

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.

Aged Care (Living Longer Living Better) Amendment (Review) Bill 2016

Purpose	This bill seeks to amend the <i>Aged Care (Living Longer Living Better) Bill 2013</i> to specifically include a review of the funding arrangements for residential aged care
Sponsor	Ms Collins MP
Introduced	House of Representatives on 10 October 2016

The committee has no comment on this bill.

Australian Postal Corporation (Unsolicited Political Communications) Bill 2016

Purpose	This bill seeks to prevent Australia Post from delivering unaddressed political material to premises if there is a sign displayed at that premises specifically requesting that unaddressed or political material not be delivered
Sponsor	Mr Wilkie
Introduced	House of Representatives on 17 October 2016

Trespass on personal rights and liberties—freedom of political communication

Item 1 of Schedule 1

The main amendment in this bill seeks to prohibit Australia Post from delivering unaddressed political material to premises if there is a sign displayed at the premises specifically requesting that unaddressed or political material not be delivered. This applies to material which is from, or contains information about, a registered political party, a candidate in a federal election, or a Member of the House of Representatives or a Senator.

The statement of compatibility asserts that the bill strengthens a person's right to privacy and acknowledges that the bill also engages the freedom of political communication. Item 2 of Schedule 1 provides that the amendment does not apply to the extent (if any) that it would infringe the constitutional doctrine of the implied freedom of political communication. The statement of compatibility concludes that any restrictions on this freedom are 'considered fair and reasonable in order to protect the rights of others'. The explanatory materials do not undertake an analysis which seeks to establish the compatibility of the measure with the free expression rights in international law nor with the implied freedom of political communication as recognised in Australian constitutional law.

The committee notes that although the measure may be considered to be reasonably proportionate to meet its objective, the committee considers it would have benefited from a more detailed justification as to how the bill is compatible with the right to freedom of political communication, 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.

Banking Commission of Inquiry Bill 2016

Purpose	This bill seeks to establish a commission of inquiry into banking in Australia with the powers of a Royal Commission
Sponsor	Mr Katter
Introduced	House of Representatives on 10 October 2016

The committee has no comment on this bill.

Commonwealth Electoral Amendment (Foreign Political Donations) Bill 2016

Purpose	This bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> to make it unlawful for a political party or candidate to receive a donation from a 'foreign person'
Sponsor	Mr Wilkie
Introduced	House of Representatives on 10 October 2016

The committee has no comment on this bill.

Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016

Purpose	<p>This bill seeks to amend the <i>Corporations Act 2001</i> to:</p> <ul style="list-style-type: none"> • remove the current exemption from the ban on conflicted remuneration for benefits paid in relation to certain life risk insurance products; • enable the Australian Securities and Investments Commission to make a legislative instrument to permit benefits in relation to life risk insurance products to be paid provided certain requirements are met; and • introduce a ban on volume based payments in life risk products
Portfolio	Treasury
Introduced	<p>House of Representatives on 12 October 2016</p> <p><i>This bill is substantively similar to a bill introduced in the previous Parliament</i></p>

The committee has no comment on this bill.

Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2016

Purpose	This bill seeks to amend the <i>Criminal Code Act 1995</i> to create a new criminal offence where a person over 18 years of age misrepresents their age in online communications with a person they believe to be under 16 years of age for the purposes of encouraging a physical meeting or committing an existing offence
Sponsors	Senators Kakoschke-Moore, Griff, Hinch and Xenophon
Introduced	Senate on 12 October 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

This committee commented on the measures in this bill when it considered the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013 in the previous Parliament (see pages 3–5 of the committee’s *Alert Digest No. 1 of 2014*). The committee takes this opportunity to re-state these comments below.

Trespass on personal rights and liberties—penalties Schedule 1, item 1, proposed subsections 474.40(1) and (2)

The committee’s expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. These subsections impose the possibility of significant custodial penalties (respectively 5 years and 8 years imprisonment), however, this issue is not addressed in the explanatory memorandum. **The committee therefore seeks the Senators’ further advice as to the justification for the penalties imposed by these subsections.**

Pending the Senators’ advice, 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.

Trespass on personal rights and liberties—legal burden of proof
Schedule 1, item 1, proposed subsection 474.41(1)

This subsection provides that for the purposes of prosecuting an offence ‘evidence that the recipient was represented to the sender as being under or of a particular age is, in the absence of evidence to the contrary, proof that the sender believed the recipient to be under or of that age’.

The subsection appears to introduce a presumption that a defendant believes a particular matter in certain circumstances. As such, the intended effect of the provision may be similar to that achieved by expressly placing a legal burden of proof on a defendant to disprove a particular matter in specified circumstances. The explanatory memorandum simply restates the effect of this provision and does not provide information about the rationale for the approach.

The committee therefore seeks the Senators’ advice as to whether this provision may be considered to undermine the common law principle that those charged with an offence have the right to be presumed innocent and, given that it appears that the provision may operate in a way that in practical effect reverses the burden of proof, the committee requests a detailed justification for the proposed approach which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50-52).

Pending the Senators’ advice, 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.

Trespass on personal rights and liberties—evidential burden of proof
Schedule 1, item 1, proposed subsections 474.42(1) and 474.42(3)

This section outlines defences against the offences in proposed section 474.40. Reading subsections 474.42(1) and (2) together, it is a defence to prosecution that the defendant had a reasonable belief that the recipient was not under 18 years of age (see also comment below in relation to a possible drafting error in proposed subsection 474.42(1)). Subsection 474.42(3) provides that a person is not criminally responsible if the person is a law enforcement officer acting

in the course of his or her duties and the conduct of the person is reasonable in the circumstances.

Defendants bear an evidential burden in relation to the matters referred to in these defences, but the explanatory memorandum does not justify the proposed approach.

The committee therefore seeks the Senators' advice as to the rationale for imposing an evidential burden of proof on the defendant which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50-52). The committee also seeks the Senators' advice as to the appropriateness of including the vague language of reasonableness in the circumstances defining the availability of the defences.

Pending the Senators' advice, 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.

Possible drafting error

Schedule 1, item 1, proposed subsection 474.42(1)

Proposed subsection 474.42(1), provides that 'it is a defence to a prosecution of an offence against section 474.40 that the defendant believed at the time the communication was transmitted that the recipient was not under 18 years of age'. However, given the offence relates to communications with persons believed to be under 16 years of age, it appears that the reference in proposed subsection 474.42(1) to '18 years of age' may be a drafting error. **The committee draws this possible error to the attention of the Senators sponsoring this bill.**

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

Criminal Code Amendment (Private Sexual Material) Bill 2016

Purpose	This bill seeks to amend the <i>Criminal Code Act 1995</i> to introduce three new offences in relation to the use of a carriage service to distribute private sexual material.
Sponsors	Mr Watts and Ms TM Butler
Introduced	House of Representatives on 17 October 2016 <i>This bill is identical to a bill introduced in the previous Parliament</i>

As this bill is identical to a bill introduced in the previous Parliament the committee restates its views as outlined in *Alert Digest No. 12 of 2015* and its *First Report of 2016*, both of which can be found on the committee's website at http://www.aph.gov.au/senate_scrutiny.

