The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 8 of 2018

15 August 2018

ISSN 2207-2004 (print)
ISSN 2207-2012 (online)

This document was prepared by the Senate Standing Committee for the Scrutiny of Bills and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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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 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

Banking System Reform (Separation of Banks) Bill 2018

Purpose	This bill seeks to separate retail commercial banking activities involving the holding of deposits, from certain wholesale and investment banking activities
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives on 25 June 2018

Trespass on rights and liberties[1]

1.2 The bill seeks to separate retail commercial banking activities involving the holding of deposits from certain wholesale and investment banking activities. In doing so, it seeks to introduce a number of offences and enable the broad sharing of personal information. This raises scrutiny concerns that the provisions may trespass unduly on personal rights and liberties.

1.3 The bill seeks to establish a number of broadly framed offences that would be subject to significant custodial penalties. For example, subclause 12(2) seeks to make it an offence for a person to attempt to structure any contract, investment, instrument, or product in such a manner that its purpose or effect is to evade or attempt to evade the provisions of the bill; or for a person who is an officer, director, employee, or agent of a person, firm, corporation, association, business trust, other similar organisation to knowingly participate in any such violation. The offence would be subject to a maximum penalty of imprisonment for five years, 1190 penalty units, or both.

1.4 Neither the bill nor the explanatory memorandum contains any guidance as to what conduct might constitute evading, or attempting to evade, the provisions of the bill, or what constitutes 'knowingly participating' in such a violation. The committee considers that it is therefore unclear how a person would be able to

1 Subclauses 10(2), 12(2) and 14(15) to (16). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

determine whether or not his or her conduct would constitute an offence. The committee has similar concerns in relation to the broad framing of the proposed offences in subclauses 10(2), 14(14) and 14(16).

1.5 Subclause 14(15) also seeks to require the Australian Prudential Regulation Authority (APRA) to provide to the Australian Federal Police and state police and law enforcement bodies any documents, information or data requested by such bodies regarding any bank under APRA's regulatory supervision, or which come to the attention of or into the possession of APRA and may evidence a crime or breach of any Australian law. This provision would require APRA to provide to law enforcement bodies a very broadly defined range of information, potentially including sensitive personal financial information about individuals. The explanatory memorandum contains no explanation of the need to include such an information sharing requirement.

1.6 In the event that this bill progresses further through the Parliament, the committee may set out its scrutiny concerns in greater detail in a future *Scrutiny Digest*.

Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

Purpose	This bill seeks to amend the *Defence Act 1903* to: • permit states and territories to request that the Commonwealth call out the Australian Defence Force (ADF) in a wider range of circumstances; • enable call out orders to authorise the ADF to operate in multiple jurisdictions, as well as the offshore area; • authorise the ADF to respond to incidents that cross a border into a jurisdiction that has not been specified in an order in certain circumstances; • allow the ADF to be pre-authorised to respond to land and maritime threats, in addition to aviation threats; • increase the requirements for the ADF to consult with state and territory police where it is operating in their jurisdictions; • simplify, expand and clarify the power of the ADF to search and seize, and to control movement during an incident; • remove the distinction between general security areas and designated areas; • clarify that acting ministers are to be treated as substantive ministers and add the Minister for Home Affairs as an alternative authorising minister; and • make technical and consequential amendments
Portfolio	Attorney-General
Introduced	House of Representatives on 28 June 2018

Trespass on personal rights and liberties[2]

1.7 Part IIIAAA of the *Defence Act 1903* (Defence Act) contains a framework under which the Australian Defence Force (ADF) may be utilised to respond to

2 Schedule 1, item 2, proposed Part IIIAAA. The committee draws senators' attention to this proposed Division pursuant to Senate Standing Order 24(1)(a)(i).

incidents of domestic violence.[3] The bill seeks to repeal this Part and substitute a new Part IIIAAA, under which the ADF may be called out in a wider range of circumstances, under an order relating to either the protection of Commonwealth interests or the protection of states or territories.[4]

