for each of these instances is why is it appropriate to extend a range of powers, authorisations and exemptions to ASIO affiliates. This does not appear to be addressed in the explanatory memorandum other than to say it is 'consistent with operational requirements'. It seems to the committee that there is a real issue about what powers etc. might be appropriately be held by different classes of decision-makers, how appropriate qualifications will be determined and assessed and what safeguards will apply given that ASIO affiliates are not employees of the organisation.

**The committee seeks more detailed advice from the Attorney-General as to the appropriateness of extending these exceptions to this broad class of persons associated with ASIO.**

*Pending the Attorney-General's reply the committee draws Senators' attention to the provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

**Insufficiently defined administrative power—exercise of authority under warrant conferred upon a person or class of persons  
Schedule 2, item 8, proposed subsection 24(2)**

Proposed subsection 24(2) would enable the Director-General (or her or his delegate) to approve a class of persons as people authorised to exercise the

authority conferred by relevant warrants or relevant device recovery provisions. The execution of the various warrants under the ASIO Act may involve the exercise of significant coercive powers which are apt to trespass on a number of personal rights and liberties. The explanatory memorandum (at p. 66) justifies this aspect of the amendment by pointing to inefficiencies created by the ‘requirement to maintain a list of the individual names of each person involved in exercising authority under a warrant’. It is further argued that:

Sometimes, the execution of a warrant takes place in unpredictable and volatile environments requiring ASIO to expand the list of individually authorised persons at very short notice (for example, an operational opportunity to exercise the authority of a warrant may be lost before the authorisation list can be updated).

The committee is mindful of these difficulties, however the committee also notes that there are accountability benefits associated with a requirement that persons able to exercise extensive coercive powers be identified with exactness, and that the responsibility for the appointment of such persons be clear. There is a danger that specification of persons able to exercise these extensive powers by reference to a class of persons (1) may be over-inclusive in the sense that particular persons covered may not be appropriately qualified to exercise the powers, and (2) that situations may arise in which it is uncertain whether a particular person is covered by an authorisation of a class of persons. Both of these problems may be thought to lessen the level of accountability associated with the exercise of authority under warrants. **Noting these concerns, the committee seeks the Attorney-General’s advice as to whether consideration has been given to these matters and whether there are ways in which to address them. The committee is also interested in whether it would be appropriate to provide legislative guidance as to any parameters on the class/es of persons to whom authorisation can be granted and whether the option to authorise classes of persons could be limited to emergency situations (those involving ‘very short notice’).**

*Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers in breach of principle 1(a)(ii) of the committee’s terms of reference.*

**Undue trespass on personal rights and liberties**

**Schedule 2, item 10, proposed new paragraph 25(4)(aa)**

**Schedule 2, item 19, proposed new paragraph 25A(4)(aaa)**

Proposed new paragraph 25(4)(aa) provides that an authorised person in the execution of a search warrant may enter any premises for the purposes of gaining entry to or exiting the subject premises. The explanatory memorandum (at p. 66) states that:

...it may occasionally be necessary for an authorised person to enter premises (specifically, third party premises) other than the subject premises in order to enter or exit the subject premises. This may be because there is no other way to gain access to the subject premises (for example, in an apartment complex where it is necessary to enter the premises through shared or common premises). It may also occur where, for operational reasons, entry through adjacent premises is more desirable (for example, where entry through a main entrance may involve a greater risk of detection). The need to access third party premises may also arise in emergency circumstances (for example, where a person enters the subject premises unexpectedly during a search and it is necessary to exit through third party premises to avoid detection and conceal the fact that things have been done under a warrant).

The committee recognises that it may *occasionally* be necessary for an authorised person to enter third-party premises in order to enter or exit the subject premises (as in the circumstances described above). However, the proposed provision is broadly drafted and therefore does not recognise the fact that such a power (noting the potential impact on third parties) should be limited to reflect the exceptional nature of the power.

The committee notes that similar issues arise in relation to computer access warrants in item 19 of Schedule 2.