The committee thanks the sponsors of the bill for including additional information in the explanatory material in line with the committee's recommendation.

Criminal Code Amendment (War Crimes) Bill 2016

Purpose	This bill seeks to amend the <i>Criminal Code Act 1995</i> to ensure consistency between Australian domestic law and international law in relation to the treatment of members of organised armed groups in non-international armed conflicts
Portfolio	Attorney-General
Introduced	House of Representatives on 12 October 2016

Trespass on personal rights and liberties—reversal of evidential burden of proof **Schedule 1, items 8–11**

Items 8 to 11 of Part 2 of Schedule 1 each introduce a defence of proportionality to a number of existing offences. The defences will apply if the relevant death or injury results from an attack on a military objective, launched in circumstances where the perpetrator reasonably did not expect that the attack would cause excessive incidental civilian death or injury. In a note to each of the proposed subsections in these items it indicates that a defendant will bear an evidential burden in relation to establishing the matters to make out this defence.

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects, as a matter of routine, any such reversal of the burden of proof to be justified. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (see in particular pp 50-52).

As neither the statement of compatibility nor the explanatory memorandum address this issue the committee seeks a justification from the Attorney-General as to why the items propose to reverse the evidential burden of proof which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50-52).

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.

Customs Amendment (2017 Harmonized System Changes) Bill 2016

Purpose	This bill seeks to amend the <i>Customs Act 1901</i> to: <ul style="list-style-type: none">• implement consequential changes resulting from the fifth review of the International Convention on Harmonized Commodity Description and Coding system;• provide for the collection of appropriate import duties and insert references in relation to biofuels and biofuel blends
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 13 October 2016

The committee has no comment on this bill.

Customs Tariff Amendment (2017 Harmonized System Changes) Bill 2016

Purpose	This bill seeks to amend the <i>Customs Tariff Act 1995</i> to create, change and clarify tariff classifications in the Act
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 13 October 2016

The committee has no comment on this bill.

Customs Tariff Amendment (Expanded Information Technology Agreement Implementation and Other Measures) Bill 2016

Purpose	This bill seeks to amend the <i>Customs Tariff Act 1995</i> to: <ul style="list-style-type: none">• create new tariff subheadings to allow for certain information technology products to be separately identified;• amend the customs duty rates for selected tariff subheadings so that they incrementally reduce to Free; and• remove obsolete customs duty rates
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 20 October 2016

The committee has no comment on this bill.

Fairer Paid Parental Leave Bill 2016

Purpose	This bill seeks to amend the <i>Paid Parental Leave Act 2010</i> to introduce revised arrangements for paid parental leave
Portfolio	Social Services
Introduced	House of Representatives on 20 October 2016

Trespass on personal rights and liberties—retrospective effect Clause 2, commencement

Clause 2 of the bill sets out when the provisions of the bill are to commence. It states that Schedule 1, which seeks to amend the paid parental leave scheme, will commence on the first 1 January, 1 April, 1 July or 1 October to occur after the day the Act receives Royal Assent.

Depending on what date the bill may pass the Parliament, this could mean that the changes to the paid parental leave scheme could commence in a matter of weeks after the Act becomes law.

The paid parental leave scheme gives parents access to 18 weeks of government-funded parental leave pay following the birth of, or adoption of, their child. The amendments proposed in this bill would mean, for some prospective parents, the 18 weeks parental leave pay would not be available after the relevant provisions commence. This could apply to women who are already pregnant and who have made decisions regarding the amount of leave to take from their workplace and childcare arrangements on the basis of the existing paid parental leave scheme.

Although it may be considered that the commencement of the provision is not, technically speaking, retrospective, there may be a question of fairness as to whether those who are pregnant should have their entitlement to parental leave pay removed after they have already made decisions regarding work and care based on the existing entitlements. Neither the explanatory memorandum nor the statement of compatibility addresses this issue. **The committee therefore seeks the Minister’s advice as to the justification for this approach.**

Pending the Minister'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.

Foreign Acquisitions and Takeovers Amendment (Strategic Assets) Bill 2016

Purpose	This bill seeks to amend the <i>Foreign Acquisitions and Takeovers Act 1975</i> to prevent foreign persons or entities from acquiring a 10 per cent or greater interest in Australian land, water or other assets that are of strategic economic or strategic defensive importance to Australia
Sponsor	Mr Katter
Introduced	House of Representatives on 10 October 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

This committee commented on the measures in this bill when it considered the Foreign Acquisitions and Takeovers Amendment (Strategic Assets) Bill 2015 in the previous Parliament (see page 22 of the committee's *Alert Digest No. 1 of 2016*). The committee takes this opportunity to re-state these comments below and make some additional comments.

Inappropriate delegation of legislative power Schedule 1, item 1, proposed subsection 2A(3)

Proposed subsection 2A(1) would prohibit foreign persons or entities from acquiring a 10 per cent or greater interest in land, water or other assets that are of 'strategic economic significance or strategic defensive significance to Australia'. Proposed subsection 2A(3) provides for the establishment of a new Foreign Ownership Assessment Board (the FOA Board) to determine whether an asset is of 'strategic economic or defensive significance to Australia for the purposes of proposed subsection 2A(1)'. In addition, proposed subsection 2A(3) states that the regulations must provide for all the relevant details relating to the establishment of the FOA Board.

The committee notes that no justification is provided in the explanatory memorandum as to why it is proposed to provide for the establishment of the FOA Board by regulation, rather than by providing for these matters on the face of the bill. The committee's view is that important matters be included in primary legislation unless a sound justification for the use of delegated legislation is provided. **As the proposed FOA Board is of central importance to the operation of the proposed ban on foreign investment,**

the committee seeks the Member's advice as to the justification for the use of delegated legislation in this instance.

Pending the Member's reply, the committee draws Senators' attention to this 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.

**Trespass on personal rights and liberties—procedural fairness
Schedule 1, item 1, proposed subsection 2A(4)**

Proposed subsection 2A(4) provides that 'if any party to an appeal against the decision of the FOA Board chooses not to be represented by a lawyer (however described), then no other party to the proceedings may be represented by a lawyer'.

The committee notes that restricting access to legal representation may affect a party's right to a fair hearing and as no explanation is provided in the explanatory memorandum as to the rationale for this provision, the committee seeks the Member's advice in this regard.

Pending the Member'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.

Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016

Purpose	This bill seeks to amend the <i>Income Tax Rates Act 1986</i> to apply a 19 per cent income tax rate for holiday makers on amounts up to \$37,000
Portfolio	Treasury
Introduced	House of Representatives on 12 October 2016

The committee has no comment on this bill.

Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016

Purpose	This bill amends various Acts relating to law enforcement to: <ul style="list-style-type: none">• support the establishment of the NSW Law Enforcement Conduct Commission and its Inspector;• align the Independent Broad-based Anti-corruption Commission of Victoria investigative powers with those available to other state anti-corruption bodies; and• amend the definition of ‘lawfully acquired’ in the <i>Proceeds of Crime Act 2002</i> in response to issues raised in a recent court decision
Portfolio	Justice
Introduced	House of Representatives on 19 October 2016

Trespass on personal rights and liberties—retrospective application Schedule 3, item 2

This item provides that the amendments made in item 1 to section 336A of the *Proceeds of Crime Act 2002* (the POC Act) apply in relation to property or wealth acquired *before*, on or after the commencement of this Schedule.

The effect of the amendment to section 336A is to provide that property or wealth is not to be considered as ‘lawfully acquired’ where it has been subject to a security or liability that has been wholly or partially discharged using property that is not ‘lawfully acquired’ (explanatory memorandum, p. 3). The amendment has been prompted by a decision of the Supreme Court of Western Australia in *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5 which held that the court could not consider the source of funds used to satisfy a mortgage over a residential property in determining whether this property was ‘lawfully acquired’, despite the possibility that unlawfully acquired funds had been used to make mortgage repayments. The Court was therefore bound to exclude the residential property from forfeiture.

The explanatory memorandum (at pp 3–4) states that the decision in *Huang* was ‘contrary to the intended meaning and the objects of the POC Act’ and that the amendments are intended to clarify that, where illegitimate funds are used to discharge a legitimately obtained security (such as a mortgage), property or wealth obtained using this security does not constitute ‘lawfully acquired’ property under section 336A.

Although the justification provided is sufficient to justify amending the law with prospective application, the fact that a court has interpreted a law contrary to the executive government’s understanding of the original provisions ‘intended meaning’ is not a sufficient justification to apply the law retrospectively. A central purpose of the rule of law is to enable people to guide their decision-making and actions by reference to the law that applies at the time of those decisions and actions. In general, this principle applies to all persons regardless of their motivation in taking the action (unless acting on a particular motivation itself contravenes a legal obligation).

The statement of compatibility (at p. 9) notes that the international human rights law prohibition on the retrospective operation of criminal laws is not applicable as orders under the POC Act are civil in character. The explanatory memorandum (at pp 33-34) states that the retrospective application of the amendment is necessary:

...to ensure that relevant orders are not frustrated by requiring law enforcement agencies to obtain evidence of, and prove, the precise point in time at which certain property or wealth was acquired. Such a requirement would be unnecessarily onerous and would be contrary to the objects of the Act.’

The committee considers the way in which the retrospective application of a law can impact on personal rights and liberties in the context of civil as well as criminal proceedings. Although the committee accepts that the retrospective application of laws is justifiable in limited instances, it expects to see the case for that conclusion fully articulated. Relying on the fact that it would be onerous for law enforcement agencies to have to prove elements of the case against a person is not generally sufficient to justify the retrospective application of laws. It is also unclear how requiring proof of when property or wealth was acquired would be contrary to the objects of the POC Act. **Noting this, the committee seeks the Minister’s more detailed justification for applying this amendment to property or wealth acquired before the commencement of the Schedule.**

Pending the Minister'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.

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

Purpose	This bill seeks to amend the <i>Migration Act 1958</i> (the Migration Act) to: <ul style="list-style-type: none"> • establish a visa revalidation framework within the Migration Act; • clarify the circumstances in which a visa can cease to be in effect under the Migration Act; and • enable the use of contactless technology to clear travellers through the immigration clearance authority (SmartGates)
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 19 October 2016

Inappropriately defined administrative powers—definition of ‘adverse information’

Item 4, proposed subsection 96A

The bill provides that the Minister may require a person who holds a certain type of visa to complete a revalidation check. Proposed subsection 96A sets out the definition of a ‘revalidation check’ as meaning a check as to whether there is any adverse information relating to a person who holds a visa. What constitutes ‘adverse information’ is not defined in the legislation. The explanatory memorandum explains this as follows (p. 11):

Adverse information is not defined in the Migration Act, and accordingly it is to be given its ordinary general meaning when considering whether the information relating to the person is adverse. Whether the information is adverse will also depend on the circumstances of each particular case and depend on the visa held by the person as a revalidation check will generally be directed to determining whether the person continues to meet the criteria for the visa that has been granted.

The check is to see if there is any adverse information *relating* to the person who holds the visa. This is because the adverse information does not need to be directly about the person, it is enough if it *relates* to the person. While still capturing adverse information that is directly about the person, it is intended that the definition will be broader and capture any adverse information if it relates to the person.

Examples of adverse information relating to the holder of the proposed new longer validity Visitor visa may include, but is not limited to, information that the person:

- has been convicted of an offence since the grant of the visa or since the last revalidation check;
- may present a health concern to the Australian community;
- has spent a period of time in Australia that may be considered de facto residency;
- no longer genuinely intends to stay in Australia for a temporary tourism or business visitor purpose; or
- may present a security risk to the Australian community.

Based on the explanation in the explanatory memorandum it appears that the definition of ‘adverse information’ is intended to be very broad. However, it is not clear why information *relating* to the person would be included in a revalidation check and what this means, over and above information directly about the person. It is also not clear why it is necessary to link the revalidation check to such a broad category of information given that the legislation sets out in detail the criteria for the grant of the initial visa. It is not clear to the committee why the revalidation check is not linked to whether the person still meets the requirements set out for the initial grant of the visa.

The committee seeks the Minister’s advice as to why the revalidation check is linked to whether there is any ‘adverse information’ about the visa holder and not to whether the person still meets the requirements for the initial grant of the visa. It also seeks the Minister’s advice as to why the legislation does not contain a definition of ‘adverse information’ which would give visa holders more certainty as to the type of information that may be taken into account when a revalidation check is undertaken.

Pending the Minister’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.

Delegation of legislative power—use of delegated legislation for important matters**Item 4, proposed subsection 96B(1)**

Proposed subsection 96B(1) provides that the Minister may, from time to time, require a person who holds a visa ‘of a prescribed kind (however described)’ to complete a revalidation check for the visa. The explanatory memorandum explains that these amendments were introduced in response to the *White Paper on Developing Northern Australia* and it is intended to trial a new longer validity Visitor visa (initially available to Chinese nationals) (at p. 5). The discussion in the explanatory memorandum is limited to this new type of visa, as stating that the revalidation checks for visas introduced by the bill will only apply to this new Visitor visa.

However, the bill does not limit the application of the revalidation checks to the Visitor visa. The power in the bill is to require persons to complete a revalidation check in relation to any visa ‘of a prescribed kind’. This gives a broad power which could result in the revalidation check being applied to any category of visa (including spouse or family visas or protection visas). The explanatory memorandum does not explain why it is necessary to include such a broad power in the bill.

The committee seeks the Minister’s advice as to why the power to subject a person to a revalidation check for their visa is expressed to relate to a visa of a prescribed kind, without any limits set as to the type of visa which could be prescribed.

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.