1.8 Under proposed section 33, the Governor-General may make a 'Commonwealth interests call out order' if the authorising ministers[5] are satisfied of various matters, including that domestic violence that would, or would be likely to, affect Commonwealth interests is occurring or is likely to occur in Australia and/or there is a threat in the Australian offshore area to Commonwealth interests. Under proposed section 35, the Governor-General may make a 'state and territories protection call out order' if a state or territory government applies to the Commonwealth Government to protect the state or territory against domestic violence that is occurring, or is likely to occur in the state or territory (and the authorising ministers are satisfied of various matters).

1.9 Proposed sections 34 and 36 provide for the making of contingent call out orders to protect both Commonwealth interests and states and territories, in circumstances where it would be impracticable for reasons of urgency to make call out orders under sections 33 and 35. Under these contingent call out orders the ADF will be automatically called out if specified circumstances arise.[6]

1.10 Proposed Divisions 3 to 6 of the bill seek to provide a very broad range of coercive powers to ADF members who are being utilised under a call out order. Division 6 contains provisions relating to the use of force when exercising powers under Divisions 3 to 5, and is discussed separately below at paragraphs 1.23 to 1.28. Proposed Divisions 3 and 4[7] include powers to:

- capture or recapture a location;
- prevent or put an end to violence or threats to life, health or safety;

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3 'Domestic violence' is defined as having the same meaning as in section 119 of the Commonwealth Constitution. Section 119 of the Constitution provides 'The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'.

4 See proposed sections 33 and 35.

5 The 'authorising ministers' means the Prime Minister, Attorney-General and the Minister for Defence, see proposed section 31.

6 Proposed subsection 34(3) and 36(3).

7 An ADF member may exercise powers under Division 3 if a minister has authorised their use or the member believes there is insufficient time to gain such an authorisation due to the existence of an extraordinary emergency. An ADF member may exercise powers under Division 4 where the call out order specifies that the Division applies and a minister has made a declaration under proposed section 51 that an area is a specified area. See proposed sections 46(1), 51A and 51D.

- take measures, including the use of force, against an aircraft or vessel;
- control the movement of persons or of means of transport;
- search persons, locations, premises, transport or things for items that may be seized;
- seize any item that the member believes on reasonable grounds is a thing that may be seized in relation to the call out order;
- detain any person that the member believes on reasonable grounds may be detained;
- direct a person to answer a question or produce a document that is readily accessible to the person, including requiring the person to produce identification; and
- actions incidental to such powers.[8]

1.11 Division 5 seeks to provide members of the ADF with powers to protect infrastructure that has been declared by the authorising ministers. Where ADF members are being utilised under a call out to which Division 5 applies, they may take action to prevent, or put an end to, damage or disruption to the operation of the declared infrastructure, and may exercise a range of powers in doing so, including powers equivalent to those listed above in relation to Divisions 3 and 4.[9]

1.12 The statement of compatibility acknowledges that the powers that the ADF may exercise under a call out order are 'significant', but states that the circumstances in which a call out order might be made will be 'extraordinary'.[10] The statement of compatibility emphasises that call out orders can only be made where 'domestic violence' is occurring or is likely to occur and states that 'domestic violence' refers to conduct that is 'marked by great physical force, and would include a terrorist attack or other mass casualty incident.'[11] In addition, the statement of compatibility also states that law enforcement agencies will retain primary responsibility for responding to incidents and that call out orders are intended to be used where:

> after assessing the particular nature of the domestic violence and whether ADF assistance would enhance a law enforcement response, it is determined that the ADF has relevant specialist equipment or capabilities

8 See proposed sections 46, 51A and 51D. It is an offence subject to a maximum penalty of 60 penalty units for a person to fail to comply with a direction—see proposed section 51R of the bill.