**Noting the above comments, the committee seeks the Attorney-General's advice as to whether it would be possible to constrain the power to enter third-party premises. If it is thought that it would not be possible to further constrain this power in the legislation, a detailed rationale as to why that is the case (and details of any internal safeguards or procedures in place to constrain this power) would assist the committee in assessing the appropriateness of this provision.**

*Pending the Attorney-General's reply, the committee draws Senators' attention to the provision as it may be considered to*

*trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

## **Undue trespass on personal rights and liberties Schedule 2, various**

There are a number of other provisions in the bill which seek to increase or extend the application of existing powers:

- Item 12 (in relation to a search warrant) and item 25 (in relation to a computer access warrant) will amend ASIO's powers so that action that is likely to materially interfere with, interrupt or obstruct the lawful use of a computer by other persons will be permitted where they are 'otherwise necessary to execute [a] warrant' (pp. 67 and 71);
- Item 13 (in relation to a search warrant) and item 26 (in relation to a computer access warrant) substitute a new heading in relation to warrants, with the effect that it 'makes clear that the use of force that is necessary and reasonable to do the things specified in the warrant is not limited to entry, but can be exercised at any time during the execution of the warrant.' (p. 68 and 72);
- Item 18 extends the scope of the target of a computer access warrant (p. 69); and
- Item 23 amends an existing power relating to the use of a third party computer and adds the new power to use a communication in transit (p. 70).

These are significant matters, but in these instances there is a detailed justification for each provided in the explanatory memorandum. In light of the information provided in the explanatory memorandum, **the committee draws these matters to the attention of Senators and leaves consideration of whether the proposed approach for each is appropriate to the Senate as a whole.**

*The committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

## **Undue trespass on personal rights and liberties Schedule 2, item 29**

Among other things, item 29 of Schedule 2 repeals subsections 26(1) and 26A(1) of the current *Australian Security Intelligence Organisation Act 1979*. These subsections in the current ASIO Act make it unlawful for an ASIO officer, employee or agent to use a listening device, certain optical surveillance devices (that is, devices that fall within the current definition of a ‘listening device’) and a tracking device, where it would otherwise have been permissible in some States and Territories.

This approach is said to be ‘consistent with the Surveillance Devices Act’ and justified on the basis that the ‘use of surveillance devices is primarily regulated by State and Territory law’ and ‘any inconsistent use of a surveillance device by ASIO under this framework will, generally, be regulated by State and Territory law’ (explanatory memorandum, p. 75). The result is that Subdivision D ‘regulates the circumstances where ASIO may use a surveillance device with and without a warrant’ and that ‘any use outside this framework will generally be regulated by State or Territory law’ (explanatory memorandum, p. 77).

It is possible that the repeal of subsections 26(1) and 26A(1) may have the result of making the use of surveillance devices by ASIO lawful in circumstances beyond those authorised by Subdivision D. The explanatory memorandum states that uses not so authorised will *generally* be regulated by State and Territory law.

**The committee seeks advice from the Attorney-General as to whether there may be circumstances where use of surveillance devices by ASIO not authorised under Subdivision D may be lawful under State and Territory law and whether, therefore, the repeal of subsections 26(1) and 26A(1) will operate to enlarge the circumstances in which the use of surveillance devices is lawful. Further, if that is so, the committee seeks the Attorney-General’s advice as to the rationale for not dealing comprehensively with the legality of the use of surveillance devices by ASIO in the ASIO Act.**

*Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee’s terms of reference.*



**Undue trespass on personal rights and liberties—issue of warrants  
Schedule 2, item 29, proposed subsections 26(1) and 26(3)**

Proposed section 26 empowers the Minister to issue a surveillance device warrant. The committee's normal expectation is that the power to issue a warrant will be given to a magistrate or judicial officer to ensure that there is an appropriate degree of independence, given that warrants authorise significant coercive powers apt to negatively impact on individual rights and liberties. The committee notes, for example, that warrants issued under the *Surveillance Devices Act 2004* (the SD Act) must be issued by a judicial officer and that the issuing judicial officer must have regard to a number of factors listed in section 16 of the SD Act, including the extent to which the privacy of any person is likely to be affected. The committee notes that the factors in section 16 of the SD Act are not included in the test for the issue of a warrant in proposed subsection 26(3) of this bill. However, the committee notes that the power to issue equivalent warrants in the existing provisions is also reposed in the Minister.

