

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

Annual Report 2018

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MEMBERSHIP OF THE COMMITTEE

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Jonathon Duniam	LP, Tasmania
Senator Jane Hume	LP, Victoria
Senator Janet Rice	AG, Victoria
Senator Murray Watt	ALP, Queensland

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Chapter 1

Introduction

Background

1.1 Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament in relation to:

- undue trespass on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

Committee establishment

1.2 The Scrutiny of Bills Committee was first established by a resolution of the Senate on 19 November 1981, following a report of the Senate's Constitutional and Legal Affairs Committee (tabled in November 1978). That report recommended the establishment of a new parliamentary committee to highlight provisions in bills which potentially affected individuals by interfering with their rights or by subjecting them to the exercise of an undue delegation of power.

1.3 The government of the day had considerable misgivings about this proposal, seeing it as having the potential to 'interfere' in the legislative process. Nevertheless, on the motion of Liberal Senator Alan Missen and Labor Senator Michael Tate, the committee was established on a trial basis in November 1981, was constituted on a discrete basis under a sessional order in May 1982 and became a permanent feature of the Senate committee system on 17 March 1987.

Committee membership

1.4 Senate standing order 24(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members—three senators from the government party or parties and three from non-government parties (as nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators). In accordance with standing orders 24(4)

and 24(5), the chair of the committee is a member of the opposition, and the deputy chair is a government member.

1.5 Members of the committee during 2018 were:

Chair

Senator Helen Polley	ALP, Tasmania	12.11.13 onwards <i>(Chair from 11.02.14)</i>
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Deputy Chair

Senator John Williams	NATS, New South Wales	01.07.14 onwards
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Members

Senator Jonathon Duniam	LP, Tasmania	01.09.16 onwards
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Senator Jane Hume	LP, Victoria	15.02.17 onwards
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Senator Janet Rice	AG, Victoria	01.09.16 onwards
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Senator Murray Watt	ALP, Queensland	01.09.16 onwards
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The committee's scrutiny principles

1.6 As noted above, the scope of the committee's interest in bills, and amendments to bills, is established by the principles outlined in Senate standing order 24(1)(a). Over the years the committee has primarily taken a case-by-case approach to articulating issues of concern and then communicating them through its correspondence with ministers and through its regular publications.

1.7 When applying each principle there are a number of well-established matters that the committee considers to be of concern. Therefore, when it is developing comments on the provisions of each new bill that comes before it for consideration, the committee takes its previous views on these matters into account, though it does not consider that it is constrained by them.

1.8 Some of the long-standing matters of concern identified by the committee over the years by reference to individual criteria are included in the diagram on page 3 and outlined in more detail in Appendix 1.

Summary of standing order 24 and examples of issues considered under each principle

1	2	3	4	5
Principle (i)	Principle (ii)	Principle (iii)	Principle (iv)	Principle (v)
Trespass unduly on personal rights and liberties	Inappropriately defined administrative powers	Appropriate review of decisions	Inappropriate delegation of legislative powers	Appropriate parliamentary scrutiny
Presumption of innocence	Broad delegation of administrative power (i.e. powers given to a large class of persons)	Exclusion of or limitation on merits review	Significant matters in delegated legislation	Adequacy of parliamentary oversight
Framing of criminal offences (i.e. reversal of burden of proof and broadly defined offences)	Broad discretionary power	Exclusion of or limitation on judicial review	Consultation prior to making delegated legislation	Delegated legislation not subject to disallowance
Privilege against self-incrimination		Procedural fairness	Power for delegated legislation to amend primary legislation (Henry VIII clause)	Incorporation of external material into the law
Coercive powers				
Retrospectivity				
Privacy				

The committee's mode of operation

1.9 As noted above, the committee examines all bills that come before the Parliament against the five principles set out in Senate standing order 24(1)(a)¹ and usually meets each sitting week to consider them. The committee's long-standing approach is that it operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the scrutiny principles. The policy content of the bill provides context for its scrutiny, but is not a primary consideration for the committee. In addition, while the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24(1)(a) it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

1.10 In undertaking its work the committee is supported by a secretariat comprised of a secretary, a principal research officer, a senior research officer and a legislative research officer.² The committee also obtains advice from a legal adviser

1 The five principles are discussed in detail in Appendix 1, with specific case studies in chapter 3.

2 The secretariat is staffed by parliamentary officers drawn from the Department of the Senate's Legislative Scrutiny Unit, who regularly work across multiple scrutiny committee secretariats.

who is appointed by the committee with the approval of the President of the Senate. The committee enjoyed the assistance of Associate Professor Leighton McDonald during 2018.

The committee's workflow

1.11 The committee's usual process for undertaking its work is shaped by the process for the passage of bills through the Parliament. (The main steps in the committee's work are outlined in the diagram on page 5.)

1.12 In the usual scrutiny process, after the introduction of bills into either the Senate or the House of Representatives, a copy of each bill, together with its explanatory memorandum and the minister's second reading speech, is provided to the committee's legal adviser. The legal adviser considers this material and provides a report against the committee's scrutiny principles. The secretariat is also involved in examining the bills as well as parliamentary amendments to bills. The work undertaken by the legal adviser and the secretariat provides the foundation for the committee's consideration of the legislative proposals before the Parliament.

1.13 Where a concern is raised about possible inconsistency with scrutiny principles, the committee's usual approach is to write to the responsible minister or other proposer seeking further information or requesting that consideration be given to amending the relevant provision.

1.14 Once a response is received, the committee reconsiders the relevant provisions and provides a further view on its compliance with the relevant scrutiny principle or principles and reports this to the Senate.

Managing the committee's workload

1.15 The committee works to ensure that, wherever possible, its comments on bills are available to senators prior to the passage of the bill. However, the ability for the committee to provide its final comments on a particular bill prior to passage often depends on the legislative timeframe and the timing of the minister's response. The committee notes that timeliness in providing responses to the committee is essential to an effective scrutiny process. For more information see paragraph 1.18.

1.16 The committee publishes on its website a list of bills on which it has sought advice from the responsible minister but had either not yet received a response or received a response but not yet finally reported.³ Where it would assist timely scrutiny of legislation before the Senate, the committee also publishes ministerial responses on its website, together with its preliminary comments, prior to the tabling of its regular *Scrutiny Digest*.

