

The Senate

Standing
Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain 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 as to whether the bills, 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.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

Chapter 1

Commentary on Bills

1.1 No bills introduced.

Commentary on amendments and explanatory materials

Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017

[Digests 5 & 7/17]

1.2 On 28 February 2018 the House of Representatives agreed to seven government amendments, the Minister representing the Minister for Communications (Mr Fletcher) presented an addendum to the explanatory memorandum and a supplementary explanatory memorandum and the bill was read a third time.

1.3 The committee has no comment on the government amendments to this bill.

1.4 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.¹

Social Services Legislation Amendment (Welfare Reform) Bill 2017

[Digest 12/17]

1.5 On 7 December 2017 the Senate agreed to 15 government amendments, 5 government requests for amendments and the Minister for Jobs and Innovation (Senator Cash) tabled a supplementary explanatory memorandum. On 19 March 2018 the Senate agreed to 12 government amendments and the Minister for Jobs and Innovation (Senator Cash) tabled two supplementary explanatory memoranda. On 20 March 2018 the Senate agreed to two Pauline Hanson's One Nation requests for amendments (in place of two of the government requests for amendments agreed to on 7 December).

Significant matters in delegated legislation²

1.6 Current sections 13 and 14 of the *Social Security (Administration) Act 1999* are 'deemed claim provisions' that allow 'leniency for claimants by effectively backdating their entitlement to a payment to the date they initially contacted the

1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, 21 June 2017, pp 43–50.

2 Government amendments to Schedule 11 on sheet JC488, proposed section 14A of the *Social Security (Administration) Act 1999*.

Department of Human Services and indicated their intention to claim'.³ The bill as originally introduced sought to repeal these provisions.

1.7 The government amendments to Schedule 11 sought to amend the current deemed claim provisions so that these provisions would only apply to a person who is included in a class of persons determined by the minister in a legislative instrument made under proposed section 14A. In this regard, the supplementary explanatory memorandum suggests that although the deemed claim provisions will no longer apply to claimants generally, the amendments 'will ensure that sections 13 and 14 will continue to apply to a vulnerable claimant, being a person included in a class of persons determined by the Minister by legislative instrument'. The supplementary explanatory memorandum further suggests that examples of vulnerable circumstances will include, but not be limited to, crisis situations where the claimant is unable to fully complete a claim due to being homeless, affected by a major disaster or family and domestic violence, a recent humanitarian entrant or recently released from prison or psychiatric confinement. Vulnerable circumstances may also relate to people in ongoing situations such as young people who are unable to live at home.⁴

1.8 The committee's view is that significant matters, such as determining the classes of persons to whom deemed claim provisions in the social security law will apply, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the committee notes that inclusion in a class of persons determined by the minister under proposed section 14A will be beneficial in that those persons will be able to access the deemed claim provisions. In this regard, the committee notes that proposed section 14A provides that the minister *may*, by legislative determine a class of persons to whom the deemed claim provisions will apply, however there is no requirement that the minister *must* make such a determination. Based on the text of the provision it appears possible that the minister could decline to make a determination and therefore no social security claimants would be able to access the deemed claim provisions.

1.9 In addition, the committee notes that while the supplementary explanatory memorandum suggests that the minister's power to make a legislative instrument under proposed section 14A will be used to define which classes of persons are to be considered 'vulnerable claimants', there is no guidance on the face of legislation to limit the minister's instrument-making power in this way.

1.10 In light of the fact that the amendments have passed both Houses of Parliament, the committee makes no further comment on this matter.

3 Supplementary explanatory memorandum to sheet JC488, p. 1.

4 Supplementary explanatory memorandum to sheet JC488, pp 1–2.

1.11 The committee draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Schedule 12—establishment of a drug testing trial

1.12 Government amendments on sheet JC466 remove Schedule 12 (relating to the establishment of a drug testing trial) from the bill. The committee notes that provisions for the establishment of a drug testing trial substantially the same as the provisions of Schedule 12 were introduced into the House of Representatives as the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (the Drug Testing Trial Bill) on 28 February 2018.

1.13 The committee draws to the attention of senators the comments that it made in relation to the Drug Testing Trial bill in *Scrutiny Digest 3 of 2018*.⁵

1.14 The committee has no comments on amendments made or explanatory material relating to the following bills:

- Treasury Laws Amendment (Junior Minerals Exploration Incentive) Bill 2017⁶

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, pp 34–44.

6 On 19 March 2018 the Senate agreed to one government amendment, two opposition amendments, one government request for an amendment and the Assistant Minister for Science, Jobs and Innovation (Senator Seselja) tabled a supplementary explanatory memorandum.

Chapter 2

Commentary on ministerial responses

2.1 This chapter considers the responses of ministers to matters previously raised by the committee.

Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017

Purpose	This bill seeks to amend the <i>Great Barrier Reef Marine Park Act 1975</i> to implement a new governance arrangements for the Great Barrier Reef Marine Park Authority
Portfolio	Environment and Energy
Introduced	Senate on 6 December 2017
Bill status	Received Royal Assent on 5 March 2018

2.2 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter received 27 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹

Retrospective application²

Initial scrutiny – extract

2.3 Part 1 of Schedule 2 to the bill seeks to amend the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act) to provide that zoning plans, and plans of management, may provide in relation to a matter by providing that the regulations, or other legislative instruments, provide in relation to that matter. That part also seeks to amend the GBRMP Act to provide that zoning plans or plans of management may provide in relation to any matter in relation to which the regulations may provide.

2.4 The explanatory memorandum states that the changes proposed by Part 1 of Schedule 2 to the bill are directed at 'clarifying the relationship between zoning

1 See correspondence relating to *Scrutiny Digest No. 4 of 2018* available at: www.apf.gov.au/senate_scrutiny_digest

2 Schedule 2, Part 2. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

plans, plans of management and regulations made under the GBRMP Act; or other legislative instruments'.³ These amendments appear to seek to address a technical defect in instruments currently made under the GBRMP Act. However, the explanatory materials do not explain the nature of that defect or the consequences that may follow from it, only stating that it addresses 'what may have been a technical defect associated with the prescription of conduct in Marine Park legislation'.⁴ The explanatory materials also indicate that proceedings have commenced in the High Court relating to the operation of the legislation as it currently stands, but no detail is provided about the nature of the proceedings.⁵

2.5 Part 1 of Schedule 2 to the bill also contains application and transitional provisions which provide that the amendments in Part 1 of Schedule 2 apply in relation to any zoning plans, plan of management or regulations made before or after commencement. As such, these amendments have retrospective application. Item 8 also provides that an instrument made under the GBRMP Act before the commencement of this bill, and anything done under such an instrument, is taken to have been valid. Item 9 also provides that the rights and liabilities of all persons are declared to be, and always to have been, the same as if instruments made under the GBRMP Act as currently in force, had always been valid.

2.6 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

2.7 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

2.8 The explanatory memorandum explains that the retrospective application of the amendments preserve the effect of actions previously taken under the existing legislation, and ensure the application of instruments made under the GBRMP Act in the past and in the future is the same, 'so that persons are not disadvantaged by any potential for inconsistent application of the existing framework'.⁶ The explanatory memorandum also states that the retrospective application of the amendments 'will not adversely impact on persons due to the inclusion of a "historic shipwrecks" clause', which provides that the Commonwealth is required to pay reasonable

3 Explanatory memorandum, p. 18.

4 Statement of compatibility, p. 6.

5 Explanatory memorandum p. 22.

6 Explanatory memorandum, p. 20.

compensation to any person whose property may be acquired otherwise than on just terms.⁷

2.9 However, while the explanatory materials give some justification as to why the retrospective application is necessary, the committee notes that the information provided lacks specificity.

2.10 The committee therefore requests the minister's advice as to:

- the nature of the technical defect with the zoning plans, plans of management and regulations currently made under the *Great Barrier Reef Marine Park Act 1975*;
- the issues arising for decision in the High Court litigation; and
- whether any person or persons may suffer detriment from the retrospective application of the legislation,⁸ and if so, the extent of that detriment.