Delegation of legislative power—disallowance**Item 4, proposed subsection 96E(1)**

Proposed subsection 96E(1) provides that the Minister may, by legislative instrument, determine that a specified class of persons holding a visa of a prescribed kind (however described) must complete a revalidation check for the visa. The only condition for the exercise of this power is that the ‘Minister thinks it is in the public interest’ to make the determination.

The determination is not subject to disallowance (due to exemptions set out in the *Legislation (Exemptions and Other Matters) Regulation 2015*). This approach is justified in the explanatory memorandum (at p. 23) on the basis that subsection 96E(3) provides for adequate Parliamentary supervision of the power. Subsection 96E(3) requires the Minister to cause to be laid before each House of Parliament a statement that a determination has been made and the reasons for the determination, specifically the reasons why the making of the determination is in the public interest.

The explanatory memorandum suggests that this subsection provides for ‘public and political accountability to the Parliament regarding the exercise of the power in new subsection 96E(1)’ and that the ‘tabling provisions will still ensure that the Parliament can scrutinise the Minister’s decision and provide comment on such a determination through a motion of disapproval or other mechanism’. The explanatory memorandum also states that it is expected that the power will only be used in rare circumstances (p. 22).

Although it may be accepted that in exercising this power the Minister may consider a broad range of factors relevant to the public interest and that there is a level of accountability to the Parliament through the reporting requirements, it is not clear why it is not feasible to provide for the Parliament to disallow the exercise of legislative power.

The committee seeks the Minister’s advice as to why a legislative instrument setting out a specified class of persons who are to complete revalidation checks should not be subject to disallowance.

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.

Merits review

Item 4

It is not clear which of the decisions made under the proposed new subdivision BA of Division 3 of Part 2 of the Migration Act will be reviewable decisions. The explanatory material is silent on this point.

The committee seeks the Minister’s advice as to which, if any, of the decisions in the proposed new Subdivision are not reviewable.

Pending the Minister’s reply, the committee draws Senators’ attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee’s terms of reference.

Trespass on personal rights and liberties—privacy

General comment

Schedule 1 of the bill, in providing for revalidation checks for certain visas, will require visa holders to provide further information as part of the revalidation process. Proposed section 96A includes a definition of a ‘revalidation check’ as a check as to whether there is any ‘adverse information relating to a person who holds a visa’. The statement of compatibility provides that this will include information relating to ‘a genuine intention to reside temporarily, identity, health, character, passport and national security criteria’ (p. 49). This will necessarily include quite personal information.

Schedule 3 of the bill enables the use of ‘contactless’ technology to clear travellers through the automated immigration clearance system. In doing so biometric data (in this case a photo) will be collected and stored in relation to a person passing through immigration clearance. The primary purpose of collecting an image of a person’s face and shoulders is to identify the individual at the border and verify their identity for border clearance and control. A person can choose whether to self-process through the Contactless Automated Immigration Clearance system or choose to present themselves to a clearance officer instead.

The explanatory memorandum and the statement of compatibility gives a detailed description of the measures, and the statement of compatibility explains how the measures are compatible with the right to privacy.

In light of the detailed information contained in the explanatory material the committee makes no further comment in relation to this matter.

The committee makes no further comment on this matter.

Passenger Movement Charge Amendment Bill 2016

Purpose	This bill seeks to amend the <i>Passenger Movement Charge Act 1978</i> to increase the rate of the passenger movement charge from \$55 to \$60 from 1 July 2017
Portfolio	Treasury
Introduced	House of Representatives on 12 October 2016

The committee has no comment on this bill.

Privacy Amendment (Notifiable Data Breaches) Bill 2016

Purpose	This bill seeks to amend the <i>Privacy Act 1988</i> (the Privacy Act) to introduce mandatory data breach notification provisions for agencies, organisations and certain other entities that are regulated by the Privacy Act
Portfolio	Attorney-General
Introduced	House of Representatives on 19 October 2016

Trespass on personal rights and liberties—right to privacy General comment

The bill seeks to amend the Privacy Act to require agencies, organisations and certain other entities that are regulated by the Privacy Act, to provide notice to affected individuals and the Australian Information Commissioner (the Commissioner) if there has been an eligible data breach. A data breach arises where there has been unauthorised access to, or unauthorised disclosure of, personal information about one or more individuals or data is lost in circumstances likely to give rise to unauthorised access or disclosure. Failure to comply with an obligation in the bill will be deemed to be an interference with the privacy of an individual for the purposes of the Privacy Act. This engages the Commissioner's existing powers to initiate investigations, make determinations, seek enforceable undertakings and pursue civil penalties for serious or repeated interferences with privacy.

In providing for mandatory data breach notification the bill promotes the right of individuals to privacy as it enables a person to know when their personal information may have been interfered with, and to bring proceedings if applicable.

The committee notes that there are a number of exceptions contained in the bill to the mandatory data breach notification provisions, including:

- where an entity has taken remedial action following the unauthorised access or disclosure or loss of information;

- where an entity experiences an eligible data breach which is also an eligible data breach of one or more other entities and one of those entities complies with the notification requirement;
- where the entity is a law enforcement body and the Chief Executive Officer of that body believes on reasonable grounds that compliance with the notification requirement would be likely to prejudice enforcement related activities;
- where the Commissioner decides to issue a notice exempting the entity from complying with the requirement;
- where, to the extent of the inconsistency, compliance with the notification requirement would be inconsistent with a law of the Commonwealth that prohibits or regulates the use or disclosure of information;
- where an entity is already required to comply with notification requirements in the *My Health Records Act 2012*.

These exceptions limit the right to privacy as in such circumstances individuals will not be notified of an eligible data breach if one of the exceptions apply. However, the committee notes that the explanatory material, including the statement of compatibility, gives a detailed discussion about any limitation on the right to privacy.

In light of the detailed information contained in the explanatory material the committee makes no further comment in relation to this matter.

The committee makes no further comment on this bill.

Privacy Amendment (Re-identification Offence) Bill 2016

Purpose	This bill seeks to amend the <i>Privacy Act 1988</i> to introduce prohibitions on the re-identification of de-identified information and disclosure of re-identified information
Portfolio	Attorney-General
Introduced	Senate on 12 October 2016

Trespass on personal rights and freedoms—reversal of evidential burden of proof

Schedule 1, item 5, proposed subsections 16D(2)-(5), 16E(3)-(6)

These provisions provide for various defences to offences for re-identifying de-identified personal information and the disclosure of re-identified information. The defences require an accused entity to demonstrate that their behaviour is consistent with relevant defences, namely that:

- The entity is an agency and either the act was done in connection with performing the agency's functions or activities or the agency was required or authorised to do the act under Australian law or court order;
- The entity was a contracted service provider for a Commonwealth contract to provide services for a responsible agency and the act was done for the purposes of meeting (directly or indirectly) an obligation under the contract;
- The entity has entered into an agreement with the responsible agency to perform functions or activities on behalf of the agency, and the act was done in accordance with the agreement; or
- The entity is an exempt entity for the purposes of a determination in force under section 16G and the act was done for a purpose specified in the determination and in compliance with any conditions specified in the determination.