3 Senate Standing Committee for the Scrutiny of Bills, *Ministerial Responses*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Ministerial_Responses

1.17 In February 2018, the committee resolved to discontinue its quarterly reporting on ministerial responsiveness in its *Scrutiny Digest* on the basis that its website now contained up-to-date information on the status of ministerial responses.

1.18 In November 2017 the standing orders were amended to provide that any senator may ask a minister for an explanation as to why a response had not been provided to the committee.⁴ During 2018, no senator used this process to ask a minister for a response. In 2018, 78 per cent of ministerial responses were received either early or by the due date. However, the committee notes that 16 per cent of ministerial responses were not received within the timeframe requested by the committee (compared with 22 per cent in 2017) and six per cent of responses were received after the bill had passed both Houses.

Committee's Work Flow



4 *Journals of the Senate*, No. 74, 29 November 2017, pp. 2372-2373.

Committee publications and resources

Scrutiny Digest

1.19 From the first sitting week of 2017 onwards, the committee has published its scrutiny comments in a single document known as the *Scrutiny Digest*. This document replaced both the *Alert Digest* and the *Report*, through which the committee had published its scrutiny comments from its commencement in 1981 until the end of 2016.⁵

1.20 The committee considers a draft *Scrutiny Digest* at its regular meeting on the Wednesday morning of each Senate sitting week and, once agreed, the *Scrutiny Digest* is tabled in the Senate, generally on the afternoon of the same day.

1.21 Chapter 1 of the draft *Scrutiny Digest* is prepared by the secretariat on the basis of the legal adviser's report and the secretariat's examination of bills and parliamentary amendments and contains comments on bills and amendments the committee wishes to make. Comments are identified by reference to the relevant principles in standing order 24. When concerns are raised by the committee and outlined in chapter 1 of the *Scrutiny Digest*, correspondence is forwarded to the minister or proposer responsible for the bill inviting him or her to respond to the committee's concerns. Ministers generally seek advice from their department before responding.

1.22 The committee generally requests that any response from a minister be received in sufficient time for it to be scrutinised before the next committee meeting. As noted above, the committee aims to report to the Senate prior to the Senate's detailed consideration of bills so that its views can be taken into account before passage.

1.23 When a minister or other proposer responds to a concern raised in the *Scrutiny Digest*, the secretariat produces for the committee's consideration an entry for chapter 2 of the draft *Scrutiny Digest*, which contains the committee's original request, the text of the minister's response, and any further comments the committee wishes to make.

1.24 In June 2018, the committee ceased providing a summary of bills with no committee comment. These bills are now provided in the form of a list within the Digest.

1.25 Commencing from *Scrutiny Digest 10 of 2018*, a further stylistic change was made to the Digest, with the full initial scrutiny no longer included in the concluding entries in chapter 2. However, the initial entry may be viewed online via a link to the relevant *Scrutiny Digest* contained in the concluding entry.

5 *Scrutiny Digests*, as well as *Alert Digests* and *Reports* dating back to 1998, are available from the committee's website at http://www.aph.gov.au/senate_scrutiny.

Scrutiny News

1.26 The committee secretariat prepares a brief *Scrutiny News* publication each sitting week which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list.⁶ *Scrutiny News* highlights recent comments drawn from material in the committee's *Scrutiny Digest*, with a particular focus on information that may be useful when bills are debated and to raise awareness about the committee's scrutiny principles.

1.27 In 2018, highlights from the Senate Regulations and Ordinances Committee's *Delegated Legislation Monitor* were also included in *Scrutiny News*.

Interaction with other committees

Legislative scrutiny committees

1.28 The Scrutiny of Bills Committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The work of the three committees is complementary in many respects. The committee therefore monitors the work of the two other legislative scrutiny committees—the Senate Regulations and Ordinances Committee and the Parliamentary Joint Committee on Human Rights (PJCHR)—and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

1.29 The committee regularly draws certain matters to the attention of the Regulations and Ordinances Committee, including provisions of bills which authorise a significant delegation of legislative power or seek to modify the usual disallowance processes for legislative instruments.⁷ When the committee draws such provisions to the attention of the Regulations and Ordinances Committee, that committee will consider the Scrutiny of Bills Committee's comments as part of their examination of any legislative instruments made under the relevant authorising provision.

1.30 For example, in May 2018 the committee drew to the attention of the Regulations and Ordinances committee its concerns about the Corporations Amendment (Asia Region Funds Passport) Bill 2018, which sought to allow delegated legislation made by the Australian Securities and Investment Commission to modify or exempt funds and entities from the operation of primary and delegated

6 Current and previous editions of *Scrutiny News*, as well as information about subscribing to the scrutiny mailing list, are available from the committee's website at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News.

7 In 2018 the committee drew 15 bills to the attention of the Regulations and Ordinances Committee.

legislation.⁸ The Senate Regulations and Ordinances Committee reiterated the committee's concerns regarding the bill when scrutinising the ASIC Corporations (Amendment) Instrument 2018/697 [F2018L01281], and drew the modification of primary legislation via delegated legislation to the attention of the Senate.⁹

1.31 Similarly, in June 2018 the committee drew its comments regarding significant matters being left to delegated legislation in the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 to the Senate Regulations and Ordinances Committee.¹⁰ The Senate Regulations and Ordinances Committee restated the same views as the committee, that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided, when commenting on the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 [F2018L00975], and drew this to the attention of the Senate.¹¹

1.32 In August 2018, the Legislation Amendment (Sunsetting Review and Other Measures) Bill 2018 passed both Houses of Parliament without amendment. The committee noted that the amendments in the bill addressed a number of concerns articulated in a joint submission made by the committee, the Regulations and Ordinances Committee and the PJCHR to a sunsetting review, as well as other concerns previously raised by the committee and by the Regulations and Ordinances Committee.¹²

1.33 The committee will continue to work closely with the Regulations and Ordinances Committee and the PJCHR where appropriate in the future.

Legislative standing committees

1.34 In addition to its interactions with the Regulations and Ordinances Committee and the PJCHR, the committee also assists the work of the Senate's eight legislative standing committees. In June 2017 the committee agreed to allow for early publication of ministerial correspondence where another parliamentary committee is due to report on a bill prior to the tabling of the next *Scrutiny Digest*.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, pp. 18-22; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, 20 June 2018, pp. 79-88.