Minister's response

2.11 The minister advised:

1. The nature of the technical defect with the zoning plans, plans of management and regulations currently made under the *Great Barrier Reef Marine Park Act 1975* (the Act)

The amendments now clearly allow for zoning plans and plans of management to refer to and rely on content in regulations and other legislative instruments. The amendments have been made retrospective to ensure the validity of the legislation underpinning the Act is clear.

2. The issues arising for decision in the High Court Litigation

There is no High Court litigation currently on foot and I am not aware of any other legal proceedings which would be affected by the amendments made by the Bill. The Bill includes provisions to ensure that it does not affect rights or liabilities of parties to proceedings for which leave to appeal to the High Court has been given before commencement date of the application and transitional provisions. These provisions are consistent with the current treatment in other Bills of this nature to preserve the rights of parties to existing litigation, regardless of whether such litigation is on foot.

3. Whether there any person or persons who may suffer detriment from the retrospective application of the legislation, and if so, the extent of that detriment

7 Explanatory memorandum p. 20.

8 The committee notes that subitem 9(3) provides that proceedings already commenced in the High Court will not be affected.

The retrospective application of the Bill will ensure that persons do not suffer detriment to the extent that they have previously relied on the validity of the current and past Marine Park legislation. In the highly unlikely event that a person would suffer detriment because of the retrospective operation of the Bill, the Bill contains a provision guaranteeing compensation to the extent that the retrospective application of the Bill would result in an acquisition of a person's property otherwise than on just terms.

Committee comment

2.12 The committee thanks the minister for this response. The committee notes the minister's advice that there is no High Court litigation currently on foot and that he is not aware of any other legal proceedings that would be affected by the amendments made by the bill.

2.13 The committee also notes the minister's advice that the retrospective application of certain provisions in the bill will ensure that persons do not suffer any detriment to the extent that they have previously relied on current and past marine park legislation. Finally, the committee notes the minister's advice that, in the 'highly unlikely' event that a person does suffer detriment due to the retrospective application of these provisions, the bill contains a provision guaranteeing compensation to the extent that the person's property has been acquired otherwise than on just terms.

2.14 In light of the information provided and the fact that this bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

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

Purpose	<p>This bill seeks to amend various Acts in relation to the criminal law to:</p> <ul style="list-style-type: none"> • amend existing espionage offences; • introduce new foreign interference offences targeting covert, deceptive or threatening actions by foreign actors; • amend Commonwealth secrecy offences; • introduce comprehensive new sabotage offences; • amend various offences, including treason; • introduce a new theft of trade secrets offence; • introduce a new aggravated offence for providing false and misleading information in the context of security clearance processes; and • allow law enforcement agencies to have access to telecommunications interception powers. <p>The bill also seeks to make amendments relevant to the Foreign Influence Transparency Scheme, including seeking to amend the <i>Foreign Influence Transparency Scheme Act 2017</i> (currently a bill before Parliament)</p>
Portfolio	Attorney-General
Introduced	House of Representatives on 7 December 2017
Bill status	Before the House of Representatives

2.15 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The Attorney-General responded to the committee's comments in a letter dated 14 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the Attorney-General's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁹

Attorney-General's comment on proposed government amendments

This response to the Senate Standing Committee for the Scrutiny of Bills (the committee's) inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (the Bill) is

⁹ See correspondence relating to *Scrutiny Digest No. 4 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

informed by a number of amendments I provided to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on 5 March 2018.

The changes are summarised below.

- The definition of ‘inherently harmful information’ will be narrowed by:
 - amending the definition of security classification in section 90.5 (at Item 16 of Schedule 1 of the Bill) and section 121.1 (at Item 6 of Schedule 2 of the Bill) to mean a classification of TOP SECRET or SECRET, or any other equivalent classification or marking prescribed by the regulations.
 - removing paragraph (d) applying to information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law.
- The definition of ‘cause harm to Australia’s interests’ will be narrowed by removing:
 - subparagraph (a)(ii) – interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a provision, that is subject to a civil penalty, of a law of the Commonwealth
 - paragraph (d) – harm or prejudice Australia’s international relations in any other way, and
 - paragraph (e) – harm or prejudice relations between the Commonwealth and a State or Territory.
- Separate offences will apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply where:
 - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
 - the communication of the information damages the security or defence of Australia and the person is reckless as to this
 - the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
 - the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.
- The definition of ‘Commonwealth officer’ will be amended to explicitly exclude officers or employees of, or persons engaged by,

the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation.

- The defence for journalists will be strengthened by:
 - removing any requirement for journalists to demonstrate that their reporting was 'fair and accurate'
 - ensuring the defence is available where a journalist reasonably believes that their conduct was in the public interest, and
 - clarifying that the defence is available for editorial and support staff as well as journalists themselves.
- Strict liability will be removed from elements of the offences relating to information or articles carrying a security classification.

Broad scope of offence provisions¹⁰

Initial scrutiny – extract

2.16 The bill proposes reforming, and introducing, a number of key offences relating to threats to national security. The committee is concerned that a number of definitions in the bill, that are central to, or at least relate to, these offences, are broadly defined. As a result, a number of the offence provisions in the bill have a broad application. In particular:

- 'deal' is defined as doing a number of listed things in relation to information or an article, including merely receiving or obtaining it, collecting it or possessing it;¹¹
- 'foreign principal' is defined as including, amongst other things, a public international organisation, being an organisation of which two or more countries are members or a commission, council or other body established by such an organisation (thereby including all United Nations bodies);¹²
- 'national security' is defined as the national security of Australia and of a foreign country and includes the protection of the integrity of the country's territory and borders from 'serious threats' (which is not defined) or the country's political, military or economic relations with another country;¹³ and
- 'inherently harmful information' is defined as including security classified information (regardless of whether the classification was appropriately

10 Various provisions. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

11 See Schedule 1, item 10, section 90.1(1), proposed definition of 'deal'.

12 See Schedule 1, item 16, proposed section 90.2.

13 See Schedule 1, item 16, proposed section 90.4.

made) or information that was provided by anyone to the Commonwealth in order to comply with an obligation under law or by compulsion of law.

2.17 As a result of these broad definitions, a number of offences in the bill appear to be overly broad. For example, under proposed section 91.3 a person commits an espionage offence if they deal with information or an article and this results in the information or article being made available to a foreign principal or to a person acting on their behalf and the information or article has a security classification or concerns Australia's national security. The penalty for the offence is imprisonment for up to 20 years. Because of the broad definition of 'deals' and 'national security' this could mean that a journalist who publishes security classified information online would commit the offence (as the publication would make the information available to a foreign principal), regardless of the public interest reasons for publishing it and whether the security classification was appropriately made. The broad definitions of 'deal' and 'foreign principal' could also make it an offence for a person to share unclassified information with a public international organisation, such as the World Health Organisation, if the information concerned Australia's political or economic relations with another country (with no requirement that the sharing of such information would affect those relations). The committee notes the only listed defence to the offence in proposed section 91.3 is that the person dealt with the information in accordance with a Commonwealth law, in the person's capacity as a public official or in accordance with an agreement with the Commonwealth allowing for the exchange of such information or articles.¹⁴ There is no defence available for journalists or others acting in the public interest or even that the information had already been lawfully made publicly available.

2.18 In addition, proposed subsections 122.1(1) and (2) make it an offence for a person to communicate or deal with inherently harmful information that was made or obtained by that or any other person by reason of being, or having been, a Commonwealth officer or engaged to perform work for a Commonwealth entity. This offence is subject to a penalty of imprisonment of up to 15 years (for communicating) and 5 years (for otherwise dealing). As a result of the definitions of 'deal' and 'inherently harmful information', an offence under section 122.1 could be made out if a person simply receives security classified information from a Commonwealth officer, even if they did not solicit that information and did nothing else with that information. The offences also do not distinguish between conduct committed by a Commonwealth officer or contractor in the course of their duties and third parties who have no professional obligation to maintain the confidentiality of such information. The committee also notes that the offence could be committed by a Commonwealth officer merely carrying out their everyday functions of dealing with security classified material, with the burden of proof resting with the officer to

14 See Schedule 1, item 17, proposed section 91.4.

raise evidence to prove that they were acting in accordance with their duties in doing so (see paragraphs 2.35 to 2.45 below).