The statement of compatibility contains a detailed explanation for placing an evidential burden on defendants in relation to the matters in the various defences (p. 8):

However, for each of the three defences it is expected that each limb of the defence will not be unreasonably difficult for an entity to prove. That is, it is expected that it will not be unreasonably difficult for an entity to demonstrate that it is a contracted service provider for a Commonwealth contract to a responsible agency, has entered into an agreement to perform functions or activities on behalf of a responsible agency, or is an exempt entity for the purpose of a determination in force under section 16G. It follows that, given a Commonwealth contract, agreement to perform functions or activities on behalf of an agency or a determination under section 16G would all be expected to be focused on achieving specific outcomes, it should not be unreasonably difficult for an entity to prove that the act falling under the defence was done for purposes of achieving those outcomes. This also reflects the seriousness of the conduct that is otherwise prohibited under section 16D, 16E or 16F, where the above defences do not apply.

Given the nature of these defences, it is expected that prosecutions will not proceed where it is clear to authorities that the entity will be able to rely on an applicable defence during the proceedings.

For these reasons the reverse burden offences contained in the Bill are a reasonable and appropriate response to the behaviours the penalties are intended to discourage.

In general, the committee has accepted that a reversal of the burden of proof is justified only where it can be argued that the defence might be said to be peculiarly within the knowledge of the defendant and/or where a particular matter would be extremely difficult or expensive for the prosecution to prove whereas it could be readily and cheaply provided by the accused. In approaching this question it appears that the statement of compatibility has applied a less exacting standard, namely, to ask whether it would be unreasonably difficult for an accused to prove a particular matter.

Therefore, the committee seeks a further justification from the Attorney-General as to the appropriateness of reversing the burden of proof and asks that the Attorney General's advice specifically addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50-52).

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.

**Rights and liberties unduly dependent on insufficiently defined administrative powers—breadth of discretion to exempt
Schedule 1, item 5, proposed section 16G**

Proposed section 16G provides a power for the Minister to determine that an entity or an entity included in a class of entities is exempt for the purposes of the criminal and civil penalty provisions relating to the re-identification of personal information and its use. The explanatory memorandum (at p. 26) indicates that the purpose of the power:

...is to provide a mechanism by which entities engaging in valuable research in areas such as testing the effectiveness of de-identification techniques, cryptology or information security...can be granted an exemption from sections 16D, 16E or 16F so that this legitimate research may continue’.

The power to make an exemption is to be exercised on the basis of a single criterion, namely, whether the Minister is satisfied it is in the public interest to exercise the power. The need for such a broad power of exemption may indicate that the offence and civil penalty provisions have been drawn too broadly. In general, the committee considers that it is appropriate that Parliament define the boundaries of criminal wrong-doing rather than leaving these boundaries to be depend (even in part) on executive decision-making.

The committee seeks further justification from the Attorney-General as to the breadth of this discretionary power and whether consideration has been given to whether it is possible to more narrowly define the offence and civil penalty provisions so that research which is in the public interest is less likely to fall within them.

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.

**Exemption from disallowance
Schedule 1, item 5, proposed section 16G**

Proposed section 16G enables the Minister to determine to exempt certain entities from relevant criminal and civil penalty provisions (as described

above). Of concern from a scrutiny perspective is that section 42 of the *Legislation Act* (relating to Parliamentary disallowance of legislative instruments) does not apply to a determination made under subsection 16G(1). The explanatory memorandum (at p. 27) contains a detailed justification for this approach:

It is necessary to exempt determinations under subsection 16G(1) from the disallowance scheme in the *Legislation Act*, to provide certainty about the application of the law and to provide commercial certainty to entities. It is expected that in most cases the types of entities who may be suitable for exemption by a determination under subsection 16G(1) would be undertaking particular projects or research activities over a period of time involving research into encryption or information security. Generally these projects would involve a commercial benefit of some kind and would require the commitment of resources to undertake from the outset.

Where this research involves, for example, the re-identification of de-identified information or attempting to do so, such entities would commit criminal offences under sections 16D and 16E in the course of their research in the absence of any exemption. If determinations made under subsection 16G(1) were subject to disallowance, these entities could not be certain from the outset of a particular project that they will be able to complete the project. This is because if the determination was disallowed, from that point in time the entity would no longer be exempted from sections 16D or 16E, and would not be able to complete the project without the potential of committing an offence. In addition, it may be difficult for the entity to cease those particular research activities at the point of disallowance.

In order to avoid this, the entity would need to wait until the full disallowance period had expired to be sure that they would not be committing criminal offences in the course of their project or research. This would generally not be practical, as particular research projects may be subject to specific timeframes and, depending on when a determination is made, the disallowance period can be as long as 4-5 months.

In addition to the commercial uncertainty, legitimate research into encryption and information security which supports important public interest objects can be time critical. For example, it would not be desirable that an entity has to wait a lengthy period of time before being able to test the effectiveness of de-identification techniques, because if there are vulnerabilities in the techniques these could be exploited in the interim.

As determinations under subsection 16G(1) are legislative instruments, there remain appropriate safeguards through the requirement to table determinations before Parliament, the consultation requirements in section 17 of the *Legislation Act* and registration of any determination on the Federal Register

of Legislation. In addition, the Minister must consult with the Commissioner prior to making any determination, which provides an additional degree of scrutiny and transparency.

In light of the detailed information provided in the explanatory memorandum in relation to the provision exempting a determination under proposed section 16G from the disallowance process, the committee makes no further comment in relation to this matter.

The committee makes no further comment on this matter.

Trespass on personal rights and freedoms—retrospective application

Schedule 1, item 5

The proposed new offences relating to the re-identification of de-identified information operate from 29 September 2016 (see proposed paragraphs 16D(1)(c), 16E(1)(c), and 16F(1)(c)). This makes the offences retrospective. The statement of compatibility contains the following justification for this approach (p. 9):

Retrospective offences challenge a key element of the rule of law — that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly.

The Bill provides that new offences relating to the re-identification of de-identified information operate from 29 September 2016. The Government does not propose to make these offences lightly.

The retrospective application of the offences is reasonable and necessary. The Government has made it abundantly clear that it is pursuing this course of action. The Attorney-General's media release ('Amendment to the Privacy Act to further protect de-identified data', 28 September 2016) states unequivocally that the offences will take effect from the date of announcement. Re-identification of de-identified information and associated conduct undertaken before the announcement is not prohibited by the Bill.

This action is necessary because releases of private information can have significant consequences for individuals beyond their privacy and reputation, which cannot be easily remedied. This warrants swift and decisive action by the Government to prohibit such conduct. Further, the retrospective commencement of the offences creates a strong disincentive for entities to engage in such conduct while the Parliament considers the Bill.

The retrospective application of the offences is proportionate as it is for a short time period, and steps have been taken to ensure it is no more retrospective than required. The Government has introduced this Bill in the Parliament at the earliest available opportunity.

These measures in the Bill are consistent with the prohibition on retrospective criminal laws.