**The committee therefore draws this provision (and the safeguards in relation to the issuing of warrants under the *Surveillance Devices Act 2004* which are not replicated in the provision) to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

*The committee draws Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

**Undue trespass on personal rights and liberties—issue of warrants  
Schedule 2, item 29, proposed paragraphs 26(2)(b) and (c)**

Proposed paragraphs 26(2)(b) and (c) have the effect that a single surveillance device warrant may authorise the use of multiple numbers, combinations and kinds of devices. Enabling this outcome is a major policy objective of new Subdivision D (use of surveillance devices). This facility to apply for a single warrant is not associated with any change to the nature of the matters of which the Minister must be satisfied before a warrant is issued in relation to a particular person, particular premises or an object or class of objects. It is noted in the explanatory memorandum that the 'existing thresholds under the

ASIO Act remain for these subjects and are incorporated into this subdivision' (pp 73–74).

The explanatory memorandum (p. 74) continues:

A single surveillance device warrant will replace the need for ASIO to obtain multiple surveillance device warrants for the purpose of using surveillance devices against a person who is the subject of an investigation, and will allow ASIO to use different kinds of surveillance devices in respect of him or her. Currently, for example, in order for ASIO to monitor a person's conversations, activities and location, ASIO would need to obtain two separate warrants, a listening device warrant in respect of the person to record or listen to words, images, sounds or signals on the premises where the person is or is likely to be, and a tracking device warrant in respect of the person in order to track the person. For both these warrants, the relevant threshold for which the Minister must be satisfied, is that the person is engaged in or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in activities prejudicial security and that ASIO's use of a listening device to listen to the person's conversations, or a tracking device applied to an object they use or wear, is likely to assist ASIO to carry out its function of obtaining intelligence relevant to security.

The committee notes that the practical result of this item is to make it more convenient for ASIO to undertake more comprehensive surveillance of persons, premises and objects. In so doing, the accountability provided by requiring multiple warrant applications is diminished. On the other hand, the committee notes that the criteria to be applied, in determining whether a warrant covering multiple devices should be issued, remains unaltered. **The committee draws these provisions to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

*The committee draws Senators' attention to the provisions as they may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

### **Undue trespass on personal rights and liberties Schedule 2, item 29, proposed section 26F**

Proposed section 26F allows the Director-General to determine that specified powers under the ASIO Act (section 26C or 26D or subsection 26E(1) or (2)) cannot be exercised by specified persons. This measure is said to be 'an

important safeguard in ensuring that, while a particular individual, or class of individuals, may be appropriately performing certain functions or services for ASIO, they are not within the categories of persons who can perform ASIO's powers by use of surveillance devices without warrant' (explanatory memorandum, pp 78–79).

Given the importance of this objective, that is, ensuring that the use of surveillance devices without warrant is used by appropriately qualified ASIO staff, **the committee seeks further advice from the Attorney-General as to whether consideration has been given to excluding 'ASIO affiliates' from the exercise of these powers unless they are positively determined to be appropriate persons to exercise such powers. The committee notes that this approach would provide a more robust safeguard than the current proposed approach. It is not clear from the explanatory memorandum whether this alternative has been considered.**

*Pending the Attorney-General's reply the committee draws Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

### **Undue trespass on personal rights and liberties Schedule 2, item 36**

This item inserts the new words, 'against persons and things' after 'any force' in existing paragraph 27A(2)(a). It thereby clarifies that persons executing warrants under this section can 'use reasonable force against both persons and things in executing that warrant where the use of force is both reasonable and necessary' (explanatory memorandum, p. 80).

In general the committee expects that the necessity of authorising force against persons in the execution of warrants to be examined and justified in explanatory memoranda. **The committee therefore seeks the Attorney-General's advice as to the justification for the authorisation of force against persons in this context.**

*Pending the Attorney-General's reply the committee draws Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

## **Undue trespass on personal rights and liberties**

### **Schedule 2, item 41, Subdivision G—Identified person warrants**

This item separates current Division 2 into two subdivisions and inserts new sections 27C, 27D, 27E, 27F, 27G, 27H and 27J into new Subdivision G—Identified person warrants. This subdivision introduces a new form of warrant which will enable ASIO to utilise multiple warrant powers to collect intelligence in relation to the activities of an identified person that are, or are likely to be prejudicial to security. It is a response to Recommendation 29 of the PJCIS report.

There is a detailed discussion of the provisions in the explanatory memorandum which emphasises a number of features which promote the accountability of the process:

- the relevant thresholds for the issue of a warrant are more stringent than those under Division 2, Part III of the ASIO Act;
- there is an extra layer of authorisation for the exercise of powers under these warrants (the Minister's initial authorisation provides only 'conditional approval');
- maximum limits consistent with those already existing in the Act have been included;
- the 'accountability mechanisms that apply to an identified person warrant are at least as strict as those that apply to comparable ASIO warrants' (p. 82); and
- the 'Inspector-General of Intelligence and Security's oversight powers in relation to the new identified person warrant are identical to his or her powers to oversight all existing ASIO warrants' (p. 83).