9 Senate Standing Committee on Regulations and Ordinances, *Delegation legislation monitor 12 of 2018*, pp. 56-57.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, 20 June 2018, pp. 22-26.

11 Senate Standing Committee on Regulations and Ordinances, *Delegation legislation monitor 8 of 2018*, pp. 68-69.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, 20 June 2018, pp. 20-23.

1.35 During 2018, the committee received one request from a legislation committee secretariat for early publication of a ministerial response and the committee's preliminary comment, in relation to the Water Amendment Bill 2018.

Acknowledgements

1.36 The committee wishes to acknowledge the work and assistance of its legal adviser Associate Professor Leighton McDonald.

1.37 The committee also wishes to acknowledge the assistance of ministers and other proposers of bills, departments and agencies during the reporting period. Their responsiveness to the committee—as detailed above—is critical to the legislative process as it ensures that the committee can perform its scrutiny function effectively.

Chapter 2

Work of the committee in 2018

2.1 This chapter provides information about the work of the committee during 2018, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills.

Statistics

2.2 Each year the committee usually analyses around 200 to 250 bills. The table below sets out the bills scrutinised by the committee from 2016 to 2018. Due to the federal election in 2016 the numbers of bills considered by the committee in that year was slightly lower than in 2017-18.

2.3 The table also outlines statistics in relation to the number of bills and amendments for which the committee had comments.

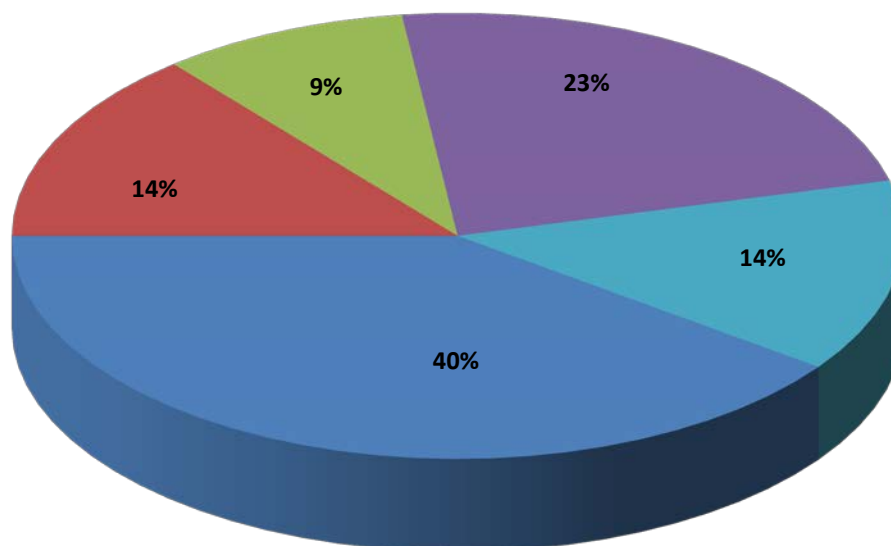
2.4 The committee commented on 112 bills in 2018, this compares to 119 bills in 2017 and 81 in 2016. In relation to amendments to bills, the committee commented on 46 amendments (or groups of amendments) in 2018, which was an increase of 13 per cent compared to 2017.

Year	Bills considered	Bills commented on	Amendments to bills considered	Amendments to bills commented on
2016	192	81	24	12
2017	266	119	61	25
2018	251	112	87	46

2.5 The chart on page 12 provides a breakdown of the committee's comments on bills by the five principles set out in standing order 24(1)(a). The accompanying table sets out the specific issues on which the committee commented under each of these five broad principles.

2.6 The chart shows, consistent with previous years, that the most common principle on which the committee commented in 2018 was principle (i) relating to possible undue trespass on personal rights and liberties (40 per cent). During 2018 principle (iv), relating to the inappropriate delegation of legislative power, was the next most common principle commented on by the committee (23 per cent).

**Scrutiny comments on bills by principle under standing order
24(1)(a)
January to December 2018**



- (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
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny

Impact of the committee's work in 2018

2.7 The work of the committee in scrutinising bills against the five principles outlined above assists and improves parliamentary consideration of legislation in a number of important ways, including:

- amendments to legislation;
- improved explanatory material;
- more informed consideration of issues in legislation committee reports;
- more informed debate in the Senate and committees; and
- more comprehensive Parliamentary Library Bills Digests.

2.8 As noted above, since the committee's establishment over 35 years ago it has developed a consistent position in relation to several long-standing matters of concern. It may be expected that the committee's consistent commentary has had a

positive impact on the number of bills introduced into the Parliament that raise these types of scrutiny concerns.

Impact prior to the introduction of bills into the Parliament

2.9 While difficult to quantify, it is clear that, prior to the introduction of bills into the Parliament, the Scrutiny of Bills Committee has an 'unseen influence' on the development of bills through the legislative drafting process. Legislative drafters often refer to the reports and long-standing scrutiny concerns of the committee when they are advising instructing departments and agencies and therefore many provisions that may have been of concern under the committee's scrutiny principles may not be included in the final text of bills that come before the Parliament.¹

2.10 Underpinning this 'unseen influence' is formal guidance available to agencies and departments as part of the legislative drafting process. The *Legislation Handbook*,² *Guide to Framing Commonwealth Offences*,³ and *OPC Drafting Directions*⁴ all draw attention to long-standing scrutiny concerns of the committee to ensure that these concerns are considered as part of the legislative drafting process. The long-standing concerns relate to a large number of matters, including:

- retrospectivity;
- absolute and strict liability offences and reversal of the burden of proof;
- excessive delegation of legislative power;
- entry, search and seizure powers; and
- penalty provisions.

2.11 In relation to the adequacy of explanatory memoranda accompanying bills, OPC Drafting Direction 4.1 advises legislative drafters to:

1 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5th ed, 2017, pp. 192-193.

2 *Legislation Handbook*, Department of the Prime Minister and Cabinet, February 2017, available at: <https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf>.