2.19 The committee therefore seeks the minister's detailed justification of:

- the breadth of the definitions of 'deal', 'foreign principal', 'national security' and 'inherently harmful information' in the context of the offences in which they apply; and
- the breadth of the offences in proposed sections 91.3 and 122.1.

Attorney-General's response

2.20 The Attorney-General advised:

The Bill inserts a number of exhaustive definitions for the purposes of the offences. These terms were previously undefined in the *Criminal Code Act 1995* (the Criminal Code).

The definition of 'deals' with information

The definition of deals in section 90.1 of the Bill has been broadened to cover the full range of conduct that can constitute secrecy and espionage offences. This is to ensure the offences comprehensively address the full continuum of criminal behaviour that is undertaken in the commission of espionage offences, and to allow authorities to intervene at any stage.

While the definition of 'deal' captures a range of conduct, a person will only commit an espionage offence where every element of the offence is satisfied. For example, a person will only commit an offence under subsection 91.1(1) where he or she deals with security classified information or information concerning Australia's security, and the person intends for the conduct to prejudice Australia's national security or advantage the national security of a foreign country, and this results or will result in the information being made available to a foreign principal.

The penalties for the secrecy offences are tiered to ensure that penalties are commensurate with the seriousness and culpability of offending. The higher penalty will apply where a person actually communicates information. Offences relating to other dealings with information will carry lower penalties.

In relation to the espionage offences in sections 91.1, 91.2 and 91.3, and the secrecy offences in subsections 122.1(1) 122.1(2), 122.2(1) and 122.2(2), the fault element of intention will apply to the physical element of the offence that a person communicates or deals with the information. Consistent with subsection 5.2(1) of the Criminal Code, this means that the person must have meant to engage in the conduct – mere receipt of information would not satisfy this fault element.

The definition of 'national security'

The definition of 'national security' in section 90.4 of the Bill is exhaustive and has been drafted consistent with definitions in other Commonwealth legislation, to ensure it reflects contemporary matters relevant to a nation's ability to protect itself from threats. This includes the definition of 'security' in section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and the definition of 'national security' in section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act).

Section 8 of the NSI Act defines 'national security' to mean 'Australia's defence, security, international relations or law enforcement interests.' Section 9 of the NSI Act further defines 'security' to have the same meaning as in the ASIO Act. Section 10 of the NSI Act further defines 'international relations' to mean the 'political, military and economic relations with foreign governments and international organisations.'

The reference to 'political, military and economic relations' in section 90.4 of the Bill aligns with the definition of 'international relations' in the NSI Act.

This definition substantially implemented the recommendations of the Australian Law Reform Commission (ALRC) in *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, June 2004). This report recommended that 'national security information' be defined by reference to the Commonwealth Protective Security Manual that existed at that time, which included reference to 'international relations' in the same terms as appear in section 10 of the NSI Act (see paragraph 2.7 of the ALRC's Report).

The definition of 'foreign principal'

As the committee notes in paragraph 1.272, 'foreign principal' is defined in section 90.2 of the Bill to include governments of foreign countries, state-owned enterprises, foreign political organisations, public international organisations and terrorist organisations.

It is appropriate and consistent with the definition in section 70.1 of the Criminal Code to define foreign principal to include public international organisations. In relation to the foreign interference offences, a person could equally seek to interfere in Australia's democratic processes or prejudice Australia's national security on behalf of such actors in some circumstances. Similarly, it is important for the espionage offences to apply to information made available to foreign principals, including public international organisations, where the person's conduct prejudices Australia's national security or advantages the national security of another country.

The definition extends to entities that are 'owned, directed or controlled' by other foreign principals to ensure that there are no gaps in coverage that can be exploited by Australia's foreign adversaries. It is important that

foreign principals cannot avoid the application of the offences by simply, for example, conducting the harmful conduct through a company that operates at its direction or under its control.

The definition of inherently harmful information

The amendments to the draft Bill will narrow the definition of ‘inherently harmful information’.

The definition of security classification in sections 90.5 and 121.1 will be amended to mean a classification of TOP SECRET or SECRET, or any other equivalent classification or marking prescribed by the regulations.

Consistent with the Australian Government’s Information Security Management Guidelines (available at www.protectivesecurity.gov.au), information should be classified as TOP SECRET if the unauthorised release of the information could cause exceptionally grave damage to the national interest. Information should be classified as SECRET if the unauthorised release of the information could cause serious damage to the national interest, organisations or individuals.

The new definition will not allow for lower protective markings to be prescribed in the regulations. This will allow flexibility to ensure the definition can be kept up to date if new protective markings of equivalent seriousness are introduced, or to ensure information bearing former protective markings of equivalent seriousness can continue to be protected.

It is worth noting that the proposed amendments also remove the provisions that apply strict liability to information that has a security classification. The effect of these amendments is that, in addition to proving that information or article had a security classification, the prosecution will also have to prove that the defendant was reckless as to the fact that the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this will require proof that the person was aware of a substantial risk that the information had a security classification and, having regard to the circumstances known to him or her, it was unjustified to take the risk.

Paragraph (d) of the definition of ‘inherently harmful information’ will be removed. This paragraph applied to information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law.

Section 91.3

The proposed amendments to the Bill will narrow the scope of the espionage offence at section 91.3, so that the offence will apply where:

- a person intentionally deals with information or an article

- the person deals with the information or article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal
- the person's conduct results or will result in the information being made available to a foreign principal or a person acting on behalf of a foreign principal and the person is reckless as to this element, and
- the information or article has a security classification and the person is reckless as to this element.

These amendments ensure that conduct that results in security classified information being passed to a foreign principal is punishable as an espionage offence where the person's primary purpose in dealing with the information was to make it available to a foreign principal. The inclusion of this additional element ensures that the offence will not inappropriately cover the publication of information by a journalist whose conduct indirectly makes the information available to a foreign principal, but whose primary purpose is to report news or current affairs to the public.

Section 122.1

The proposed amendments to the Bill address the committee's concerns about the application of many of the secrecy offences to both Commonwealth and non-Commonwealth officers.

The amendments create separate offences that apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply to the most serious and dangerous conduct. This recognises that secrecy offences should apply differently to Commonwealth and non-Commonwealth officers given that the former have a higher duty to protect such information and are well versed in security procedures.

Sections 122.1 and 122.2 will only apply to a person who made or obtained the information by reason of being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

New offences in section 122.4A will apply to non-Commonwealth officers who communicate or deal with a narrower subset of information than the offences at sections 122.1 and 122.2.

The new offence at subsection 122.4A(1) will apply where:

- a person intentionally communicates information
- the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer

or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element

- any one or more of the following applies:
 - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
 - the communication of the information damages the security or defence of Australia and the person is reckless as to this
 - the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
 - the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of 10 years imprisonment, which is lower than the penalty applying to the offences relating to communication of information by current or former Commonwealth officers at subsections 122.1(1) and 122.2(1).

The new offence at subsection 122.4A(2) will apply where:

- a person intentionally deals with information (other than by communicating it)
- the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- any one or more of the following applies:
 - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
 - the dealing damages the security or defence of Australia and the person is reckless as to this
 - the dealing interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
 - the dealing harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of three years imprisonment, which is lower than the penalty applying to the offences relating to dealings with information by current or former Commonwealth officers at subsections 122.1(2) and 122.2(2).