The explanatory materials recognise that the retrospective application of a criminal offence ‘challenges a key element of the rule of law’. The key justification provided for imposing these offences retrospectively is that the government announced by media release that legislation would be introduced to provide for these offences and that the offences would take effect from the date of that announcement.

In most instances the introduction of new offences is justified on the basis of the public interest in prohibiting certain behaviour. While the committee acknowledges the importance of protecting privacy and reputation this is not, in itself, sufficient to override this general principle. For these reasons, the rationale provided for the retrospective application of these offences appears to be overly broad.

The committee has consistently commented on provisions that back-date commencement to the date of announcement, i.e. ‘legislation by press release’. The committee’s scrutiny concerns in this regard are particularly acute in relation to provisions which create new offences. As a result, the committee considers that the conclusion expressed in the statement of compatibility that the measures in the bill are consistent with the prohibition on retrospective criminal laws has not been adequately explained. The committee therefore seeks further advice from the Attorney-General as to the appropriateness of making these offences retrospective in light of the committee’s comments.

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.

Register of Foreign Ownership of Agricultural Land Amendment (Water) Bill 2016

Purpose	This bill seeks to amend the <i>Register of Foreign Ownership of Agricultural Land Act 2015</i> to require foreign persons to register certain water entitlements and rights with the Australian Taxation Office
Portfolio	Treasury
Introduced	House of Representatives on 12 October 2016

The committee has no comment on this bill.

Regulatory Powers (Standardisation Reform) Bill 2016

Purpose	This bill seeks to amend 15 Commonwealth Acts to repeal existing provisions providing for regulatory regimes and instead apply the standard provisions of the Regulatory Powers Act
Portfolio	Attorney-General
Introduced	Senate on 12 October 2016

The committee has no comment on this bill.

Seafarers and Other Legislation Amendment Bill 2016

Purpose	This bill seeks to repeal the <i>Occupational Health and Safety (Maritime Industry) Act 1993</i> and extend the Commonwealth <i>Work Health and Safety Act 2011</i> to apply to the Seacare scheme
Portfolio	Employment
Introduced	House of Representatives on 13 October 2016

Trespass on personal rights and liberties—strict liability offences Schedule 2, items 8, 9 and 176

Items 8, 9 and 176 introduce three new provisions which make it an offence for a person with certain notification obligations to omit to do an act and that omission breaches those requirements. Each offence is stated to be one of strict liability and subject to 20 penalty units. The explanatory memorandum provides no justification as to why the offences are subject to strict liability.

In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including commenting whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The committee seeks a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 22–25).

Pending the Minister'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 powers—breadth of discretion
Schedule 2, item 84, proposed new section 25M**

Proposed new section 25M provides that the Safety, Rehabilitation and Compensation Commission may make a written instrument exempting the employment of certain employees on a particular vessel from the application of this proposed Act and the *Seafarers Safety and Compensation Levies Act 2016* and the *Seafarers Safety and Compensation Levies Collection Act 2016* (currently bills before Parliament). In deciding whether to make such an instrument the Commission must have regard to any matters prescribed by the legislative rules and any such other matters that the Commission considers relevant.

This is a broad discretionary power with no legislative guidance on how such decisions would be made. The explanatory memorandum does not explain why this provision is considered necessary and does not explain what type of matters the Commission would take into account in making such an instrument. There is also no requirement in the bill that legislative rules must be made setting out the matters the Commission must have regard to in exercising this discretionary power.

The committee seeks the Minister’s advice as to why it is necessary to give the Commission the power to exempt the employment of people on particular vessels from the operation of the specified legislation (and what effect this would have on the employment of persons on those vessels). It also seeks the Minister’s advice as to why the legislation does not set out the relevant considerations the Commission must have regard to in exercising this discretionary power or, at a minimum, provide that rules (subject to Parliamentary disallowance) are required to be made which specify the relevant matters the Commission must have regard to.

Pending the Minister’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.

Merits review

Schedule 2, item 84, proposed new section 25R

Proposed new section 25R provides that an application for review of a decision by the Commission to make an instrument of exemption under proposed section 25M can be made to the Administrative Appeals Tribunal. However, an application can only be made if the decision to make an instrument of exemption was made following an application to the Commission by the owner of the vessel or the employer. If the Commission on its own initiative decides to make the exemption there is no right to seek merits review of that decision. No justification is provided in the explanatory memorandum as to why this is not subject to merits review.

The committee seeks the Minister's advice as to why the right to seek merits review of the Commission's decision to make an instrument exempting the employment of persons on a particular vessel is restricted when the Commission has made the instrument of exemption on its own motion.

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Seafarers Safety and Compensation Levies Bill 2016

Purpose	This bill seeks to impose two levies (an insurance levy and a cost recovery levy) on seafarer berths
Portfolio	Employment
Introduced	House of Representatives on 13 October 2016

The committee has no comment on this bill.

Seafarers Safety and Compensation Levies Collection Bill 2016

Purpose	This bill seeks to provide for the collection of the seafarers' insurance levy and cost recovery levy
Portfolio	Employment
Introduced	House of Representatives on 13 October 2016

Trespass on personal rights and liberties—privilege against self-incrimination Subclause 9(7)

Clause 9 requires an employer to give the Safety, Rehabilitation and Compensation Commission a return setting out information about seafarer berths within a set period of time. Subclause 9(7) abrogates the privilege against self-incrimination, as it provides that a person is not excused from giving a return on the ground that the return might tend to incriminate them or expose them to a penalty. However, subclause 9(8) provides for a use and derivative use immunity as it provides that the return or anything obtained as a direct or indirect consequence of giving the return is not admissible in evidence in most proceedings.

As the explanatory memorandum does not provide a justification for abrogating the privilege against self-incrimination, **the committee seeks the Minister's advice as to the rationale for the approach, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (specifically pages 94–97).**

Pending the Minister'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.

Trespass on personal rights and liberties—reversal of the evidential burden of proof

Subclauses 9(6) and 20(5)

As set out above, clause 9 requires an employer to give the Safety, Rehabilitation and Compensation Commission a return setting out information about seafarer berths within a set period of time. Subclauses 9(4) and (5) make it an offence of strict liability to omit to comply with these requirements and subclause 9(6) states the offence does not apply if the person has a reasonable excuse. This defence reverses the burden of proof by placing an evidential burden on the defendant.

Subclause 20(3) provides that a person commits an offence if they have been issued with an identity card and, as soon as practicable after ceasing to be an authorised person, the person does not return the card. Subclause 20(4) makes this an offence of strict liability and subclause 20(5) states that the offence does not apply if the identity card was lost or destroyed. This defence reverses the burden of proof by placing an evidential burden on the defendant.

The explanatory memorandum provides a justification as to why strict liability attaches to the offences, and in light of those justifications the committee makes no comment in relation to that aspect of the offences. However, the explanatory memorandum does not provide any justification for reversing the evidential burden of proof.

The committee therefore seeks the Minister's advice as to the rationale for seeking to reverse the evidential burden of proof, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (specifically pages 50–51).

Pending the Minister'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.