3 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, available at: <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

4 OPC Drafting Directions Series, Office of Parliamentary Counsel, available at: http://www.opc.gov.au/about/draft_directions.htm.

alert your instructors to any requested provisions that are likely to be of interest to the [Scrutiny of Bills] Committee, and advise your instructors to set out clearly in the explanatory memorandum the reasons for such provisions.⁵

Amendments to legislation

2.12 One of the most noticeable outcomes of the committee's scrutiny of bills is amendments to legislation arising from the committee's work. Amendments may be moved by any senator directly in response to the committee's comments, or as a result of a recommendation of a Senate legislation committee which, in turn, explicitly drew on this committee's comments. Alternatively, amendments which reflect the committee's comments can be moved by a senator without any direct acknowledgment of the committee's work, or there may have been a cumulative impact if a similar point was also made in another forum (such as a legislation committee inquiry)—it is therefore difficult to gauge with complete accuracy the impact the committee has in terms of amendments to legislation.

2.13 It is clear that some amendments are moved that directly address the committee's concerns in relation to particular matters. For example, in 2018 government amendments were moved in direct response to the committee's concerns in relation to the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and the Telecommunications (Regional Broadband Scheme) Charge Bill 2017. The bills, as originally introduced, included provisions that sought to reverse the usual process for disallowance, so that if a disallowance motion was lodged, but not brought on for debate before the end of the disallowance period, the relevant instrument would remain in force by default. Following the committee's comments,⁶ and after the Senate Environment and Communications Legislation Committee supported the committee's comments, government amendments were moved which reinstated the usual disallowance procedures.⁷

2.14 The committee also expressed scrutiny concerns in relation to the Civil Law and Justice Legislation Amendment Bill 2018 about conferring powers of arrest, search and entry on Australian Public Service employees in the (then) Department of Immigration and Border Protection, who may lack the appropriate training to

5 OPC Drafting Direction 4.1, *Dealing with instructors*, 29 February 2016, p. 3.

6 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 8 of 2017* at pp. 33-40 and Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 10 of 2017* at pp. 103-121.

7 The committee welcomed the amendments made in response to its concerns: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, 20 June 2018, p. 56.

exercise those powers. In response, government amendments were made to address the issues raised by the committee, which were welcomed by the committee.⁸

2.15 Further, the committee expressed scrutiny concerns about provisions in the Identity-matching Services Bill 2018 and suggested it may be appropriate to amend the bill to include:

- a requirement that the minister must have regard to submissions made by the Human Rights Commissioner and the Information Commissioner prior to making certain rules and, if the minister makes rules that are inconsistent with the advice provided by the commissioners, that the minister provide reasons explaining why the rules depart from that advice; and
- a requirement to report on the number of instances in which an entrusted person discloses protected information.

2.1 In response, the minister made a commitment to amend the bill to address those concerns.⁹

Improved explanatory material

2.16 The committee regularly requests that additional information be included in explanatory memoranda to ensure that provisions of bills on which the committee has commented are adequately explained. 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.

2.17 In addition, the committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions.

2.18 In relation to the scrutiny process, a comprehensive explanatory memorandum can provide the foundation for avoiding adverse scrutiny committee comment because whether or not a provision is of concern often depends on the context and circumstances. An explanatory memorandum should demonstrate that the proposed policy approach reflects an informed choice that is appropriately justified.

2.19 In the amendments section of each *Scrutiny Digest* the committee provides commentary on updated explanatory material. In 2018, additional information was

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, 17 October 2018, pp. 64-65.

9 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, pp. 110-113 and 117-120.

included in 27 explanatory memoranda in response to the committee's comments, an increase of 20 per cent compared to 2017.¹⁰

Use in legislation committee reports

2.20 The committee routinely forwards its comments on bills to Senate legislation committees so that these committees may take the Scrutiny of Bills Committee's comments into consideration during their inquiries into particular bills. This practice is reflected in standing order 25(2A) which provides that:

The legislation committees, when examining bills or draft bills, shall take into account any comments on the bills published by the Standing Committee for the Scrutiny of Bills.

2.21 For example, on 13 August 2018, the Community Affairs Legislation Committee tabled its report on the Private Health Insurance Legislation Amendment Bill 2018 and related bills. The report considered issues raised by the committee in relation to:

- coercive powers—allowing the Private Health Insurance Ombudsman (PHIO) to enter premises and inspect documents without a warrant; and
- broad delegation of administrative powers—allowing for the delegation of the PHIO's functions or powers, including powers of entry and inspection, to any person, including persons outside the Australian Public Service.

10 See addenda to explanatory memoranda for the following bills: Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017; Therapeutic Good (Charges) Amendment Bill 2017; Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016; Social Services Legislation Amendment (Cashless Debit Card) Bill 2017; National Health Amendment (Pharmaceutical Benefits Budget and Other Measures) Bill 2017; Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017; Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017; Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017; Security of Critical Infrastructure Bill 2017; Private Health Insurance Legislation Amendment Bill 2018; Road Vehicle Standards Bill 2018; Road Vehicle Standards Charges (Imposition—Customs) Bill 2018; Road Vehicle Standards Charges (Imposition—Excise) Bill 2018; Road Vehicle Standards Charges (Imposition—General) Bill 2018; Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017; Primary Industries Levies and Charges Collection Amendment Bill 2018; Underwater Cultural Heritage Bill 2018; Education and Other Legislation Amendment (VET Student Loan Debt Separation) Bill 2018; Space Activities Amendment (Launches and Returns) Bill 2018; Imported Food Control Amendment Bill 2017; Government Procurement (Judicial Review) Bill 2017; Unexplained Wealth Legislation Amendment Bill 2018; Veterans' Entitlements Amendment Bill 2018; Australian Institute of Health and Welfare Amendment Bill 2018; Defence Amendment (Call Out of the Australian Defence Force) Bill 2018; Higher Education Support Amendment (VET FEE-HELP Student Protection) Bill 2018; Aged Care Quality and Safety Commission Bill 2018.