Committee comment

2.21 The committee thanks the Attorney-General for this response. The committee considers that the proposed government amendments to the bill would help to alleviate a number of the committee's scrutiny concerns regarding the breadth of the offences in the bill, however, the committee retains scrutiny concerns in relation to the breadth of the proposed offences in sections 91.2, 91.3, 122.1 and proposed section 122.4A, as set out below.

Definitions

2.22 The committee notes the Attorney-General's advice that the definition of 'deals' with information has been broadened so as to ensure the secrecy and espionage offences in the bill capture the 'full continuum of criminal behaviour that is undertaken in the commission of espionage offences' and to allow authorities to intervene at any stage. The committee also notes the Attorney-General's advice that the fault element of intention will apply to the espionage and secrecy offences, meaning that a person must have intended to engage in the relevant conduct, and as such, mere receipt of information would not satisfy the fault element of intention. However, some concerns remain in relation to the operation of the definition of 'deals' in the context of specific offences as discussed below at paragraph 2.31.

2.23 The committee notes the Attorney-General's advice that the drafting of the definition of 'national security' in the bill is consistent with the definition in other legislation. The committee also notes the Attorney-General's advice that it is considered appropriate to include public international organisations in the definition of 'foreign principal' because a person could seek to interfere in Australia's democratic processes or prejudice Australia's national security on behalf of such organisations in some circumstances. However, the breadth of these definitions in the context of the specific proposed offences continues to raise scrutiny concerns as discussed at paragraphs 2.26 to 2.34.

2.24 The committee welcomes the Attorney-General's advice that the government's proposed amendments to the bill would narrow the definition of 'inherently harmful information' by removing proposed paragraph (d), which applies to information that was provided to a person by the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law. The committee also welcomes the Attorney-General's advice that the proposed government amendments would change the definition of 'security classification' to mean a classification of top secret or secret, or any equivalent classification or marking prescribed by the regulations. This amended definition of 'security classification' would no longer allow for any protective

markings to be prescribed in the regulations, as originally proposed in the bill. The committee also welcomes the advice that government's amendments will remove the provisions applying strict liability to information with a security classification, (see the committee's discussion of this at paragraphs 2.75 to 2.77).

Espionage offences: sections 91.2 and 91.3

2.25 The committee welcomes the Attorney-General's advice that the proposed government amendments will narrow the scope of the espionage offence at proposed section 91.3 by including an additional element to require that the person who deals with the information or article must do so for the primary purpose of making it available for a foreign principal or a person acting on behalf of a foreign principal. This addresses the committee's concern that the offence could cover the publication of information online, for example by a journalist, which would have made it available to a foreign principal despite that not being the intention of the publication. The committee also notes that the proposed government amendments would restrict the offence to information or an article that has a security classification, and not to information or articles that 'concern Australia's national security'.

2.26 While the proposed amendments alleviate many of the committee's scrutiny concerns about the breadth of the offence, the committee notes that there is no public interest defence available. Given the definition of 'foreign principal' includes public international organisations, this could mean that a person who shares security classified information with a United Nations body, such as the World Health Organisation (WHO), with the primary purpose of highlighting a matter of public health concern, could be liable to up to 20 years imprisonment.

2.27 It would also appear that such a disclosure may also constitute an offence under subsection 91.2(2). This would be the case if the person was 'reckless' as to whether their conduct would prejudice Australia's 'national security,' which is defined to include Australia's political, military or economic relations with a foreign country or countries. This would appear to potentially subject a person to an offence punishable by up to 20 years imprisonment for sharing information with, for example, the WHO highlighting a public health concern in relation to particular export foods (if it could prejudice Australia's exports to, and therefore economic relations with, another country).

Secrecy offences - section 122.1 and proposed new section 122.4A

2.28 The committee notes the Attorney-General's advice that the proposed government amendments seek to address the committee's concern in relation to the application of secrecy offences to both Commonwealth and non-Commonwealth officers by creating separate offences that apply to non-Commonwealth officers and are narrower in scope. The committee also notes the Attorney-General's advice that these amendments would recognise that secrecy offences should apply differently to Commonwealth and non-Commonwealth officers, and the proposed new offences

will be subject to a lower maximum penalty to that applicable to current or former Commonwealth officers.

2.29 While the committee welcomes the amendments that recognise the distinction between obligations owed by Commonwealth officers and non-Commonwealth officers, the committee remains concerned regarding the breadth of the offences in proposed section 122.1 and proposed new section 122.4A.

2.30 As previously noted by the committee, the offences in proposed section 122.1 could be committed by a Commonwealth officer merely carrying out their everyday functions of dealing with security classified material, with the burden of proof resting on the officer to raise evidence to prove that they were acting in accordance with their duties (see paragraphs 2.47 to 2.54 below).

2.31 In relation to the proposed government amendments to introduce a new section 122.4A, while the committee welcomes the introduction of a lower penalty offence for non-Commonwealth officers, it reiterates its concerns that a person could be subject to up to three years imprisonment for receiving security classified information from a Commonwealth officer, even if they did not solicit that information and did nothing else with that information. While the committee notes the Attorney-General's advice that 'mere receipt of information' would not be enough to satisfy the requisite fault element, the committee considers it may be enough for the offence to be made out if a person receives the information knowing it has a security classification but does not intend to do anything further with the information. Further, the breadth of the definition of 'deal' in the context of subsection 122.4A(2) would appear to criminalise, for example, the conduct of a lawyer who makes a file note of a classified document for the purpose of providing legal advice to a client about whether they can disclose information. There would not appear to be any applicable defence to this.¹⁵

2.32 The committee also notes that, while there is a public interest defence for journalists, there is no broader public interest defence for disclosures made by non-Commonwealth officers. It appears that a whistleblower may have a defence under proposed subsection 122.5(4) in disclosing information to a third party, and a journalist who reports the information disclosed to him or her by the third party may have a defence under proposed subsection 122.5(6), but the third party would have no public interest defence in disclosing the information to the journalist.

2.33 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the

15 The committee notes the Attorney-General's advice (as set out in relation to its concerns regarding the reversal of the evidential burden of proof) that amendments will be developed to clarify that the defences at subsections 122.5 'do not affect any immunities that exist in other legislation'. The committee will consider any amendments made to the bill to this effect in a future Scrutiny Digest.

importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the Acts Interpretation Act 1901).

2.34 The committee considers that the breadth of the offences in proposed subsection 91.2(2) and sections 91.3, 122.1 and 122.4A, coupled with the significant custodial penalties, no requirement of an intention to do harm to Australia's interests and no public interest defence, may unduly trespass on personal rights and liberties. The committee draws its scrutiny concerns in relation to these measures to the attention of senators and leaves this matter to the Senate as a whole.

Reversal of evidential burden of proof¹⁶

2.35 A number of key offences relating to threats to national security in the bill provide offence-specific defences, which provide that the offence does not apply, or it is a defence to the offence, in certain specified circumstances. In doing so, the defence provisions reverse the evidential burden of proof, as subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.36 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. 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 this common law right.

2.37 While in these instances 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 any such reversal of the evidential burden of proof to be justified.

2.38 The committee also notes that the *Guide to Framing Commonwealth Offences*¹⁷ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

16 See Schedule 1, item 4, proposed subsection 80.1AA(4); item 8, proposed section 82.10 and proposed subsections 83.3(2) and (3); item 17, proposed sections 91.4, 91.9, 91.13, 92.5 and 92.11; and Schedule 2, item 6, proposed section 122.5. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

17 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 50-52.