9 See proposed section 51L.

10 Statement of compatibility, p. 6.

11 Statement of compatibility, p. 6.

that could be provided to most effectively respond to the incident, and ultimately, to save lives.[12]

1.13 On these grounds, the statement of compatibility argues that the proposed call out powers allow for a 'necessary, reasonable and proportionate response to circumstances of significant violence.'[13]

1.14 However, the committee considers that a number of aspects of the bill raise scrutiny concerns as to whether the proposed call out powers are only capable of being exercised in such extreme circumstances. In particular, there is a lack of clear definitions in relation to two key terms—'domestic violence' and 'Commonwealth interests'. The bill states that 'domestic violence' has the same meaning as in section 119 of the Constitution, but the Constitution does not contain a definition of the term.[14] While the explanatory memorandum states that domestic violence states that terrorism or other mass casualty incidents would be captured by the term 'domestic violence', it is not clear what other, less extreme, types of events might also be captured.

1.15 In particular, the committee notes proposed subsection 39(3) effectively provides that in utilising the ADF to carry out an order the Chief of the Defence Force can stop or restrict protests, dissents, assemblies or industrial action if there is a reasonable likelihood of the death of, or serious injury to, persons or 'serious damage to property'. In addition, proposed subsections 33(4), 34(4), 35(4) and 36(4) provide that 'the Reserves must not be called out or utilised in connection with an industrial dispute'. However, this implies that the *permanent* Defence Force could be called out in relation to industrial disputes. As a result, it is unclear the extent to which call out orders may be able to be made in relation to strikes or protests and it is not clear that the term 'domestic violence' would function to appropriately limit the circumstances in which the ADF may be called out and the associated coercive powers that may be used.

1.16 The committee also holds scrutiny concerns in relation to the term 'Commonwealth interests'. Neither the bill nor the explanatory memorandum provide a definition of this term and it is unclear what types of activities might be considered to affect or threaten 'Commonwealth interests' and thereby meet the conditions under which a Commonwealth interests call out order may be made.[15]

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12 Statement of compatibility, p. 6.

13 Statement of compatibility, p. 6.

14 Section 119 of the Commonwealth Constitution provides: 'The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'.

15 See proposed section 33.

1.17 In addition, the committee notes that the bill seeks to remove the requirement under the current Defence Act that, prior to a call out order being made, authorising ministers must be satisfied that the states and territories are not, or are unlikely to be, able to protect themselves or Commonwealth interests against domestic violence. The bill instead seeks to require that the authorising ministers merely take into account the nature of the domestic violence and whether the use of the ADF would 'enhance' the ability of the states and territories to protect themselves or Commonwealth interests against the domestic violence.[16]

1.18 The explanatory memorandum states that this proposed new threshold:

> allows greater flexibility for the ADF to be used to provide the most rapid, effective or appropriate specialist support to the states and territories, while respecting the states' and territories' position as first responders by ensuring that there is some assessment of the potential benefit of ADF assistance.[17]

1.19 The committee notes that the proposed new threshold appears to significantly expand the range of circumstances in which a call out order may be made. The requirement that the authorising ministers consider the nature of the domestic violence and whether the use of the ADF would 'enhance' state and territory capabilities do not appear to limit the use of the proposed powers to exceptional circumstances, nor to circumstances that the states or territories cannot address themselves.

1.20 The committee further notes that although the bill provides that call out orders must not be in force for longer than 20 days after they are made,[18] proposed subsection 37(2) provides that the Governor-General may vary a call out order to extend the period during which it is in force for up to an additional 20 days. These provisions would allow call out orders to remain in place for up to 40 days. Neither the explanatory memorandum nor the statement of compatibility contain any explanation of why these time limits are considered appropriate. In light of the extraordinary powers that may be exercised under a call out order and the stated intention that they only be used to respond to extreme circumstances, the committee considers that the explanatory memorandum should include a detailed justification for allowing call out orders to remain in effect for up to 40 days.