2.22 The Community Affairs Legislation Committee stated in its report that the government should examine the committee's recommendations as to possible safeguards on the PHIO's delegation of powers.¹¹

Debate in the Parliament and committees

2.23 The committee's comments on bills are regularly referred to in debate in the Parliament. For example, the committee's comments were substantively discussed in 2018 during consideration of the following bills:

- Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017;¹²
- Copyright Amendment (Online Infringement) Bill 2018;¹³
- Enhancing online safety (non-consensual Sharing of Intimate Images) Bill 2017;¹⁴
- Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017;¹⁵
- Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017;¹⁶
- Regional Investment Corporation Bill 2017;¹⁷
- Veterans' Affairs Legislation Amendment (Veteran-Centric Reforms No. 1) Bill 2018;

Use in Parliamentary Library Bills Digests

2.24 The Parliamentary Library prepares Bills Digests to assist senators, members and others in understanding the key matters in many bills introduced into the Parliament. These Bills Digests regularly canvass issues raised by the Scrutiny of Bills Committee, thereby assisting interested senators and members in assessing key issues raised by this committee.

11 Senate Community Affairs Legislation Committee, *Private Health Insurance Legislation Amendment Bill 2018 and related bills*, 13 August 2018, pp. 4-5 and 14.

12 *Senate Hansard*, 10 May 2018, pp. 2828-2829.

13 *Senate Hansard*, 28 November 2018, pp. 8793-8794.

14 *Senate Hansard*, 14 February 2018, pp. 1021-1053.

15 *House of Representatives Hansard*, 13 February 2018, pp. 1179-1182.

16 *House of Representatives Hansard*, 6 February 2018, pp. 409-414 and 7 February 2018, pp. 523-533.

17 *Senate Hansard*, 6 February 2018, pp. 185-195.

Chapter 3

Case studies

3.1 This chapter includes examples of the committee's work during 2018. The case studies include instances of significant legislation considered during the year and highlight issues of continuing interest into the future.

3.2 Case studies that provide examples of the committee's work help to illustrate:

- the committee's approach to its scrutiny role;
- the committee's role in identifying matters of concern as assessed against the scrutiny principles outlined in standing order 24(1)(a) and in obtaining relevant information which informs the legislative process; and
- the committee's role in providing the foundation for amendments to provisions and improvements to the content of explanatory material.

Telecommunications (Regional Broadband Scheme) Charge Bill 2017

3.3 This bill was introduced into the House of Representatives on 22 June 2017. It, together with the Telecommunications (Competition and Consumer) Bill 2017,¹ sought to establish an ongoing funding arrangement for fixed wireless and satellite broadband infrastructure through the imposition of a new industry charge. The committee initially commented on the bill in *Scrutiny Digest 8 of 2017*.²

3.4 The bill sought to modify the usual commencement and disallowance procedures for the legislative instrument that would vary the rate of the charge. First, the bill sought to improve parliamentary oversight by providing that such a legislative instrument does not come into effect until 15 sitting days after the disallowance period has expired, which the committee welcomed.³ Second, the bill sought to reverse the usual disallowance procedure to require that a House of the Parliament had to positively pass a resolution disallowing a determination within the

1 See the committee's related comments on the Telecommunications (Competition and Consumer) Bill 2017 in Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, pp. 33-36; and Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, pp. 103-114.

2 The committee also commented on the inclusion of significant matters in delegated legislation. See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, pp. 37-40

3 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 39.

15 sitting day disallowance period in order for the disallowance to be effective. Normally, where a motion to disallow an instrument remains unresolved at the end of the disallowance period, the instrument is taken to have been disallowed.⁴

3.5 The committee noted that, because the executive has considerable control over the conduct of business in the Senate, the proposed reversal of the usual disallowance procedure would undermine the Senate's oversight of delegated legislation where time is not made available to consider a disallowance motion within 15 sitting days. The explanatory memorandum contained no justification for this proposed reversal.⁵ The committee noted that an amendment to require the positive approval of each House of the Parliament before a new determination comes into effect would address its scrutiny concerns.⁶

3.6 The comments of the committee were extensively discussed in the report into the bill by the Senate Environment and Communications Legislation Committee, which supported the committee's recommendation that the bill be amended to provide that determinations will not come into effect if a motion to disallow is unresolved at the end of the disallowance period.⁷

3.7 In response to the committee, the minister advised that the modified disallowance procedure provides greater parliamentary scrutiny than the usual disallowance procedure because relevant ministerial determinations can only commence and take effect once the disallowance period has passed. The committee reiterated that it would be appropriate for the disallowance procedures for these ministerial determinations to be amended so that the determinations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period.⁸

3.8 On 10 May 2018 the House of Representatives agreed to one government amendment to the bill. The amendment effectively reinstated the usual disallowance procedures under the *Legislation Act 2003*. The supplementary explanatory

4 As a result of subsection 42(2) of the *Legislation Act 2003*.

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 39.

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 40.

7 Senate Environment and Communications Legislation Committee, *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 [Provisions] and Telecommunications (Regional Broadband Scheme) Charge Bill 2017 [Provisions]*, 6 September 2017, p. 41.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 40.

memorandum notes that the amendment seeks to address the concerns of the committee.⁹

3.9 The committee considered the amendment in *Scrutiny Digest 6 of 2018*. The committee welcomed the amendment and noted that it appeared to address the committee's concerns.¹⁰

Foreign Influence Transparency Scheme Bill 2017

3.10 This bill was introduced into the House of Representatives on 7 December 2017. It sought to establish the Foreign Influence Transparency Scheme, to introduce registration obligations for persons or entities who have arrangements with, or undertake certain activities on behalf of, foreign principals. In *Scrutiny Digest 1 of 2018*, the committee commented on a number of scrutiny concerns arising in the bill, including a broad delegation of administrative powers.¹¹

3.11 The bill proposed to allow the delegation of broad information-gathering powers and powers to authorise the communication of scheme information to Senior Executive Service (SES) employees of the department, or to Australian Public Service employees of the department in an Executive Level 2 or equivalent position.

3.12 The committee noted that its general preference is that delegates be confined to the holders of nominated offices or to members of the SES. The committee raised concerns regarding extending the scope of the delegation to Executive Level 2 positions and noted that there was particular concern in relation to the delegation of powers to require persons to answer questions or produce documents (failure to comply being an offence) and the communication of scheme information as set out in Divisions 3 and 4 of Part 4 of the bill.¹²

3.13 In response to the committee's concerns, the Attorney-General advised that the delegation of the secretary's powers was to ensure 'flexibility and timeliness' in dealing with matters under the scheme, and that these delegations have been restricted to SES and Executive Level 2 employees so as to ensure that powers and

9 Telecommunications (Regional Broadband Scheme) Charge Bill 2017, Supplementary Explanatory Memorandum, p. 1.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, 20 June 2018, p. 56.