In light of the justification for these new powers and the accountability measures outlined in the explanatory memorandum and statement of compatibility, **the committee draws this provision to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

*The committee draws Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

## **Undue trespass on personal rights and liberties—evidentiary certificates**

### **Schedule 2, item 47, proposed section 34AA**

This provision is said to be based on similar provision in the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004* (the SD Act). However section 62 of the SD Act contains the following additional provisions:

- (5) A certificate must not be admitted in evidence under subsection (2) in prosecution proceedings unless the person charged or a solicitor who has appeared for the person in those proceedings has, at least 14 days before the certificate is sought to be so admitted, been given a copy of the certificate together with reasonable evidence of the intention to produce the certificate as evidence in those proceedings.
- (6) Subject to subsection (7), if, under subsection (2), a certificate is admitted in evidence in prosecution proceedings, the person charged may require the person giving the certificate to be called as a witness for the prosecution and cross-examined as if he or she had given evidence of the matters stated in the certificate.
- (7) Subsection (6) does not entitle the person charged to require the person giving a certificate to be called as a witness for the prosecution unless the court before which the prosecution proceedings are brought, by order, allows the person charged to require the person giving the certificate to be so called.
- (8) Any evidence given in support, or in rebuttal, of a matter stated in a certificate given under subsection (2) or (3) must be considered on its merits and the credibility and probative value of such evidence must be neither increased nor diminished by reason of this section.

These subsections, especially (5) and (6) appear to provide further safeguards, and the committee is interested in whether analogous provisions would be appropriate in this context. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states (p. 55) that ‘procedural safeguards have generally been included with provisions for evidentiary certificates directed to a technical/scientific context’, but does not specify examples. The explanatory memorandum explains how this provision works

but it is not clear why it has been considered necessary to include it. **The committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach, including whether the additional provisions outlined above would be appropriate in this context.**

*Pending the Attorney-General's reply the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

### **Undue trespass on personal rights and liberties—immunity from civil and criminal liability**

#### **Schedule 3, general comment**

Schedule 3 of the bill proposes to establish a statutory framework for the conduct of 'special intelligence operations' (SIOs), which includes granting limited immunity from civil and criminal liability for conduct undertaken by ASIO in an SIO.

The committee notes that the creation of such a scheme was recommended by the Parliamentary Joint Committee on Intelligence and Security in its *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (May 2013). Specifically, the committee recommended 'that the *Australian Security Intelligence Organisation Act 1979* be amended to create an authorised intelligence operations scheme, subject to similar safeguards and accountability arrangements as apply to the Australian Federal Police controlled operations regime under the *Crimes Act 1914*.' The explanatory memorandum to the bill (at p. 96), however notes that:

While the SIO scheme is based broadly on the controlled operations scheme in the Crimes Act, appropriate modifications have been made to reflect the differences between a law enforcement operation to investigate a serious criminal offence in order to gather admissible evidence, and a covert intelligence-gathering operation conducted for national security purposes.

The committee notes that it would assist the committee's scrutiny of this schedule if it were aware (in a systematic manner) of the differences between the proposed SIO scheme and the controlled operations scheme. **The committee therefore requests advice from the Attorney-General as to the differences between the proposed SIO scheme in schedule 3 of the bill and the controlled operations scheme in Part IAB of the *Crimes Act 1914*. In particular, the committee is interested in information as to:**

- **any differences in the authorisation process (including matters on which authorising officers must be satisfied);**
- **any differences in the immunities (civil and criminal) provided in the two schemes;**
- **any differences in reporting and oversight mechanisms; and**
- **any other safeguards which are present in the controlled operations scheme that are not replicated in the proposed SIO scheme.**

*Pending the Attorney-General's reply the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

**Undue trespass on personal rights and liberties—use of evidence obtained as a result of a person engaging in criminal activity  
Schedule 3, item 3, proposed section 35A**