Social Security Legislation Amendment (Youth Jobs Path: Prepare, Trial, Hire) Bill 2016

Purpose	This bill seeks to provide that incentive payments to eligible young job seekers placed in internships under the Youth Jobs PaTH are not to be 'income' for social security and veterans' entitlements purposes
Portfolio	Employment
Introduced	House of Representatives on 13 October 2016

The committee has no comment on this bill.

Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016

Purpose	This bill seeks to amend various Acts relating to family assistance and social security to: <ul style="list-style-type: none">• ensure that clear ‘date of effect rules’ operate for certain merits review decisions relating to family tax benefit by instalment in the 2012-13 and/or later income years;• make several contingent amendments to remove reference to Family Tax Benefit supplements; and• correct an unintended consequence of amendments that were made to the Youth Allowance Rate Calculator
Portfolio	Social Services
Introduced	House of Representatives on 20 October 2016

Trespass on personal rights and liberties—retrospective application Schedule 1, items 13–15

Schedule 1 proposes amendments to how the ‘date of effect rules’ in Part 5 of the *A New Tax System (Family Assistance) (Administration) Act 1999* operate for certain merits review decisions that create new or increased entitlements to family tax benefit. The amendments to the ‘date of effect rules’ will apply in relation to review decisions made on or after the commencement of the bill, however, the application provisions in items 13–15 mean that where the decision under review relates to the payment of family tax benefit by instalment in the 2012-13 or later income years, the new rules provided for in these amendments will be taken to apply.

The statement of compatibility (at p. 2) states that ‘most of the amendments have retrospective effect from the 2012-13 income year’, however ‘individuals have been aware of these notification timeframes for a number of years already’ and ‘there have been extensive communications of the requirements; the individuals have been advised of these timeframes regularly in letters sent directly to them, and on government websites’.

The committee notes this explanation, however, persons are generally entitled rely on the law as it actually is, rather than as they are advised by government departments as to what the law may be. **To assist the committee in considering the appropriateness of the retrospective application of these amendments, the committee seeks the Minister's advice as to the number of persons likely to be affected by these amendments and the extent of detriment they are likely to suffer as a result of the retrospective application of these new provisions.**

Pending the Minister'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.

Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016

Purpose	This bill seeks to transition the Mobility Allowance program to the National Disability Insurance Scheme
Portfolio	Social Services
Introduced	House of Representatives on 13 October 2016

The committee has no comment on this bill.

**Superannuation (Departing Australia
Superannuation Payments Tax) Amendment
Bill 2016**

Purpose	This bill seeks to amend the <i>Superannuation (Departing Australia Superannuation Payments Tax) Act 2007</i> to increase the rate of the departing Australia superannuation payments tax to 95 per cent for working holiday makers
Portfolio	Treasury
Introduced	House of Representatives on 12 October 2016

The committee has no comment on this bill.

Treasury Laws Amendment (Working Holiday Maker Reform) Bill 2016

Purpose	This bill seeks to amend taxation and migration Acts to: <ul style="list-style-type: none">• require employers of working holiday makers to register with the Commissioner of Taxation to allow employers to withhold tax at income tax rates;• require the Commissioner to provide the Treasurer with a report on working holiday makers for presentation to the Parliament; and• reduce the visa application charge for subclass 417 and 462 working holiday maker visas from \$440 to \$390 from 1 July 2017
Portfolio	Treasury
Introduced	House of Representatives on 12 October 2016

The committee has no comment on this bill.

VET Student Loans Bill 2016

Purpose	This bill seeks to introduce a new student loan program to replace the VET FEE-HELP loan scheme from 1 January 2017
Portfolio	Education and Training
Introduced	House of Representatives on 13 October 2016

Trespass on personal rights and liberties—vicarious liability Clause 65

Subclauses 65(1) and (3) impose personal liability on executive officers of approved course providers where the provider commits an offence or contravenes a civil penalty provision, if the officer knew that the offence would be committed or the contravention would occur and the officer was in the position to influence the conduct of the provider and failed to take all reasonable steps to prevent the commission of the offence or the contravention. The explanatory memorandum provides the following justification for this approach (at p. 50):

This clause recognises the role of proper management and governance and the serious nature of the problem when people in management and governance roles in the provider are involved in the commission of offences or contraventions of civil penalty provisions. These subclauses prevent executive officers from avoiding personal responsibility but only in the limited circumstances described above where the officer was aware a contravention would occur and was in a position to influence the provider's conduct and did not take steps to prevent it. This clause should further incentivise persons of influence to ensure the provider complies with the Bill.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that when criminal responsibility is imposed on directors or officers of bodies corporate, the Council of Australian Government Principles and Guidelines for assessment of directors' liability must be applied. It also indicates that Treasury should be consulted on all provisions that seek to impose personal liability for corporate fault (at p. 33).

The committee has consistently taken the view that vicarious liability should only be used where the consequences for the offence are so serious that the normal requirement for proof of fault can be put aside. **The committee seeks**

the Minister's advice as to whether the principles and processes identified in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 32-33) in relation to the imposition of vicarious liability have been followed in this instance.

Pending the Minister'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.

Merits review

Clause 74

Clause 74 sets out a table which lists the decisions that are reviewable under Part 7 of the proposed Act. Division 2 of Part 7 sets out the process for reconsideration of reviewable decisions, setting out a process for internal merits review and later review by the Administrative Appeals Tribunal (AAT) of reconsidered decisions. In contrast, decisions that are not classified as 'reviewable decisions' may be reconsidered, but there is no requirement that the decision be reviewed and there is no process for an application to the AAT for review of such a decision.

The explanatory memorandum provides no justification for limiting reviewable decisions to the five decisions listed in the table. There are other decisions that can be made under the proposed Act, for example decisions made by the Secretary under clauses 20, 25 and 34, which are therefore exempted from the process of merits review.

The committee seeks the Minister's advice as to why significant decisions which are authorised to be made under the proposed Act have been excluded from the merits review process set out in the bill.

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Rights and liberties dependent on insufficiently defined administrative powers—reconsideration of decisions Clauses 77 and 81

Clause 77 provides for a decision-maker to reconsider a reviewable decision if satisfied there is a ‘sufficient reason to do so’, regardless of whether there is an application to do so. Clause 81 provides for the same power in relation to a decision that is not a reviewable decision, on the same basis. In exercising both powers the decision-maker must confirm or vary the initial decision or set aside the initial decision and substitute a new decision.

In general, once an administrative decision is made the power to make that decision is spent and the decision-maker has no power to revisit the decision. (Complications in the application of this general principle may arise if the initial decision was beyond the powers of the decision-maker, that is, based on a ‘jurisdictional error’.) This principle serves the value of certainty and predictability as affected persons may rely on administrative decisions that have been made (absent an application from a person with standing for judicial review). Allowing the decision-maker a general power to reconsider applications, which does not appear to be time limited, may be thought to make their legal position unduly dependent on insufficiently defined or determined administrative powers.

Therefore the committee seeks the Minister’s advice as to why it is necessary to enable a decision-maker to reconsider a decision on their own motion and whether consideration has been given to including limits on the exercise of this power (for example, time limits).