1.21 The committee considers that, given the nature of the coercive powers the bill seeks to confer on ADF members, including the use of deadly force in certain circumstances (as discussed in detail below), it is imperative that the bill carefully restrict the circumstances in which, and the length of time for which, these powers

16 Compare proposed sections 33(2) and 35(2) and *Defence Act 1903*, s. 51A(1)(b), and 51B(1)(a).

17 Explanatory memorandum, p. 35.

18 Proposed sections 33(5)(d) and 35(5)(d).

may be used. The committee is concerned that the use of undefined terms such as 'domestic violence' and 'Commonwealth interests', combined with the lowering of the threshold that must be met before a call out order can be made, and allowing orders to be in effect for up to 40 days, could allow these powers to be exercised in undefined circumstances and for longer than is strictly necessary, and could thereby unduly trespass on personal rights and liberties.

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

- **the type of incidents that would fall within the definition of 'domestic violence', and whether incidents involving widespread industrial action, political protests or civil disobedience could fall within the definition;**
- **if the definition of 'domestic violence' would allow for orders to be made to stop or restrict protests, dissents, assemblies or industrial action, would action be able to be taken against peaceful protesters if there is a risk that other actors may cause injury to people or serious damage to property as a direct consequence of the protest;**
- **what would be covered by the term 'Commonwealth interests';**
- **why it is appropriate that before an order is made the authorising ministers must simply 'consider' the nature of the domestic violence and whether utilising the ADF would 'enhance' the abilities of the states and territories to protect the relevant interests, noting that this is not a precondition to the exercise of the power (but merely a matter which must be considered) and noting the stated intention that these orders only be made in exceptional circumstances; and**
- **why it is considered necessary to allow call out orders to remain in effect for up to 40 days.**

Use of force[19]

1.23 Proposed section 51N sets out the conditions under which a member of the ADF who is being utilised under a call out order may use force. Proposed subsection 51N(1) provides that an ADF member may use such force against persons and things as is reasonable and necessary in the circumstances, subject to a number of restrictions. Proposed subsection 51N(2) states that an ADF member must not use force against persons or things in exercising a power to direct a person to answer a question or to produce a particular document that is readily accessible to the person.[20] Proposed paragraph 51N(3)(a) provides that, in using force against a

19 Schedule 1, item 2, proposed sections 46, 51H and 51N. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

20 See proposed paragraphs 46(7)(h), 51D(2)(i) and 51L(3)(g).

person, an ADF member must not do anything that is likely to cause the death of, or grievous bodily harm to, the person, unless the ADF member believes on reasonable grounds that doing that thing is:

(i) necessary to protect the life of, or prevent serious injury to, a person; or

(ii) necessary to protect declared infrastructure against the domestic violence or threat specified in the call out order; or

(iii) reasonable and necessary to give effect to an order or authority under which the member is acting to take measures against an aircraft or vessel, up to and including destroying the aircraft or vessel.

1.24 In addition, proposed paragraph 51N(3)(b) provides that, where one of the three grounds listed above has been met and the person is attempting to escape being detained by fleeing, an ADF member may use force that is likely to cause the death of, or grievous bodily harm to, the person if they have first been called on to surrender, if practicable, and the ADF member believes on reasonable grounds that the person cannot be apprehended in any other manner.

1.25 Finally, proposed subsection 51N(4) provides that, in using force against a person, an ADF member must not subject a person to greater indignity than is reasonable and necessary in the circumstances, except when taking measures against an aircraft or vessel.

1.26 The statement of compatibility states that it is necessary to allow ADF members to use lethal force, or cause grievous bodily harm, in the circumstances described above in order to 'achieve the legitimate objective of the protection of the Australian populace from acts of significant violence, such as terrorism incidents' and to ensure that members of the ADF 'have the necessary powers to assist state and territory police responding to incidents of domestic violence in a manner that minimises risk to members of the public'.[21] The statement of compatibility further states that each of the circumstances in which ADF members may use lethal force is 'connected with the protection of others' lives'.[22] This connection is said to be explicit in subparagraph 51N(3)(a)(i), and implicit in subparagraphs (ii) and (iii).