Proposed section 35A modifies the operation of the courts' general discretion to exclude evidence obtained through unlawful conduct. Subsection 35A(2) provides that in determining whether evidence should be admitted or excluded, the fact that the evidence was obtained as a result of criminal activity is to be disregarded if the person was an authorised participant in an SIO (special intelligence operation) and the criminal activity was special intelligence conduct (i.e. conduct for which a person would, but for section 35K, be subject to civil or criminal liability). This modification to the rules of evidence may be considered to affect rights associated with the provision of a fair trial. The explanatory memorandum (p. 100) justifies the modification as follows:

It is appropriate that section 35A provides statutory guidance in the exercise of judicial discretion concerning the admissibility in evidence of information obtained during an SIO. While the focus of an SIO is on the collection of intelligence as distinct from evidence, it is appropriate as a matter of policy to remove the possibility that the discretion to exclude such evidence might be exercised by reason of its connection with an SIO alone. Section 35A makes clear that such evidence is able to be adduced if it is otherwise admissible in accordance with general rules of evidence. For example, evidence gathered via an SIO might be

excluded on the basis that its probative value is outweighed by its prejudice to the interests of a party.

It is an appropriate starting point that information obtained in an SIO is admissible in accordance with general rules of evidence, as distinct from a general prohibition on the admissibility of such information in evidence, subject to limited exceptions. With the increasing crossover of laws regulating conduct that was previously exclusively in the security intelligence realm, there has been an increase in interoperability between ASIO and law enforcement. In particular, there has been an increase in the need for intelligence collected by ASIO to be used as evidence in the prosecution of these offences. An example of this, as evidenced in completed prosecutions for terrorism offences, is in relation to offences concerning acts which are preparatory to terrorist acts, such as collecting or making documents likely to facilitate a terrorist act under section 101.5 of the Criminal Code.

**The committee notes this justification, however the committee requests further advice from the Attorney-General as to whether this approach is consistent with that taken in relation to the controlled operations scheme in Part IAB of the *Crimes Act 1914* and, if it is not, a rationale as to why a different approach is required for special intelligence operations.**

*Pending the Attorney-General's reply the committee draws Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

**Undue trespass on personal rights and liberties—immunity from civil and criminal liability**

**Schedule 3, item 3, proposed sections 35B and 35C**

Special intelligence operations must be authorised and carried out for a purpose relevant to the performance of specified functions of the Organisation (see schedule 3, item 1, definition of special intelligence operation). Proposed sections 35B and 35C provide for the authorisation of SIOs and the granting of SIO authorities.



Pursuant to proposed subsection 35C(1) the authorising officer must be satisfied on reasonable grounds of a number of matters before authorising an SIO. These matters are set out in subsection 35C(2):

- the operation will assist the Organisation in performing its special intelligence functions;
- the circumstances are such as to justify the conduct of an SIO;
- any unlawful conduct will be limited to the maximum extent consistent with the effective conduct of the operation;
- the SIO will not be conducted in such a way that a person is likely to be induced to commit an offence (against a law of Commonwealth, a State or a Territory) that the person would not otherwise have intended to commit; and
- any conduct will not cause death or serious injury, involve the commission of a sexual offence, or result in significant loss of, or serious damage to, property.

Although such operations may only be authorised by a senior officer (the Director-General or the Deputy Director-General), it remains the case that the authorisation process is internal to ASIO. Put differently, SIOs may be authorised without any external oversight. Given that the immunity granted in relation to unlawful conduct may impact on the personal rights and liberties of individuals, the lack of external oversight of the exercise of this power is a matter of concern to the committee. This approach may be contrasted with the authorisation process associated with warrants which typically involve a judicial officer and, in the case of ASIO warrants, involve the Minister.

The explanatory memorandum (at p. 101) argues that this approach to authorising special intelligence operations is justified:

The authorisation process for an SIO is internal to the Organisation, which appropriately reflects the fact that the conduct of SIOs is an internal, operational matter, on which the Director-General or a Deputy Director-General is best placed to make decisions given their detailed awareness of the security environment, and their practical expertise in relation to the conduct of intelligence operations. The internal authorisation process established by Division 4 is further necessary to facilitate operational efficiency and protect the security of covert intelligence operations. In addition to the scrutiny of an application by the authorising officer (who holds an appropriately senior position within the Organisation), accountability and oversight arrangements are

given effect via reporting requirements in new section 35Q and subsection 94(1C)...In short, these provisions establish, respectively, the Organisation's reporting requirements to the Minister and the IGIS on the exercise of powers under Division 4, and a reporting requirement to the Parliament as part of the Organisation's annual report. These requirements are additional to the general jurisdiction of IGIS to examine all of the Organisation's activities, including those in relation to SIOs, under section 8 of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act), and the mandate of the PJCIS to conduct inquiries into such activities on a reference from the Attorney-General, or on a resolution of either House of the Parliament under section 29 of the *Intelligence Services Act 2001* (IS Act).