11 The committee also commented on the reversal of the evidential burden of proof in a number of offences, the leaving of significant aspects of the scheme to delegated legislation, the inclusion of significant penalties and the application of absolute liability to an element of an offence. See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, pp. 63-74.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, 7 February 2018, p. 74.

functions under the bill are only exercisable by 'senior officers with experience and judgement in matters of public administration.' The Attorney-General also advised that the government considered that it would be appropriate to amend the bill to ensure that the information-gathering powers in the bill were limited only to more senior departmental officers.¹³

3.14 On 26 June 2018, the House of Representatives agreed to 126 Government amendments to the bill. These included amendments that limited the secretary's ability to delegate functions, including by:

- preventing the secretary from delegating functions or powers relating to the issuing, varying or revoking of a transparency notice; and
- limiting the delegation of information-gathering powers to employees at the SES level.

3.15 The supplementary explanatory memorandum for the amendments acknowledged that these amendments implemented the recommendation of the committee.¹⁴

3.16 The committee welcomed these amendments noting that they appeared to address some, but not all, of the committee's broader scrutiny concerns.¹⁵

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

3.17 The bill was introduced into the House of Representatives on 7 December 2017. The bill sought to make amendments to a number of Commonwealth Acts in relation to espionage, foreign interference and treason offences. In *Scrutiny Digest 1 of 2018*, the committee commented on a number of issues arising in the bill, including in relation to the reversal of the burden of proof in a number of offences.¹⁶

3.18 A number of key offences relating to threats to national security in the bill provided offence-specific defences which reverse the evidential burden of proof,

13 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, p. 232.

14 Foreign Influence Transparency Scheme Bill 2017, Supplementary Explanatory Memorandum, pp 110 – 111.

15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, 15 August 2018, p. 37.

16 The committee also commented on the broad scope of many offence provisions, the inclusion of strict liability offences, the presumption against bail and the incorporation of external material into the law. See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, pp. 82-96.

providing that the offence does not apply, or it is a defence to the offence, in certain specified circumstances.

3.19 The committee noted that provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with the common law right to be presumed innocent until proven guilty. The committee also noted that proposed Division 122 set out a number of offences for a person to communicate or deal with security classified information which was obtained by the person by reason of being a Commonwealth officer (or engaged to perform work for a Commonwealth entity). The committee raised concerns that this would appear to leave officials acting appropriately in the course of their employment open to a criminal charge and then places the evidential burden of proof on the officer to raise evidence to demonstrate that they were in fact acting in accordance with their employment. The committee also noted that there may be some officers who, by reason of the sensitive national security nature of their work and secrecy requirements under other legislation, may be unable to lawfully raise evidence relating to whether they were acting in the course of their duties.

3.20 In response to the committee, the Attorney-General advised that amendments to the draft bill would be developed to ensure that Inspector General of Intelligence and Security (IGIS) officials would not bear an evidential burden in relation to the defences in proposed section 122.5 of the bill, and to broaden the defences at proposed subsections 122.5(3) and (4) to cover all dealing with information and clarify that the defences in section 122.5 do not affect any immunities that exist in other legislation.¹⁷

3.21 The committee considered that the proposed amendments would address concerns raised in its initial report that some officers may be unable to lawfully raise evidence relating to whether they were acting in the course of their duties due to the sensitive national security nature of their work and secrecy requirements under other legislation. However, the committee also noted that the bill would still leave non-IGIS officials acting appropriately in the course of their employment open to a criminal charge and place the evidential burden of proof on these officers to raise evidence to demonstrate that they were in fact acting in accordance with the duties of their employment.¹⁸

3.22 On 26 June 2018, the House of Representatives agreed to 154 Government amendments to the bill. These amendments included the amendments proposed by the Attorney-General in his response to the committee and also removed the

17 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2018*, 28 March 2018, p. 26.

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2018*, 28 March 2018, pp. 27-28.

reversal of the evidential burden in subsection 122.5 for officials of the Commonwealth Ombudsman, the Law Enforcement Integrity Commissioner, and the Australian Information Commissioner.

3.23 The committee welcomed these amendments noting that they appeared to address some, but not all, of the committee's scrutiny concerns.¹⁹

Senator Helen Polley
Chair

19 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, 15 August 2018, p. 37.

Appendix 1

The committee's scrutiny principles in detail

Provisions which trespass unduly on personal rights and liberties

Application of criterion set out in standing order 24(1)(a)(i)

The committee is required to report on whether the provisions of proposed legislation could 'trespass unduly on personal rights and liberties'. For example, a bill might raise issues relating to:

- having a retrospective and adverse effect on those to whom it applies, sometimes from the date of a media announcement (in these instances known as 'legislation by press release');
- abrogating the privilege against self-incrimination (the right people have at common law to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved);
- reversing the common law burden of proof (requiring a person to prove their innocence when legal proceedings are taken against them);
- imposing strict or absolute liability as an element of fault for an offence;
- authorising search and seizure without the need to obtain a judicial warrant;
- privacy, including the confidentiality of professional communications with a person's legal advisers;
- equipping officers with oppressive powers, especially for use against a vulnerable group of people; or
- taking away Parliament's right to obtain information from the executive.

These are categories that have arisen for consideration during most parliaments and are ones with which the committee is very familiar. However, standing order 24(1)(a)(i) may also apply in other circumstances and the committee is alert to identifying any new matters that may be considered inconsistent with the intent of the principle. More detail about matters that give rise to scrutiny concern and examples are discussed below.

Retrospectivity

Legislation has retrospective effect when it makes a law apply to an act or omission that took place *before* the legislation itself was enacted. Criticism of this practice is longstanding. The committee considers that retrospective legislation is of concern where it will, or might, have a detrimental effect on people. The committee will comment adversely in these circumstances. Where proposed legislation will have retrospective effect the committee expects that the explanatory memorandum

should set out in detail the reasons retrospectivity is sought. The justification should include a statement of whether any person will or might be adversely affected and, if so, the number of people involved and the extent to which their interests are likely to be affected.

For examples, see the committee's comments concerning the:

- Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2018 (*Scrutiny Digest 2 of 2018*);
- Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018 (*Scrutiny Digest 5 of 2018*); and
- Veterans' Entitlements Amendment Bill 2018 (*Scrutiny Digest 10 of 2018*).