1.27 With respect to the use of lethal force to protect declared infrastructure under subparagraph 51N(3)(a)(ii), the committee notes that proposed paragraph 51H(2)(b) provides that an infrastructure declaration may only be made if the authorising ministers believe on reasonable grounds that the threat of damage or disruption to the operation of infrastructure would 'directly or indirectly' endanger the life of, or cause serious injury, to any person. However, it is unclear what are the

21 Statement of compatibility, p. 8.

22 Statement of compatibility, p. 8.

circumstances in which infrastructure may be declared where the damage or disruption may 'indirectly' endanger life or cause serious injury. In addition there is a potentially broad range of infrastructure that may fall within this category.[23] For example, it is unclear if the bill might authorise the making of an infrastructure declaration if it was considered reasonably necessary to prevent the interruption of the electricity supply, which could indirectly lead to deaths (e.g. hospitals losing electricity supply could lead to patient deaths). An ADF member would then be authorised to use force to protect that infrastructure in respect of which the call out order is made, without any requirement that the member consider whether the use of force is reasonably necessary to protect life or prevent serious injury. It is therefore not clear to the committee that the bill restricts the use of force in relation to declared infrastructure in such a way that authorising the potential use of deadly force in order to protect declared infrastructure would always be appropriate.

1.28 With respect to the use of lethal force during the taking of measures against an aircraft or vessel, subparagraph 51N(3)(a)(iii) provides that an ADF member must only use lethal force if it is reasonable and necessary to give effect to the order under which they are acting. However, this focuses on whether giving effect to the order is reasonable and necessary and not on whether using the lethal force is itself reasonable and necessary. The statement of compatibility points to a number of intended safeguards with respect to the taking of measures against aircraft or vessels.[24] First, under proposed subsection 46(3) an authorising minister must not authorise the taking of measures against an aircraft or vessel, or the giving of an order in relation to the taking of such measures, unless they are satisfied taking the measure is reasonable and necessary. Second, under proposed subsection 46(6), the ADF member can only take such measures where they are based on an order of a superior, the member is legally obliged to follow the order, the order is not manifestly unlawful, the member has no reason to believe the circumstances have changed in a material way since the order was given, the member has no reason to believe the order was based on a mistake as to a material fact, and taking the measure is reasonable and necessary to give effect to the order.

1.29 However, the committee notes that under proposed paragraph 46(1)(b) an ADF member may take measures against an aircraft or vessel if the member believes on reasonable grounds that there is insufficient time to obtain a ministerial authorisation because a sudden and extraordinary emergency exists. Therefore, ministerial authorisation, based on a belief that the measures are reasonable and necessary, would not be required wherever an ADF member believes on reasonable

23 See existing section 51 of the Defence Act which provides that 'infrastructure' includes 'physical facilities, supply chains, information technologies and communication networks or systems'.

24 Statement of compatibility, p. 9.

grounds that there is not time to gain such authorisation due to a sudden emergency existing.

1.30 The explanatory memorandum states that the requirement for ministerial authorisation recognises that any decision to take action against vessels and aircraft (such as destroying an aircraft or vessel that may be carrying large numbers of innocent people in order to save the lives of other people)[25] involves a unique assessment of the potential impact of action versus inaction.[26] However, the bill does not require the minister to have regard to whether the loss of life likely to result from taking measures against an aircraft or vessel carrying a large number of people is necessary and reasonable to protect the lives of others. In addition, while the bill requires an ADF member to consider whether using lethal force is reasonable and necessary to give effect to the order when taking measures against an aircraft or vessel, it does not explicitly require the ADF member to consider whether the use of lethal force is necessary to protect the lives of others.

1.31 It therefore appears that the use of potentially lethal force under 51N(3)(a)(iii) is not necessarily limited to circumstances where such action is necessary to protect the lives of, or prevent serious injury to, other persons.