**In light of this justification, the committee draws these provisions to the attention of Senators and leaves the question of whether the authorisation process for special intelligence operations strikes an appropriate balance between pursuing national security objectives and the rights of persons affected by the immunities from criminal and civil proceedings to the Senate as a whole.**

*The committee draws Senators' attention to these provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

### **Undue trespass on personal rights and liberties—immunity from civil and criminal liability**

#### **Schedule 3, item 3, proposed section 35H**

Proposed section 35H describes the effect of a special intelligence operation (SIO) authority. The provision provides that an SIO authority has the effect of authorising 'each person who is identified...to engage in the special intelligence conduct specified in the special intelligence operation authority in respect of that person'. As stated in the explanatory memorandum, proposed section 35H is 'material to the application of the protection from criminal or civil liability in section 35K, which is strictly limited to conduct authorised under an SIO authority' (p. 107).

From a scrutiny perspective, it is a matter of concern that it is quite possible that the limits of conduct authorised by an SIO authority may not be clear. The result is that the extent of the trespass on personal rights occasioned by

the immunity from liability will also not be clear. Proposed section 35D sets out the required content of a special intelligence operation authority. Paragraph 35D(1)(c) provides that the authority must ‘state a general description of the nature of the special intelligence conduct that the persons referred to’ in the authority ‘may engage in’.

**Under the provisions of the bill in its current form the limits of authorised conduct under an SIO may be unclear because an SIO authority is only required to state authorised conduct in general terms. The committee therefore seeks the Attorney-General’s advice as to whether it is possible to require authorised conduct to be particularised with more clarity.**

*Pending the Attorney-General’s reply the committee draws Senators’ attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee’s terms of reference.*

**Undue trespass on personal rights and liberties—immunity from civil and criminal liability**  
**Schedule 3, item 3, proposed section 35J**

Proposed section 35J provides that special intelligence operation (SIO) applications and authorities are not invalidated by defects unless the defect affects the application, authority or variation in a ‘material particular’. The explanatory memorandum states that this ‘provision is designed to ensure that minor matters relating to form or process do not invalidate an application, authority or variation’ (p. 107). However, there is little guidance in the provision as to how to distinguish between minor and material matters. Given that the authorised conduct is apt to trespass on the rights of persons affected in significant ways, the committee’s general expectation is that legality of the authorisation or application should be clearly established and that it is incumbent on the ASIO to implement appropriate procedures to obviate the risk of defects.

**The committee therefore seeks the Attorney-General’s further advice as to the justification for the necessity of this provision. Further, if the provision is considered necessary, the committee seeks advice as to the sort of defects that would not invalidate applications and authorisations**

(and whether more detailed guidance on this may be included in the provision).

*Pending the Attorney-General's reply, the committee draws Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

**Undue trespass on personal rights and liberties—immunity from civil and criminal liability**  
**Schedule 3, item 3, proposed section 35K**

This provision protects a person from civil and criminal liability as a result of their 'participation' in a special intelligence operation if specified conditions are met. The explanatory memorandum (p. 108) explains that:

The application of the immunity is subject to satisfaction of the conditions specified in subsections 35K(1) and (2), which ensure that it is limited strictly to authorised conduct under an SIO, and that the immunity is proportionate to the purpose of an SIO by excluding from its scope several serious offences including those in the nature of entrapment.

The explanatory memorandum includes a detailed outline of the scope of the provision and justification for it. In addition to detailing the specific requirements that will need to be met, the explanatory memorandum (pp 108–109) notes that:

A number of safeguards apply to the immunity conferred by section 35K. These safeguards [described further in the EM], ensure that its application is duly limited and is subject to independent oversight, and that there remains scope for the payment of compensation to aggrieved individuals in appropriate cases.

**The committee notes this justification, however the committee requests further advice from the Attorney-General as to whether this approach (including in relation to payment of compensation in respect of damage to property and personal injury and the status of civilian participants in operations) is consistent with that taken in relation to the controlled operations scheme in Part IAB of the *Crimes Act 1914* and, if it is not, a rationale as to why a different approach is required for special intelligence operations.**

*Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

**Undue trespass on personal rights and liberties—offences  
Schedule 3, item 3, proposed section 35P**

Proposed section 35P creates two new offences in relation to the unauthorised disclosure of information relating to an SIO.