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.¹⁸

2.39 In this bill, there are a number of offence-specific defences that do not appear to satisfy these criteria, particularly as knowledge of the matters specified in the defences do not appear to be matters that would be peculiar to the defendant.¹⁹ For example, the bill provides that offences do not apply, or defences are available, in circumstances such as:

- the conduct was engaged in solely by way of, or for the purposes of, the provision of aid or assistance of a humanitarian nature;²⁰
- the conduct engaged in was accessing or using a computer or other electronic system in the person's capacity as a public official;²¹
- the conduct was authorised by a written agreement to which the Commonwealth is a party;²²
- the military-style training provided, received or participated in was as part of a person's service with the armed forces of the government of a foreign country or specified armed forces;²³
- the person dealt with information or an article in accordance with the law of a Commonwealth or an arrangement or agreement to which the Commonwealth is a party; or in the person's capacity as a public official;²⁴
- the information or article had already been communicated or made available to the public with the authority of the Commonwealth;²⁵
- the information was disclosed to the Inspector-General of Intelligence and Security (or a person assisting them); the Commonwealth Ombudsman; or

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

19 See Schedule 1, item 4, proposed subsection 80.1AA(4); item 8, proposed section 82.10 and proposed subsections 83.3(2) and (3); item 17, proposed sections 91.4, 91.9, 91.13, 92.5 and 92.11; and Schedule 2, item 6, proposed section 122.5

20 See Schedule 1, item 4, proposed subsection 80.1AA(4).

21 See Schedule 1, item 8, proposed section 82.10.

22 See Schedule 1, item 8, proposed subsection 83.3(2).

23 See Schedule 1, item 8, proposed subsection 83.3(3).

24 See Schedule 1, item 17, proposed subsections 91.4(1), 91.9(1) and sections 91.13, 92.5 and 92.11; Schedule 2, item 6, proposed subsection 122.5(1).

25 See Schedule 1, item 17, proposed subsections 91.4(2) and 91.9(2); Schedule 2, item 6, proposed subsection 122.5(2).

the Law Enforcement Integrity Commissioner, for the purposes of them exercising a power, or performing a function or duty;²⁶

- the communication of information was in accordance with the *Public Interest Disclosure Act 2013* or was to a court or tribunal;²⁷
- the person dealt with or held information in the public interest and in their capacity as a journalist engaged in fair and accurate reporting.²⁸

2.40 In most cases, the explanatory memorandum gives a detailed explanation as to the effect of the provision, but the justification for reversing the evidential burden of proof is generally that the defendant 'should be readily able to point to' the relevant evidence²⁹ or the defendant is 'best placed' to know of the relevant evidence.³⁰ The committee reiterates that the *Guide to Framing Commonwealth Offences* states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where it is *peculiarly* within the knowledge of the defendant. Because a defendant is readily able to point to evidence or in a good position to do so does not mean that the relevant matter is 'peculiarly' within their knowledge. Rather, many of the matters listed above would appear to be matters that the prosecution would be best placed to establish, e.g. whether something had been done in accordance with the authority or agreement of the Commonwealth or disclosed to a specified Commonwealth entity.

2.41 In other instances, the explanatory memorandum³¹ states that whether a person has lawful authority for doing something is a matter peculiarly within the knowledge of the defendant, but gives no justification as to why this is something especially within the defendant's knowledge, rather than something the prosecution would know. Rather, the explanatory memorandum states that it would be 'significantly more cost-effective for the defendant to assert the matter' than for the prosecution to disprove. It is not clear to the committee what significant difficulties the prosecution would face in proving whether or not a person acted in accordance with a law of the Commonwealth. The committee also notes the test is not whether or not it is more 'cost-effective' for the defendant (who may have limited financial resources) to raise evidence in relation to a matter, rather it is whether it is a matter peculiarly within the defendant's knowledge, and as such, it would be significantly more difficult and costly for the prosecution to disprove.

26 See Schedule 2, item 6, proposed subsection 122.5(3).

27 Schedule 2, item 6, proposed subsections 122.5(4) and (5).

28 Schedule 2, item 6, proposed subsection 122.5(6).

29 See explanatory memorandum, pp. 73, 127, 148, 159, 276-283.

30 See explanatory memorandum, p. 88.

31 See explanatory memorandum, pp. 123, 145, 155, 182 and 195.

2.42 The committee also notes that proposed Division 122 sets 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). This appears to criminalise the work any public servant or engaged contractor does when dealing with security classified information. The bill relies on the existence of defences to the offence, which provide it is not an offence if a person is acting in their capacity as a Commonwealth officer or is engaged to perform the relevant work. However, 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.

2.43 The explanatory memorandum states that there are a vast range of circumstances in which Commonwealth officers and others deal with security classified information, noting that possessing or copying information concerning national security 'is a day to day occurrence in many Commonwealth departments and agencies, for Ministers and their staff, for State and Territory law enforcement agencies working on counter-terrorism investigations, and for defence contractors'.³² It goes on to state that it is not intended to criminalise such dealings, and that the prosecution would consider the availability of defences before seeking to prosecute a person. However, the committee notes, in not making the question of whether a person is authorised to deal with such matters an element of the offence, the provisions do, in fact, criminalise such officers and impose an evidential burden of proof on such persons. The committee further notes 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.³³

2.44 The committee considers that many of the matters listed above at paragraph 2.39 do not appear to be matters that are *peculiarly* within the defendant's knowledge, or that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offences.

2.45 The committee requests the Attorney-General's detailed advice as to:

- the appropriateness of including each of the specified matters as an offence-specific defence, by reference to the principles set out in the *Guide to Framing Commonwealth Offences*;

32 Explanatory memorandum, p. 275.

33 See pp. 5-6 of submission 13 from the Inspector-General of Intelligence and Security to the Parliamentary Joint Committee on Intelligence and Security, Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

- whether there are secrecy provisions in other legislation that might prevent public officials from discharging the evidential burden of proof as to whether they were acting in accordance with their statutory duties; and
- the appropriateness of amending the bill to provide that the relevant matters be included as an element of each offence or that, despite section 13.3 of the *Criminal Code*, a defendant does not bear the burden of proof in relying on the offence-specific defences.

Attorney-General's response

2.46 The Attorney-General advised:

It is appropriate and consistent with the principles in the *Guide to Framing Commonwealth Offences* to include offence-specific defences in the Bill.

The *Guide to Framing Commonwealth Offences* acknowledges that it is appropriate to reverse the onus of proof and place a burden on the defendant in certain circumstances. This includes where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish the matter.

The justification contained in the Explanatory Memorandum for casting lawful authority as a defence for the espionage and foreign interference offences applies equally to the secrecy offences. For example, in relation to the defences in section 91.4 to the espionage offences, paragraphs 709 to 710 of the Explanatory Memorandum states:

Lawful authority is currently included as a physical element of the existing espionage offences in Division 91 of the Criminal Code where a person communicates, or makes available, information intending to give an advantage [to] another country's security or defence (for example, subparagraph 91.1(2)(b)(i)). This requires the prosecution to prove, beyond a reasonable doubt, that the person did not have lawful authority for their actions. In contrast, subsection 91.4(1) casts the matter of lawful authority as a defence, which has the effect of placing an evidential burden on the defendant.

If lawful authority was an element of the espionage offences in Subdivision A, it would be necessary for the prosecution to prove, beyond a reasonable doubt, that there was no authority in any law or in any aspect of the person's duties that authorised the person to deal with the information or article in the relevant manner. This is a significant barrier to prosecutions.

It is appropriate for the matter of lawful authority to be cast as a defence because the source of the alleged authority for the defendant's actions is peculiarly within the defendant's knowledge. It is significantly more cost-effective for the defendant to assert this matter rather than the prosecution needing to disprove the existence of any authority, from any source.

It would be difficult and more costly for the prosecution to prove, beyond a reasonable doubt, that the person did not have lawful authority. To do this, it would be necessary to negative the fact that there was authority for the person's actions in any law or in any aspect of the person's duty or in any of the instructions given by the person's supervisors (at any level). Conversely, if a Commonwealth officer had a particular reason for thinking that they were acting in accordance with a law, or their duties, it would not be difficult for them to describe where they thought that authority arose. The defendant must discharge an evidential burden of proof, which means pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (section 13.3 of the Criminal Code).

The prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. Further, if the defendant discharges an evidential burden, the prosecution will also be required to disprove these matters beyond reasonable doubt, consistent with section 13.1 of the Criminal Code.