Pending the Minister’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.

Trespass on personal rights and liberties—infringement notices Clause 85

Clause 85 provides that an offence or civil penalty provision of the proposed Act is subject to an infringement notice under Part 5 of the *Regulatory Powers*

(Standard Provisions) Act 2014. That Act creates a framework for the use of infringement notices.

The discussion on the implementation of infringement notice schemes in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* is premised on the principle that not all offences are appropriately enforced through infringement notices. In particular the Guide states (at p. 58):

An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. The offences should be such that an enforcement officer can easily make an assessment of guilt or innocence.

The explanatory material does not explain why it is considered appropriate that each offence and civil penalty provision in the bill should be subject to an infringement notice.

It is not clear to the committee why all of the offence and civil penalty provisions in this bill are appropriately subject to an infringement notice scheme. The committee therefore seeks a more detailed explanation from the Minister as to the approach taken.

Pending the Minister'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.

Trespass on personal rights and liberties—absolute liability Subclause 101(2)

Clause 101 sets out an offence relating to unauthorised access to, or modification of, personal information. Subclause (2) states that absolute liability applies to an element of the offence (relating to where the information is held). The offence is subject to 2 years imprisonment. The explanatory memorandum provides no justification as to why an element of the offence is subject to absolute liability.

In a criminal law offence the proof of fault is usually a basic requirement. However, offences of absolute liability remove the fault element that would otherwise apply, and does not allow for a defence of reasonable mistake of

fact. The committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including commenting whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The committee seeks a detailed justification from the Minister for the imposition of absolute liability in clause 101 with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 22–25).

Pending the Minister’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—delegation of administrative powers

Clause 114

Clause 114 allows the Secretary to delegate, in writing, any or all of his or her powers under the Act to ‘an APS employee’. There is no limit on what level of the Australian Public Service the employee is employed at. The explanatory memorandum provides no explanation as to why there is a need to enable the Secretary’s power to be delegated so broadly.

The committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee’s preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. **In this case as there is no explanation for the approach in the explanatory memorandum, the committee seeks the Minister’s advice as to the rationale for enabling the Secretary to delegate his or her powers to ‘an APS employee’ and whether consideration was**

given to limiting the powers that might be delegated and/or confining the delegation to members of the Senior Executive Service.

Pending the Minister'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.

Delegation of legislative power Subclause 116(5)

Clause 116 sets out a rule making power under the proposed Act. Subclause 116(5) provides that the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time (despite the requirements in the *Legislation Act 2003*).

At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

The explanatory memorandum does not justify the need for such a provision or provide any examples of instruments which may be so incorporated. The explanatory memorandum states that such rules 'would ordinarily not incorporate another instrument or written document unless it is publicly available'. This implies that in some instances instruments or written documents which are not publicly available may be incorporated.

The committee seeks a detailed explanation from the Minister as to why subclause 116(5) allows for the incorporation of legislative provisions by

reference to other documents (as in force from time to time) which addresses the issues identified above.

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.

VET Student Loans (Charges) Bill 2016

Purpose	This bill seeks to impose a charge on approved VET course providers
Portfolio	Education and Training
Introduced	House of Representatives on 13 October 2016

Delegation of legislative power—setting level of charge by regulation Clause 7

This bill provides for the imposition of a charge on ‘approved course providers’ as a tax. Approved course providers are VET providers approved in accordance with the VET Student Loans Bill 2016. The charges imposed on ‘approved course providers’ are intended to fund the VET student loan program, including costs incurred by the Commonwealth in administering the program, data collection and analysis as well as compliance and enforcement activities (explanatory memorandum, p. 1).

Clause 7 of the bill, however, provides for the amount of charge payable to be prescribed by the regulations or in a manner worked out in accordance with a method prescribed in the regulations.

The explanatory memorandum (at p. 5) states that ‘it is anticipated that the amount of the charge will be determined having regard to the size of the provider’ and that ‘prior to the introduction of the regulations a fees schedule will be determined that is consistent with the Australian Government Cost Recovery Guidelines and documented in a cost recovery implementation statement’.

The committee notes this explanation of how it is anticipated that the level of charge will be determined. However, there are no limitations on the amount of charge payable on the face of the bill. **As the setting of the amount of charges is a significant matter, the committee seeks the Minister’s advice as to whether the bill can be amended to provide greater legislative guidance as to how the charge amount is to be determined and to limit the amount that may be imposed.**

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.

VET Student Loans (Consequential Amendments and Transitional Provisions) Bill 2016

Purpose	This bill seeks to amend various Acts in relation to education and training to: <ul style="list-style-type: none">• cease the VET FEE-HELP scheme;• establish transition arrangements for current VET FEE-HELP students and currently approved VET FEE-HELP providers; and• make consequential amendments
Portfolio	Education and Training
Introduced	House of Representatives on 13 October 2016

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment (Budget and Other Measures) Bill 2016

Purpose	<p>This bill seeks to amend the <i>Veterans' Entitlements Act 1986</i> and the <i>Military Rehabilitation and Compensation Act 2004</i> to:</p> <ul style="list-style-type: none"> • extend eligibility for Non-Liability Health Care treatment for certain mental health conditions to cover all current, former and future ADF members; • pay interim incapacity payments at 100% of Normal Earnings; and • align the cut-off age for incapacity payments to the increased 'pension age' as defined in the <i>Social Security Act 1991</i>
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 13 October 2016

The committee has no comment on this bill.

Commentary on amendments and additional explanatory materials

National Cancer Screening Register Bill 2016

[Digest 6/16 – Report 7/16]

On 11 October 2016 the House of Representatives agreed to 12 Government amendments and the Minister for Health and Aged Care (Ms Ley) presented a supplementary explanatory memorandum.

Government amendments (2) and (6)—authorisation of prescribed bodies to collect and use protected information

In the committee's *Alert Digest No. 6 of 2016* the committee had sought the Minister's advice in relation to the rationale for, and necessity of, a provision which would have allowed 'prescribed bodies' to collect, make a record of, disclose or otherwise use protected information for the purposes of the Register. **The committee welcomes these amendments which remove this provision from the bill.**

Government amendment (12)—requirement to consult the Information Commissioner to ensure privacy interests are considered

In the committee's *Alert Digest No. 6 of 2016* the committee had sought the Minister's advice as to whether consideration had been given to including in the bill a specific requirement to consult the Privacy Commissioner prior to the making of rules which would allow further classes of information to be included on the Register. **The committee welcomes this amendment which will ensure that the Information Commissioner is consulted prior to the making of such rules and also requires the Minister to have regard to any submission made by the Information Commissioner as a result of the consultation.**

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*.

Bills introduced with standing appropriation clauses in the 45th Parliament since the previous Alert Digest was tabled:

Seafarers Safety and Compensation Levies Collection Bill 2016 —
Subclause 22(4)

VET Student Loans Bill 2016 — Part 10, clause 115

Other relevant appropriation clauses in bills

Nil