Abrogation of the privilege against self-incrimination

At common law, a person can decline to answer a question on the ground that their reply might tend to incriminate them. Legislation that interferes with this common law entitlement trespasses on personal rights and liberties and causes the committee considerable concern. However, the committee is also conscious of a government's need to have sufficient information to enable it to properly carry out its duties for the community. The committee accepts that in some circumstances good administration might require access to information that can only be obtained, or can best be obtained, by forcing a person to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence.

The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a provision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.

One of the factors the committee considers is the subsequent use that may be made of any incriminating disclosures. The committee generally holds to the view that it is relevant to take into account whether the proposed legislation balances the harm of abrogating the privilege by including a prohibition against any direct and indirect uses of the information beyond the purpose for which it is being obtained.

To date the only exception to this that the committee generally finds acceptable is that a forced disclosure should only be available for use in criminal proceedings when they are proceedings for giving false or misleading information in the disclosure the person has been compelled to make. The committee's experience is that the importance of the availability of these use and derivative use immunities are generally understood and they are usually included in bills that seek to abrogate the privilege against self-incrimination.

For examples see the committee's comments concerning the:

- Road Vehicle Standards Bill 2018 (*Scrutiny Digest 2 of 2018*);
- Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018 (*Scrutiny Digest 5 of 2018*); and
- Unexplained Wealth Legislation Amendment Bill 2018 (*Scrutiny Digest 7 of 2018*).

Reverse burden of proof

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence; the accused is not required to prove anything. Provisions in some legislation reverse this burden and require the person charged with an offence to prove, or disprove, a matter in order to establish his or her innocence or at least identify evidence that suggests a reasonable possibility that the matter exists or does not exist.

The committee usually comments adversely on a bill that places the burden on an accused person to disprove one or more elements of the offence with which he or she is charged, unless the explanatory memorandum clearly and adequately justifies the rationale for the approach, particularly by reference to the principles outlined in its comments on this issue recorded in the committee's *Scrutiny Digests* and in the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which states in relation to a provision which reverses the burden of proof (often drafted, in effect, as a defence):

- However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence.¹

For examples, see the committee's comments concerning the:

- Criminal Code and Other Legislation Amendment (Removing Commonwealth Restrictions on Cannabis) Bill 2018 (*Scrutiny Digest 6 of 2018*);
- Office of National Intelligence Bill 2018; (*Scrutiny Digest 8 of 2018*); and
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (*Scrutiny Digest 5 of 2018*).

Strict and absolute liability offences

The committee draws the Senate's attention to provisions that create offences of strict or absolute liability and expects that where a bill creates such an offence the

1 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 50.

reasons for its imposition will be set out in the explanatory memorandum that accompanies the bill.

An offence is one of **strict liability** where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. A person charged with a strict liability offence is able to invoke a defence of mistake of fact.

An offence of **absolute liability** also provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. However, in the case of absolute liability offences, the defence of mistake of fact is not available.

For examples, see the committee's comments concerning the:

- Corporations Amendment (Asia Region Funds Passport) Bill 2018 (*Scrutiny Digest 5 of 2018*);
- Education and Other Legislation Amendment (VET Student Loan Debt Separation) Bill 2018 (*Scrutiny Digest 5 of 2018*); and
- Health Legislation Amendment (Improved Medicare Compliance and Other Measures) Bill 2018 (*Scrutiny Digest 6 of 2018*).

Powers of search and seizure without warrant

The committee consistently draws the Senate's attention to provisions that allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties. A provision giving such a power will be acceptable only when the circumstances and gravity of the matter justify it (and this information should be included in the explanatory memorandum).

For example see the committee's comments concerning the:

- Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (*Scrutiny Digest 6 of 2018*); and
- Private Health Insurance Legislation Amendment Bill 2018 (*Scrutiny Digest 5 of 2018*); and
- Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (*Scrutiny Digest 12 of 2018*).

Insufficiently defined administrative powers

Application of criterion set out in standing order 24(1)(a)(ii)

Legislation may contain provisions which make rights and liberties unduly dependent on insufficiently defined administrative powers. For example, a provision might:

- give administrators ill-defined and/or wide powers;
- delegate power to 'a person' without any further qualification as to who that person might be; or
- fail to provide for people to be notified of their rights of appeal against administrative decisions.

Broad discretionary powers

Since its establishment in 1981, the committee has drawn the Senate's attention to legislation that gives administrators seemingly ill-defined and wide powers. The committee sees a number of approaches that are of concern from year to year, though it is also always alert to identifying novel ways in which this issue may arise.

As is often the case, if a provision that is of interest to the committee is accompanied by a comprehensive explanation of the rationale for the approach in the explanatory memorandum, the committee is able to better understand the proposal and either make no further comment or leave the matter to the consideration of the Senate.

For examples, see the committee's comments concerning the:

- Future Drought Fund Bill 2018 (*Scrutiny Digest 15 of 2018*); and
- National Housing Finance and Investment Corporation Bill 2018 (*Scrutiny Digest 3 of 2018*); and
- Underwater Cultural Heritage Bill 2018 (*Scrutiny Digest 5 of 2018*).

Delegation of power to 'a person' or to a wide class of persons

The committee consistently draws attention to legislation that allows significant and wide-ranging powers to be delegated to anyone who fits an all-embracing description (such as 'a person') or which allows delegations to a relatively large class of persons with little or no specificity as to appropriate qualifications or attributes. Generally the committee prefers to see a limit set either on the sorts 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 delegations are made the committee also expects that an explanation of why they are considered necessary should be included in the explanatory memorandum, especially if the delegation is broad.

For examples, see the committee's comments concerning the:

- Aged Care Quality and Safety Commission Bill 2018 (*Scrutiny Digest 11 of 2018*);
- Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017 (*Scrutiny Digest 1 of 2018*); and
- Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (*Scrutiny Digest 10 of 2018*).

Undue dependence on non-reviewable decisions

Application of criterion set out in standing order 24(1)(a)(iii)

Legislation may contain provisions which make 'rights, liberties or obligations unduly dependent upon non-reviewable decisions'. Relevantly, a bill may seek to:

- exclude review on the merits by an appropriate appeal tribunal;
- exclude judicial review of the legality of a decision; or
- provide that reasons need not be given for a decision.