1.32 In addition, as noted above at paragraph 1.24, proposed paragraph 51N(3)(b) provides that lethal force may be used against a person attempting to escape being detained by fleeing. Given the scrutiny concerns listed above in relation to subparagraphs 51N(3)(a)(ii) and (iii), the use of lethal force in circumstances where a person is attempting to escape also raises scrutiny concerns.

1.33 Finally, the committee notes that, in addition to authorising the use of lethal force in the circumstances described above, the bill seeks to provide members of the ADF with a defence of superior orders in certain circumstances. Proposed section 51Z provides that it is a defence to a criminal act done or purported to be done under Part IIIAAA that the act was done under an order of a superior, the ADF member was legally obliged to obey the order, the order was not manifestly unlawful, the ADF member had no reason to believe the circumstances had changed in a material respect since the order was given or that the order was based on a mistake as to a material fact, and the action was reasonable and necessary to give effect to the order. Noting the committee's scrutiny concerns regarding the making of the call out orders, the committee notes that such a defence has the potential to make the enforcement of personal rights more vulnerable.

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

25 Statement of compatibility, p. 9.

26 Explanatory memorandum, p. 55.

- **the appropriateness of amending proposed subsection 51H(2)(b) so as to require that infrastructure can only be declared where damage or disruption would *directly* endanger life or cause serious injury; and**
- **the appropriateness of amending proposed subsection 46(3) to require that the minister may only authorise the taking of measures against an aircraft or vessel where this is necessary and reasonable to protect the lives or safety of others.**

Immunity from liability[27]

1.35 Proposed subsection 51S(1) provides that if, before, while or after exercising a power under Divisions 3 to 6 an ADF member fails to comply with any obligations relating to the use of the power under Part IIIAAA, the member is taken not to have been entitled to exercise the power, unless the member exercised the power in good faith. Proposed subsection 51S(2) provides that an ADF member is not subject to civil or criminal liability in relation to the exercise, or purported exercise, of powers under Divisions 3 to 6 relating to a call out order, infrastructure declaration, specified area declaration or authorisation, if the order, declaration or authorisation was not validly made and the powers were exercised in good faith. In effect, the two proposed subsections seek to exclude liability for ADF members who act in good faith but exceed their legal authority, either because they have not complied with a statutory obligation on the use of a power or because an order, declaration or authorisation is invalid.

1.36 The explanatory memorandum states that the wording of current section 51W (which proposed section 51S seeks to replace) presents a risk that ADF members who breach a 'minor technical obligation, such as failing to wear their name badge, may be found to have exercised powers unlawfully and be subject to criminal prosecution.'[28] Proposed subsection 51S(1) is intended to remedy this by providing that only ADF members who exercise powers in bad faith may be taken as not being entitled to exercise that power. The explanatory memorandum also states that proposed subsection 51S(2) is 'necessary to ensure that ADF members have operational certainty that they will not be held responsible for procedural or other defects in the making of a call out order, declaration or authorisation.'[29]

1.37 The committee notes, however, that the exclusion of liability under proposed subsection 51S(1) is not restricted to minor or technical instances of non-compliance

27 Schedule 1, item 2, proposed section 51S. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

28 Explanatory memorandum, p. 79.

29 Explanatory memorandum, p. 79.

with the provisions of Part IIIAAA. Rather, it excludes liability in relation to a failure to comply with *any* obligation imposed under Part IIIAAA on the use of a power, provided the ADF member acted in good faith. Given the extraordinary nature of the powers conferred on ADF members under the proposed call out regime, the committee is concerned that limiting liability to instances where bad faith can be shown could unduly trespass on personal rights and liberties.

1.38 The committee requests the Attorney-General's advice as to the appropriateness of amending the bill so as to preserve legal liability in instances where an ADF member has exceeded their legal authority in circumstances that cannot be characterised as minor or technical.

Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018

Purpose	This bill seeks to amend the *Family Law Act 1975* to restrict personal cross-examination in family law proceedings where there are allegations of family violence between the parties.
Portfolio	Attorney-General's
Introduced	House of Representatives on 28 June 2018

Procedural fairness[30]

1.39 The bill seeks to insert a new Division 4 into the *Family Law Act 1975* (Family Law Act), to provide that if a party to family law proceedings intends to cross-examine another party, there is an allegation of family violence between the parties, and certain circumstances are satisfied, mandatory requirements will apply. The mandatory requirements are that the parties not personally cross-examine each other, and that the cross-examination is conducted by a legal practitioner acting on behalf of the examining party.[31]

1.40 Proposed subparagraphs 102NA(1)(c)(i)-(iv) prescribe the circumstances that must be satisfied in order for the mandatory requirements to apply. These include:

(i) either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party; or

(ii) a family violence order (other than an interim order) applies to both parties; or

(iii) an injunction under section 68B or 114 of the Family Law Act for the personal protection of either party is directed against the other party; or

(iv) the court may order that the mandatory requirements apply to the cross-examination.

1.41 It appears that, in each of the circumstances in subparagraphs (i) to (iii) there must be a finding relating to family violence by a judge or prosecutorial decision-maker. However, in relation to subparagraph (iv) it appears the court would be able to make such an order on its own initiative, or on the application of the witness party, the examining party or an independent children's lawyer appointed in relation

30 Schedule 1 , item 1, proposed subparagraph 102NA(1)(c)(iv). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iii).

31 Proposed subsection 102NA(2).

to the proceedings.[32] The bill does not appear to place any further limits on the exercise of the court's power.

1.42 The explanatory memorandum states that the mandatory requirements are intended to prevent re-traumatisation of family violence survivors, and to ensure that power imbalances created by family violence do not compromise the integrity of the trial process—including the ability of survivors to give clear evidence.[33] However, while the explanatory memorandum gives examples of when the court could make such an order (e.g. where there is an interim family violence order or family violence allegations raised for the first time in the proceedings),[34] it does not explain why it is necessary or appropriate to provide the court with a broad discretion to order that the mandatory requirements apply, without setting any legislative guidance as to when the discretion should be exercised.

1.43 In this context, the committee also notes that proposed section 102NB would require the court to ensure appropriate protections for the alleged victim of family violence in circumstances where the mandatory protections do not apply, such as directing that cross-examination be conducted through an audio or video link, closing the court to the general public and allowing the victim of family violence to have support persons present with them at trial.[35] In light of these requirements, it is unclear why it is necessary and appropriate to also provide the court with a broad power to order that the mandatory requirements apply, particularly in the absence of any statutory limitation on how that power may be exercised.

1.44 The committee appreciates the importance of protecting survivors of family violence from re-traumatisation, and of preserving the integrity of family law proceedings. However, the committee has concerns that an order that the mandatory requirements apply could potentially require a party to family law proceedings to argue their case without the opportunity to cross-examine a significant witness—including in circumstances where an individual is unable to obtain the services of a legal practitioner or receive representation from legal aid.

1.45 With regard to the availability of legal aid for parties to procedings contemplated by proposed Division 4, the explanatory memorandum states that 'it is intended that a party would obtain their own legal representation where possible, and that legal aid would be available where a party is unable to obtain private representation'.[36] The explanatory memorandum further states that:

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32 See proposed subsection 102NA(3).

33 Explanatory memorandum, p. 2.

34 Explanatory memorandum, p. 11.

35 Explanatory memorandum, pp. 13-14

36 Explanatory memorandum, p. 2

> a party who wishes to conduct cross-examination would be at liberty to obtain the assistance of a legal practitioner to act on his or her behalf. It is intended that the court would allow a party adequate time to obtain legal representation, and that legal aid would be available where a party is unable to obtain private representation.
>
> The Australian Government is consulting with National Legal Aid to determine the process by which parties would obtain legal aid representation.[37]