Amendments to the draft Bill will be developed to ensure Inspector General of Intelligence and Security (IGIS) officials do not bear an evidential burden in relation to the defences in section 122.5 of the Bill. The amendments will also broaden the defences at subsections 122.5(3) and (4) to cover all dealings with information, and clarify that the defences in section 122.5 do not affect any immunities that exist in other legislation.

It would not be appropriate to replace the defences in section 122.5 and instead include additional elements in the secrecy offences. This would mean that in every case the prosecution would need to disprove all of the matters listed in the defences in section 122.5, including for example that:

- the information was not communicated to the IGIS, the Commonwealth Ombudsman or the Law Enforcement Integrity Commissioner
- the information was not communicated in accordance with the *Public Interest Disclosure Act 2013* (PID Act)
- the information was not communicated to a court or tribunal, and
- the person was not engaged in reporting news, presenting current affairs or expressing editorial content in the news media and did not have a reasonable belief that his or her dealing with the information was in the public interest.

Proving all of these matters beyond reasonable doubt would be burdensome and costly when compared to the approach taken in the Bill of providing defences for the defendant to raise, as appropriate and as relevant to the individual facts and circumstances of the particular case.

Committee comment

2.47 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that it is appropriate to cast lawful

authority as a defence for the espionage and foreign interference offences proposed in the bill because it would be 'difficult and more costly' for the prosecution to prove, beyond reasonable doubt, that a person did not have lawful authority. The committee notes the advice that making this matter an element of the offence would require the prosecution to establish that there was no authority for the person's actions in any law or any aspect of the person's duty or in any of the instructions given by the person's supervisors at any level. The committee notes the Attorney-General's advice that conversely 'it would not be difficult' for a Commonwealth officer to describe what law they thought they were acting in accordance with.

2.48 While the committee acknowledges that it may be 'difficult and more costly' for the prosecution to establish that a person did not have lawful authority to engage in the conduct set out in the offences, the committee emphasises that these factors do not meet the test of when it is appropriate to reverse the evidential burden of proof as set out in the *Guide to Framing Commonwealth Offences*.³⁴ To reiterate, the *Guide to Framing Commonwealth Offences* states that it is only appropriate to include a matter in an offence-specific defence when:

- it is peculiarly within the knowledge of the defendant; *and*
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.³⁵

2.49 As the Attorney-General's advice does not explain how the matters in each of the offence-specific defences on which the committee sought advice are peculiarly within the knowledge of the defendant, the committee remains of the view that it does not appear to be appropriate to reverse the evidential burden of proof in relation to these matters.

2.50 The committee welcomes the Attorney-General's advice that amendments to the draft bill will be developed to ensure that IGIS officials do 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. Such amendments would address the committee's specific concern 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.

34 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 50-52.

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

2.51 However, as it is proposed that these amendments exclude only IGIS officials from bearing the evidential burden in relation to the defences in proposed section 122.5, the committee restates its concern 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.

2.52 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.53 The committee welcomes the Attorney-General's statement that the government will develop amendments to the bill to ensure that IGIS officials do not bear an evidential burden in relation to the defences in proposed section 122.5; will broaden the defences at proposed subsections 122.5(3) and (4) to cover all dealing with information; and will clarify that the defences in section 122.5 do not affect any immunities that exist in other legislation. The committee will consider any amendments made to the bill in a future Scrutiny Digest.

2.54 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

Broad scope of offence provision³⁶

2.55 Proposed section 80.1AC seeks to make it an offence for a person to engage in conduct that involves the use of force or violence, where the person engages in such conduct with the intention of overthrowing the Constitution, the federal or a state or territory government or the lawful authority of the federal government. The offence is subject to a penalty of imprisonment for life. The explanatory memorandum explains that the offence in proposed section 80.1AC will replace an existing treachery offence, and gives an example of how the offence might be committed:

Person B holds the strong view that Australia's constitutional democracy does not best serve the interests of the Australian people and that anarchy is preferable. Person B forms an anarchist group with a large number of like-minded people and they storm Parliament House. Using weapons and

36 See Schedule 1, item 4, proposed section 80.1AC. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

violence, the group seeks to cause harm to a large number of parliamentarians, intending that the anarchist movement will remove the established government.³⁷

2.56 The explanatory memorandum goes on to state:

Whether or not the overthrow of the Constitution or government occurs or the conduct is capable of bringing it about is not relevant to the defendant's culpability for the offence. For example, Person B's conduct may not be capable of defeating the security measures in place at Parliament House and therefore Person B's conduct was not capable of overthrowing the Government. The defendant could still commit the offence despite the fact that this outcome does not occur, or is not capable of occurring.³⁸

2.57 The committee notes that while this offence could apply to extremely serious forms of conduct as described in the explanatory memorandum, the way the offence is drafted means it could also potentially apply to much less serious conduct. What constitutes conduct involving 'the use of force or violence' is not specified, and the committee notes that the use of force would include force against things. In addition, while the defendant would need to intend to engage in conduct, he or she would only need to be reckless as to whether the conduct involved the use of force or violence.³⁹ This, combined with the fact that it is not relevant whether the conduct was capable of achieving the defendant's aims, could mean, for example, that a person with a delusional aim of overthrowing the government might be liable to be sentenced to life imprisonment, despite only having engaged in conduct that resulted in minor force being applied to a government building.

2.58 The committee therefore seeks the Attorney-General's detailed justification for making the offence in proposed section 80.1AC subject to a penalty of life imprisonment when the provision does not precisely specify the nature of the offending conduct.

Attorney-General's response

2.59 The Attorney-General advised:

The offence in section 80.1AC criminalises serious conduct. Consistent with the *Guide to Framing Commonwealth Offences*, the maximum penalty must be adequate to deter and punish a worst case offence. The consequences of the commission of this offence may be particularly dangerous or damaging. The penalty is also consistent with the existing treason and treachery offences, and other offences of similar seriousness. A sentencing court will continue to have the discretion to set the penalty

37 Explanatory memorandum, p. 34.

38 Explanatory memorandum, pp. 35-36.

39 See explanatory memorandum, p. 35.

at an appropriate level to reflect the relative seriousness of the offence based on the facts and circumstances of the particular case.

The prosecution will need to prove the physical element that the conduct involved force or violence and that the defendant was reckless as to this element. The application of recklessness requires the prosecution to prove that the person was aware of a substantial risk that his or her conduct involved force or violence, and that, having regard to the circumstances known to him or her, it was unjustifiable to take the risk. The prosecution will also need to prove that the person intentionally engaged in the conduct with the intention of overthrowing the Constitution, or the Government of the Commonwealth, of a State or of a Territory, or the lawful authority of the Government of the Commonwealth.

The offence would not necessarily capture the conduct, described by the committee at paragraph 1.289, of a person with a delusional aim of overthrowing the government where the conduct resulted in minor force being applied to a government building.

The defence of mental impairment in section 7.3 of the Criminal Code provides that a person is not criminally responsible where that person was suffering from a mental impairment that had the effect that the person:

- did not know the nature and quality of the conduct, or
- did not know the conduct was wrong, or
- the person was unable to control the conduct.

Committee comment

2.60 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the offence in proposed section 80.1AC criminalises serious conduct and that, consistent with the *Guide to Framing Commonwealth Offences*, the maximum penalty is adequate to deter and punish a worst case offence,⁴⁰ thereby leaving a sentencing court with the discretion to set the penalty at an appropriate level given the seriousness of the offence and the circumstances in each case. The committee also notes the Attorney-General's advice that the prosecution will need to prove that the conduct involved force or violence and that the defendant was reckless as to this element, and that the defendant engaged in the conduct with the intention of overthrowing the Constitution, the government of the Commonwealth or a state or territory, or the lawful authority of the Commonwealth Government.

2.61 Finally, the committee notes the Attorney-General's advice that the offence would not necessarily capture the conduct of a person with a delusional aim of overthrowing the government where the conduct resulted in minor force being

40 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 37.

applied to a government building, noting that the defence of mental impairment in section 7.3 of the Criminal Code may apply in such a case.