Excluding merits and judicial review

The committee is of the view that, where a decision may have a substantial impact on a person's rights and interests, judicial review should generally be available to ensure that such decisions are lawfully made. Since its establishment, the committee has drawn attention to provisions that explicitly or otherwise exclude or fail to provide for effective judicial review.

The committee routinely draws attention to bills that seek to deny the opportunity for effective review. However, the committee also accepts that there are circumstances in which review is not, or may not be, necessary. The committee is assisted to come to this conclusion when the explanatory memorandum comprehensively and persuasively describes the rationale for the proposed approach.

For examples, see the committee's comments concerning the:

- Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 (*Scrutiny Digest 1 of 2018*)
- Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018 (*Scrutiny Digest 9 of 2018*); and
- National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 (*Scrutiny Digest 6 of 2018*).

Inappropriate delegation of legislative power

Application of criterion set out in standing order 24(1)(a)(iv)

Legislation often includes the delegation of a power to make laws, giving delegates (usually a member or representative of the Executive Government) the authority to make regulations or other instruments that are not required to be considered and approved by Parliament before they take effect. The committee's task under this criterion is therefore to draw the Senate's attention to provisions that seek to delegate Parliament's power inappropriately. Examples of provisions that may inappropriately delegate legislative power include those which:

- enable subordinate legislation to amend an Act of Parliament (often called a 'Henry VIII' clause);
- provide that matters which are so important that they should be regulated by Parliament but are, in fact, to be dealt with by subordinate legislation;
- provide that a levy or a charge be set by regulation; or
- give to the Executive unfettered control over whether or when an Act passed by the Parliament should come into force.

Henry VIII clauses

A Henry VIII clause is an express provision which authorises the amendment of either the empowering Act, or any other primary legislation, by means of delegated legislation. Since its establishment, the committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Once again, a clear and helpful explanation in the explanatory memorandum can allow the committee to leave the matter to the Senate.

For examples, see the committee's comments concerning the:

- National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018 (*Scrutiny Digest 3 of 2018*);
- Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2018 (*Scrutiny Digest 15 of 2018*); and
- Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (*Scrutiny Digest 12 of 2018*).

Significant matters in delegated legislation

The committee also draws attention to provisions that inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. Significant matters should be undertaken directly by Parliament and not left to the subordinate legislation disallowance process.

For example, see the committee's comments concerning the:

- Australian Passports Amendment (Identity-matching Services Bill 2018 (*Scrutiny Digest 2 of 2018*);
- Higher Education Support Amendment (Cost Recovery) Bill 2018 (*Scrutiny Digest 12 of 2018*); and
- Primary Industries Levies and Charges Collection Amendment Bill 2018 (*Scrutiny Digest 5 of 2018*).

Setting the rate of a 'levy' by regulation

The committee has also consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation. This creates a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the committee expects that there will be some limits imposed on the exercise of this power. For example, the committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

For example, see the committee's comments concerning the:

- Higher Education Support (Charges) Bill 2018 (*Scrutiny Digest 12 of 2018*); and
- Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017 (*Scrutiny Digest 1 of 2018*).

Appropriate parliamentary scrutiny of legislative power

Application of criterion set out in standing order 24(1)(a)(v)

Whenever Parliament delegates power to legislate, it should properly address the question of how much oversight to maintain over the exercise of that delegated power. Provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny include those which:

- provide a power to make delegated legislation that is not to be tabled in Parliament, or which is to be tabled, but is not disallowable;
- require delegated legislation to be tabled and disallowable, but with a disallowance period so short that Parliament may not be able to scrutinise it properly;
- provide that legislative instruments to be made under primary legislation may incorporate rules or standards of other bodies as in force from time to time; or
- enable a Minister or other person to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised, with no obligation that they be tabled in Parliament or subject to disallowance.

Not tabled or not subject to disallowance

When a provision specifies that an instrument is *not* a legislative instrument the committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the committee expects to see a full explanation outlined in the explanatory memorandum justifying the need for the exemption.

For example, see the committee's comments concerning the:

- Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 (*Scrutiny Digest 5 of 2018*);
- Office of National Intelligence Bill 2018 (*Scrutiny Digest 7 of 2018*); and
- Unexplained Wealth Legislation Amendment Bill 2018 (*Scrutiny Digest 7 of 2018*).

Incorporating material 'as in force from time to time'

The *Legislative Instruments Act 2003* includes a general rule which allows a legislative instrument, such as a regulation, to adopt or incorporate additional material and give it the force of law. The incorporated material applies in the form in which it exists *at the time of adoption* unless a provision in the relevant Act allows material to be incorporated 'as in force from time to time'. Typical wording included in bills to achieve this outcome provides that the relevant regulations may:

...apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing as in force from time to time.

Allowing material to be incorporated 'as in force from time to time' is of concern from a scrutiny perspective because it:

- allows a change in legal obligations to be imposed without the Parliament's knowledge and without the opportunity for Parliament to scrutinise the variation;
- can create uncertainty in the law because those affected may not be aware that the law has changed; and
- those obliged to obey the law may have inadequate access to its terms, depending on the nature of the material being incorporated.

The committee expects that the explanatory memorandum for a bill that includes a provision which seeks to incorporate non-legislative material 'as in force from time to time' will clearly and comprehensively explain the necessity for this approach and indicate how the concerns outlined above will be met.

In some instances the committee noted that a bill sought to incorporate material 'as in force from time to time', but acknowledged that an appropriate explanation was provided in the explanatory memorandum.

For example, see the committee's comments concerning the:

- Agricultural and Veterinary Chemicals Legislation Amendment (Streamlining Regulation) Bill 2018 (*Scrutiny Digest 13 of 2018*);
- Road Vehicle Standards Bill 2018 (*Scrutiny Digest 2 of 2018*); and
- Space Activities Amendment (Launches and Returns) Bill 2018 (*Scrutiny Digest 6 of 2018*).

Standing Appropriations

In the committee's *Fourteenth Report of 2005*, the committee stated that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the

committee's terms of reference relating to the delegation and exercise of legislative power. (p. 272)

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation in the period during which it applies.

For example, see the committee's comments concerning the:

- Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 1) Bill 2018 (*Scrutiny Digest 3 of 2018*).