Subsection 35P(1) creates an offence if 'a person' discloses information and the information relates to a special intelligence operation. The penalty is imprisonment for 5 years. Subsection 35P(2) creates an aggravated version of this offence. It applies where the disclosure is (i) intended to endanger the health or safety of any person or prejudice the effective conduct of an SIO, or (ii) will endanger the health or safety of any person or prejudice the effective conduct of an SIO. The penalty is imprisonment for 10 years. The offences may be committed by any person, including participants in an SIO.

The explanatory memorandum suggests these 'offences are necessary to protect persons participating in an SIO and to ensure the integrity of operations, by creating a deterrent to unauthorised disclosures, which may place at risk the safety of participants or the effective conduct of the operation' (at p. 111). The explanatory memorandum also explains that the offences may be committed by any 'persons to whom information has been about an SIO has been communicated in an official capacity, and persons who are the recipients of an unauthorised disclosure on information, should they engage in subsequent disclosure'.

Although the purposes of protecting the integrity of operations and the safety of participants in operations can be readily understood, it must also be noted that these offences are drafted so as to have broad application. First, they are not limited to initial disclosures of information relating to an SIO but cover all subsequent disclosures (even, it would seem, if the information is in the public domain). In addition, these new offences as currently drafted may apply to a wide range of people including whistleblowers and journalists.

Second, the primary offence (unlike the aggravated version) is not tied to the underlying purposes of the criminalisation of disclosure. This means that the

offence (under subsection 35P(1)) could be committed even if unlawful conduct in no way jeopardises the integrity of operations or operatives. The concern about the breadth of application of these offences, in light of their purposes, is arguably heightened given that whether or not the disclosure of information will be caught by the provisions depends on whether or not the information relates to an SIO, a question which depends on an authorisation process which is internal to the Organisation.

**As the justification for the breadth of application of these provisions is not directly addressed in the explanatory memorandum the committee seeks a more detailed justification from the Attorney-General in this regard. The committee emphasises that its interest is not only in the underlying purposes served by the provisions, but whether these purposes could be achieved by offences that are more directly connected and proportionate to the achievement of those purposes.**

A further reason why these offences may be considered to be too broad in their application is that it is possible they may apply to the disclosure of information even if the person who discloses the information is not aware that it relates to an SIO. Given the nature of an SIO it is likely that only persons within the Organisation will know whether information relates to an SIO. It is also relevant to note that the boundaries of an SIO, and therefore what information ‘relates’ to such an operation, may be unclear to the extent that an SIO authority need only state ‘a general description of the nature of the special intelligence conduct that the persons’ authorised to engage in conduct for the purposes of the SIO ‘may engage in’ (paragraph 35D(1)(c)). **The committee therefore also seeks clarification about (and a justification for) the applicable fault requirement in relation to the element that ‘the information relates to a special intelligence operation’ (paragraph 35P(1)(b) and paragraph 35P(2)(b)).**

*Pending the Attorney-General’s reply the committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.*

**Undue trespass on personal rights and liberties—penalties**  
**Schedule 3, item 3, proposed subsection 35P(1)**

The explanatory memorandum (at p. 113) and statement of compatibility (at p. 19) explicitly deal with the appropriateness of the penalties imposed for the offences detailed above. It is suggested that the penalties are consistent with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The consequences of the prohibited conduct is said to be ‘particularly dangerous or damaging’.

The committee notes that the breadth of application of the offence in subsection 35P(1), which applies to any person and is not limited to intended or actual consequences of the offence, means that the offence may be proved even though the conduct did not in fact compromise the integrity of operations or place at risk the safety of any participants in an SIO. **In light of this, the committee seeks a fuller justification from the Attorney-General as to why the penalty of imprisonment for 5 years is considered appropriate given that the breadth of application of the offence provision.**

*Pending the Attorney-General’s reply the committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.*

**Undue trespass on personal rights and liberties—onus of proof**  
**Schedule 3, item 3, proposed subsection 35P(3)**  
**Schedule 6, item 2, proposed subsection 18(2A)**  
**Schedule 6, item 4, proposed subsections 18A(2) and 18B(2)**

The proposed new offences in subsections 35P(1) and 35P(2) are subject to an offence-specific defence in subsection 35P(3). The defendant bears an evidential burden in relation to the defences listed in this subsection.