2.62 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.63 In light of the information provided, the committee makes no further comment on this matter.

Strict liability offences⁴¹

2.64 A number of proposed offence provisions in the bill apply strict liability to elements of the offence. Those elements relate mainly to whether information or an article has a security classification (which has the meaning prescribed by the regulations).⁴² Item 17 of Schedule 1 to the bill repeals Division 91 of the Criminal Code, and substitutes a new Division 91 – which includes a series of proposed offences relating to espionage. Proposed section 91.1 creates an offence of dealing with classified information relating to national security in a way that will make that information available to a foreign principal or to a person acting on their behalf. The offence is punishable by life imprisonment, or a prison term of 25 years, depending on whether the offence is committed intentionally or recklessly. Proposed section 91.3 of the bill creates a similar offence of dealing with security classified information, which is punishable by 20 years' imprisonment. Proposed section 91.6 creates an aggravated offence, which would apply where a person commits an offence under proposed sections 91.1, 91.2 or 91.3 (underlying offence), and an aggravating circumstance listed in proposed subsection 91.6(1) also exists.

2.65 A key element of each of the offences in proposed sections 91.1 and 91.2 is that the information with which the person deals has a security classification. The explanatory memorandum states that:

It is anticipated that the regulations will prescribe the relevant protective markings that will denote information as being [security] classified for the purposes of these offences. At this time, these markings are listed in the *Australian Government information security management guidelines – Australian Government security classification system* (available at www.protectivesecurity.gov.au), and include:

41 See Schedule 1, item 17, proposed sections 91.1, 91.3 and 91.6, and Schedule 2, item 6, proposed sections 122.1 and 122.3. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

42 See item 16, proposed section 90.5 for a definition of 'security classification'.

- PROTECTED
- CONFIDENTIAL
- SECRET
- TOP SECRET⁴³

2.66 With respect to the offences in proposed sections 91.1 and 91.3, the question of whether the relevant information is security classified is a matter of strict liability. Further, an aggravating circumstance in proposed section 91.6 is that the person dealt with five or more records or articles, each of which has a security classification. Whether the records or articles have a security classification is also a matter of strict liability.

2.67 Item 6 of Schedule 2 to the bill inserts a new Division 122 into the Criminal Code – which contains a number of offences relating to secrecy. Proposed section 122.1 creates a series of offences relating to communicating and dealing with inherently harmful information, to removing or holding inherently harmful information outside its proper place of custody, and to failing to comply with a direction in relation to inherently harmful information. The offences are punishable by terms of imprisonment of between 5 and 15 years. The bill provides that where the information with which the alleged offender deals has a security classification (outlined above), whether the information is inherently harmful would be a matter of strict liability.

2.68 Proposed section 122.3 creates an aggravated offence, which would apply where a person commits an underlying offence under proposed sections 122.1 or 122.2, and an aggravating circumstance listed in proposed subsection 122.3(1) also exists. One of the aggravating circumstances in proposed section 122.3(1) is that the commission of the underlying offence involves five or more records, each of which has a security classification. Whether the records have a security classification is a matter of strict liability.

2.69 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is only imposed on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence, or an element of an offence, is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, the offence or the element of the offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant's conduct was intentional, reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a justification for any imposition of strict

43 Explanatory memorandum, p. 105

liability, including clearly outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.⁴⁴

2.70 The statement of compatibility states:

For the elements relevant to information or articles carrying a security classification, [the application of strict liability] is appropriate because information or articles carrying a security classification are clearly marked with the security classification and any person who has access to security classified information should easily be able to identify as such.

...

The application of strict liability is also necessary to ensure that a person cannot avoid criminal responsibility because they were unaware of certain circumstances for example that information was security classified information. Consistent with the *Guide to Framing Commonwealth Offences*, requiring knowledge of such an element in these circumstances would undermine deterrence of the offence. There are also legitimate grounds for penalising a person's lacking 'fault' in these circumstances because, with an offence of espionage for example, the person still engaged in conduct with the intention to, or reckless as to whether, that conduct would prejudice Australia's national security or advantage the national security of a foreign country⁴⁵

2.71 However, the committee notes that the meaning of 'security classification' is to be prescribed by the regulations, with no detail set out in the bill. The committee notes the explanatory memorandum's advice that at this time the markings listed in the *Australian Government information security management guidelines* are likely to be prescribed by the regulations.⁴⁶ However, the committee notes that those guidelines provide that '[i]f information is created outside the Australian Government the person working for the government actioning this information is to determine whether it needs a protective marking'.⁴⁷ This indicates that any outside contractor or consultant working for the government can mark information with a security classification. It is not clear that in all cases the question of whether information or articles had a security classification would always be apparent to a person, particularly as there is a vast range of persons who can apply a security

44 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22-25.

45 Statement of compatibility, p. 17.

46 Explanatory memorandum, pp. 104-105.

47 Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, approved November 2014, amended April 2015, p. 4, paragraph 29. Available at: <https://www.protectivesecurity.gov.au/informationsecurity/Documents/INFOSECGuidelinesAustralianGovernmentSecurityClassificationSystem.pdf>

classification to a document. It is therefore not clear that such a classification would always be appropriately applied and made clearly apparent to persons unfamiliar with the classification process. The committee also notes that the defence of mistake of fact only applies to persons who have considered whether certain facts exist (but is under a mistaken but reasonable belief about those facts). It will not apply if a person has failed to consider the existence of a security classification.

2.72 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability to all elements of an offence is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.⁴⁸ While in this instance strict liability only applies to a discrete element of each of the identified offences, the committee notes that the offences are subject to very significant terms of imprisonment (between 5 years and life imprisonment).

2.73 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying strict liability to elements of the offences in proposed sections 91.1, 91.3, 91.6, 122.1 and 122.3 (as to whether information or articles have a security classification), particularly given such offences are punishable by terms of imprisonment ranging from 5 years to life imprisonment.

Attorney-General's response

2.74 The Attorney-General advised:

Strict liability will be removed from elements of the offences relating to information or articles carrying a security classification in the proposed amendments to the Bill. This means the prosecution will be required to prove, beyond reasonable doubt, that the information or article had a security classification, and that the defendant was reckless as to whether the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this means the person will need to be aware of a substantial risk that the information or article carried a security classification and, having regard to the circumstances known to the person, it was unjustifiable to take that risk.

Committee comment

2.75 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the government intends to amend the bill so as to remove strict liability from elements of offences relating to information or articles carrying a security classification.⁴⁹ The committee notes the

48 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

49 See proposed government amendments (2), (6), (8), (26) and (33).

Attorney-General's advice that the effect of the proposed amendments would be that the prosecution will be required to prove, beyond reasonable doubt, that the information or article had a security classification and that the defendant was reckless as whether this was the case.

2.76 The committee welcomes the Attorney-General's advice that the government intends to amend the bill so as to remove strict liability from elements of the offences in proposed sections 91.1, 91.3, 91.6, 122.1 and 122.3 (as to whether information or articles have a security classification).

2.77 In light of the information provided, and on the basis that amendments will be moved to the bill to remove the application of strict liability, the committee makes no further comment on this matter.

Right to liberty: presumption against bail⁵⁰

2.78 Section 15AA of the *Crimes Act 1914* (Crimes Act) provides for a presumption against bail for persons charged with, or convicted of, certain Commonwealth offences unless exceptional circumstances exist. Item 38 of Schedule 1 to the bill proposes to amend section 15AA of the Crimes Act to apply the presumption against bail to the proposed offences in Divisions 80 and 91 of the Criminal Code (including offences relating to urging violence, advocating terrorism, genocide, offences relating to espionage).⁵¹ Item 39 of Schedule 1 to the bill also proposes to amend section 15AA of the Crimes Act, in this case to apply the presumption against bail to the new foreign interference offences in circumstances where it is alleged that the defendant's conduct involved making a threat to cause serious harm of a demand with menaces.⁵²

2.79 The presumption against bail applies both to those convicted of, but also those charged with, certain offences. The committee notes that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption. As such, the committee expects that a clear justification be given in the explanatory materials for imposing a presumption against bail (including extending the presumption against bail to new offences), and expects that the explanatory materials would include any evidence that courts are currently failing to consider the serious nature of an offence in determining whether to grant bail.