In addition, several defences relating to proposed new offences in schedule 6 (see proposed subsections 18(2A), 18A(2) and 18B(2)) also provide that the defendant bears an evidential burden in relation to those defences.

As there is a detailed justification for this approach in the explanatory memorandum (pp 112, 133, 140–141 and 145), **the committee draws these**

**provisions to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*The committee draws Senators' attention to these provisions as they may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

### **Undue trespass on personal rights and liberties—evidentiary certificates**

#### **Schedule 3, item 3, proposed section 35R**

This provision seeks to permit an authorising officer to issue a written certificate setting out facts relevant to the granting of a special intelligence operation authority and the certificate will constitute prima facie evidence of these facts. The explanatory memorandum notes that this 'creates a rebuttable presumption as to the existence of the factual basis on which the authorising officer was satisfied the relevant issuing criteria for an SIO authority were met.' (p. 114)

The explanatory memorandum argues (p. 114) that this is appropriate:

...to minimise the time that authorising officers (who are senior position-holders within the Organisation, being the Director-General and Deputy Directors-General) must spend away from their duties providing evidence in proceedings as to the factual basis for the granting of an authority. The prima facie nature of evidentiary certificates issued under section 35R is consistent with Commonwealth policy that a party to proceedings should generally be accorded an opportunity to adduce evidence to the contrary, and that a court should adjudicate on the respective weight to be placed on the evidence before it in proceedings.

While the committee appreciates the importance of ensuring that senior officers are able to spend their time efficiently, whether or not the proposed reversal of onus is appropriate depends significantly on the types of facts likely to be included in an evidentiary certificate. **The committee therefore seeks the Attorney-General's further advice as to the justification for this provision, including possible general examples of the content of these evidentiary certificates.**



*The committee draws Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

**Undue trespass on personal rights and liberties—penalties  
Schedule 6, item 1**

There is a detailed justification for raising the penalty applying to the offence for unauthorised communication of information in subsection 18(2) of the ASIO Act from two to 10 years (explanatory memorandum pp. 130-132). In light of this explanation, **the committee draws this provision to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*The committee draws Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014**

*[Digest 4/14 – Report 5/14]*

On 28 August 2014 the Parliamentary Secretary to the Minister for Foreign Affairs (Senator Mason) tabled an addendum to the explanatory memorandum in the Senate and the bill was read a third time.

The committee notes that this addendum includes information which the committee requested be included in the explanatory memorandum in its *Fifth Report of 2014* (pp 176–184). The committee’s intention in requesting that important information be included in explanatory memoranda is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill. **The committee therefore thanks the Parliamentary Secretary for tabling this additional information in accordance with the committee’s request.**

### **Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014**

*[Digest 5/14 – Reports 7 and 9/14]*

On 28 August 2014 the House of Representatives agreed to seven Government amendments to this bill and the Parliamentary Secretary to the Treasurer (Mr Ciobo) presented a supplementary explanatory memorandum.

Government amendments (4), (5) and (6) will allow regulations to prescribe circumstances in which, despite another provision of the section, ‘all or part of a benefit is to be treated as conflicted remuneration.’

The supplementary explanatory memorandum simply restates the effect of the provisions without providing advice as to the justification for the use of delegated legislation for potentially significant material and also without explaining why it is appropriate for delegated legislation to be able to override the effect of the primary legislation. While it appears that the provisions might be intended to have a beneficial effect for consumers, it would be appropriate for this to be clearly expressed in the explanatory memorandum and to include possible examples for the use of these regulation-making powers. **The committee therefore seeks the Minister advice about these matters.**

*Pending the Minister's reply, the committee draws Senators' attention to the provisions as they may be considered to delegate legislative powers inappropriately in breach of principle 1(a)(iv) of the committee's terms of reference.*

**Land Transport Infrastructure Amendment Bill 2014**

*[Digest 2/14 – no comment]*

On 28 August 2014 the Senate agreed to one amendment and the bill was read a third time.

The committee has no comment on this amendment.

## SCRUTINY OF STANDING APPROPRIATIONS

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the Committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42<sup>nd</sup> Parliament.

### **Bills introduced with standing appropriation clauses in the 43rd Parliament since the previous *Alert Digest***

Nil

### **Other relevant appropriation clauses in bills**

Nil