50 Schedule 1, items 38 and 39. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

51 See explanatory memorandum, p. 215.

52 See explanatory memorandum, p. 216.

2.80 In this instance, the explanatory memorandum states that extending the presumption against bail to the offences proposed by the bill is appropriate given the relevant conduct is similar in nature to that of an espionage offence and it is appropriate that a person being prosecuted for a foreign interference offence should only be subject to a presumption against bail in circumstances where there is a threat of harm.⁵³ The statement of compatibility also gives a general justification for when it may be appropriate to impose a presumption against bail, noting that the existing provisions in the Crimes Act and the amendments in the bill means the presumption against bail is appropriately reserved for serious offence, and the accused nevertheless has the opportunity to rebut the presumption.

2.81 The committee reiterates its concerns that some of the espionage offences (for which there would be a presumption against bail) may be overly broad (see above at paragraphs 2.16 to 2.19) and no information has been provided as to why bail authorities and courts would not be able to adequately assess the risks posed by persons charged with such offences before setting bail. The committee further emphasises that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption.

2.82 The committee requests the Attorney-General's detailed justification as to the appropriateness of imposing a presumption against bail and why it is necessary to create a presumption against bail rather than specifying the relevant matters a bail authority or court must have regard to in exercising their discretion whether to grant bail.

Attorney-General's response

2.83 The Attorney-General advised:

A presumption against bail is appropriate for the offences in Division 80 and 91 of the Criminal Code and the foreign interference offences in subsections 92.2(1) and 92.3(1) where it is alleged that the defendant's conduct involved making a threat to cause serious harm or a demand with menaces. The offences that are subject to a presumption against bail are very serious offences. The presumption against bail will limit the possibility of further harmful offending, the communication of information within the knowledge or possession of the accused, interference with evidence and flight out of the jurisdiction. Communication with others is particularly concerning in the context of the conduct targeted by these offences.

The existing espionage, treason and treachery offences are currently listed in subparagraph 15AA(2)(c) of the *Crimes Act 1914* (Crimes Act) – inclusion of offences in Division 80 and 91 merely updates subparagraph 15AA(2)(c) given that the existing offences are being repealed. For these offences, it is

53 Explanatory memorandum, p. 216.

important to note that, consistent with subparagraphs 15AA(2)(c)(i) and (ii), the presumption against bail will only apply if the person's conduct is alleged to have caused the death of a person or carried a substantial risk of causing the death of a person.

For the foreign interference offences in sections 92 and 93, the presumption against bail will only apply where it is alleged that any part of the conduct the defendant engaged in involved making a threat to cause serious harm or a demand with menaces. This limitation recognises the significant consequences for an individual's personal safety and mental health if the conduct involves serious harm (consistent with the definition of 'serious harm' in the Dictionary to the Criminal Code) or making a 'demand with menaces' (as defined in section 138.2 of the Criminal Code).

For offences subject to a presumption against bail the accused will nevertheless be afforded to opportunity to rebut the presumption. Further, the granting or refusing of bail will always be at the discretion of the judge hearing the matter.

Committee comment

2.84 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the offences for which it is proposed to impose a presumption against bail are very serious and that the presumption against bail will limit the possibility of further harmful offending, the accused's ability to communicate information or to interfere with evidence, and flight out of the jurisdiction.

2.85 The committee also notes the Attorney-General's advice that the presumption against bail will apply only where it is alleged that any part of the conduct the defendant engaged in involved making a threat to cause serious harm or a demand with menaces, that the accused will be afforded the opportunity to rebut the presumption, and that the granting or refusing of bail will always be at the discretion of the judge hearing the matter.

2.86 However, the committee notes that no information has been provided by the Attorney-General as to why it is necessary to impose a presumption against bail rather than specify relevant matters a bail authority or court must have regard to in exercising their discretion as to whether to grant bail. For example, the committee considers that it may be more appropriate if the bail authority or court were instead directed to consider the specific risks outlined by the Attorney-General—that is, the risk of further offending, communication of information by the accused, interference with evidence and flight from the jurisdiction—when exercising their discretion with regard to granting bail.

2.87 The committee reiterates that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption.

2.88 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.89 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of imposing a presumption against bail.

Incorporation of external material into the law⁵⁴

2.90 Proposed section 121.2 seeks to provide a definition of 'proper place of custody'. Proposed subsection 121.2(1) provides that 'proper place of custody' will have the meaning prescribed by the regulations. Proposed subsection 121.2(2) then provides that, despite section 14(2) of the *Legislation Act 2003*, regulations made for the purposes of the definition of 'proper place of custody' may prescribe a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

2.91 At a general level, the committee will have concerns where provisions in a bill allow legislative provisions to operate 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, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- 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).

2.92 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in or affected by the law.

54 Schedule 2, item 6, proposed section 121.2. The committee draws Senators' attention to this provision pursuant Senate Standing Order 24(1)(a)(i).

2.93 The issue of access to external material incorporated into the law by reference, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue,⁵⁵ which comprehensively outlines the significant concerns associated with the incorporation of material by reference – particularly where the material is not readily and freely available.

2.94 With regard to these matters, the explanatory memorandum states:

The incorporation of the content of the definition [of 'proper place of custody'] by reference to another instrument or document is necessary to enable the definition to incorporate documents setting out Commonwealth protective security policy documents, to ensure alignment between the Commonwealth's protective security police [*sic*] as in force from time-to-time and the scope of the offences.

The Commonwealth *Protective Security Policy Framework* sets out the Commonwealth protective security policy as in force from time-to-time. Tier 1, 2 and 3 documents comprising the PSPF are available free of charge online. Tier 4 documents that agencies develop to set out agency-specific protective security policies and procedures are available free of charge to all persons in agencies subject to those policies and procedures.⁵⁶

2.95 The committee acknowledges that the explanatory memorandum states that all persons would have access to Tier 1, 2 and 3 documents within the PSPF, and that Tier 4 documents would be available to persons to whom they directly apply (that is, persons in relevant agencies). However, the committee reiterates that it is a fundamental principle of the rule of law that *every* person interested in or affected by the law should be able readily and freely access its terms. In this regard, the committee is concerned that Tier 4 documents (and potentially other documents incorporated by reference into regulations made for the purpose of proposed section 121.2) may not be freely and readily available to the public at large.

2.96 The committee requests the Attorney-General's advice as to whether, at a minimum, the bill can be amended to insert a statutory requirement that the relevant documents to be incorporated will be made freely and readily available to all persons in agencies subject to those policies and procedures.

Attorney-General's response

2.97 The Attorney-General advised:

55 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

56 Explanatory memorandum, p. 234.

The Bill could be amended to include a statutory requirement similar to that suggested by the committee.

Committee comment

2.98 The committee thanks the Attorney-General for this response. The committee welcomes the Attorney-General's advice that the bill could be amended to include a statutory requirement that documents incorporated by reference into regulations made for the purpose of proposed section 121.2 be made freely and readily available to all persons in agencies that will be subject to the relevant protective security policies and procedures. The committee will consider any such amendments made to the bill in a future Scrutiny Digest.

2.99 As most of the proposed incorporated material will be readily and freely available on the internet, and on the basis of the Attorney-General's advice that the bill may be amended to require that other documents incorporated by reference will be made freely and readily available to all persons in agencies who would be subject to the relevant protective security policies and procedures, the committee makes no further comment on this matter.

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 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 on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.¹ 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.²

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator John Williams
Acting Chair

- 1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.
- 2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