1.46 However, there does not appear to be anything on the face of the bill which would require that legal aid be made available to persons to whom the mandatory requirements apply. Further, while the explanatory memorandum states that arrangements would be provided for in the court rules and/or practice directions to facilitate legal representation and to minimise delays,[38] it is not apparent that these arrangements would be directed at ensuring *access* to legal aid. In this regard, the committee notes that reports have found that retaining a private lawyer can be prohibitively costly, while legal aid means tests are often set at a level that allows only the poorest Australians to be eligible, leaving many individuals unable to afford private legal representation but nevertheless ineligible for legal aid.[39]

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

- **why it is considered necessary and appropriate to provide the court with a broad discretion to order that the mandatory requirements apply,[40] and the appropriateness of amending the bill to provide some legislative guidance as to when the discretion should be exercised;**
- **the circumstances in which legal aid would be available to parties to family law proceedings involving allegations of family violence; and**
- **whether, in the circumstances that a person is subject to the prohibition on personal cross-examination or to other restrictions on their ability to present their own case, legal aid will be made more readily available.**

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37 Explanatory memorandum, p. 12.

38 Explanatory memorandum, p. 12.

39 See e.g. Attorney-General's Department, *Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, p. 52 and the Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment (Family Violence and Cross-Examination) Bill 2018*, August 2018, pp. 8-15 which noted submissions highlighting concerns regarding procedural fairness and the availability of legal representation for parties to whom the mandatory requirements apply.

40 See proposed subparagraph 102NA(1)(c)(iv).

Parliamentary scrutiny—no requirement to table certain documents[41]

1.48 Proposed section 102NC seeks to require the minister to cause a review of the operation of proposed Division 4 to be commenced as soon as possible after the second anniversary of the commencement of that section, or such other day after the second anniversary that is prescribed by regulations. The explanatory memorandum states that the review is intended to ensure the amendments are operating as intended to reduce potential trauma to victims of family violence, while also maintaining procedural fairness for all parties.[42]

1.49 However, the bill does not appear to require that documents associated with the review (for example, terms of reference or a final report) be tabled in Parliament. The bill also does not appear to require that documents associated with the review be made available online.

1.50 Tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of the documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Making documents associated with review processes available online promotes transparency and accountability. Consequently, where a bill does not require documents associated with a significant legislative review to be tabled in Parliament or published online, the committee would expect an appropriate justification to be included in the explanatory memorandum.

1.51 In this instance, the explanatory memorandum only states that the Attorney-General's Department will review the amendments internally, in consultation with the family law courts, National Legal Aid and other relevant stakeholders.[43]

1.52 Noting that there may be impacts on parliamentary scrutiny where documents associated with a significant review are not made available to the Parliament, the committee requests the Attorney-General's advice as to:

- **why it is not proposed to require documents associated with the review of proposed Division 4, conducted pursuant to proposed section 102NC, be tabled in Parliament; and**
- **whether the documents associated with the review of proposed Division 4 will be made available online.**

41 Schedule 1, item 1, proposed section 102NC. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

42 Explanatory memorandum, p. 15.

43 Explanatory memorandum, p. 15.

Freedom of Speech Legislation Amendment (Security) Bill 2018

Purpose	This bill seeks to amend various Acts to remove certain restrictions on speech
Sponsor	Senator David Leyonhjelm
Introduced	Senate on 27 June 2018

Reversal of evidential burden of proof[44]

1.53 A number of provisions in the bill seek to amend existing offence provisions relating to the unauthorised disclosure of information. In doing so, the bill seeks to apply existing offence-specific defences to new or modified offences, or to insert new offence-specific defences and apply them to new or modified offences. As a result of subsection 13.3(3) of the *Criminal Code Act 1995*, offence-specific defences reverse the evidential burden of proof, such that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.54 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, interfere with this common law right.

1.55 While in this instance 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. In this instance, the explanatory memorandum restates the effect of the proposed reversals of the evidential burden of proof, but does not provide any explanation of why it is appropriate to reverse the evidential burden in relation to the relevant matters in each case.[45]

44 Schedule 1, items 6-7, 12-14, 18-20, 32, 35-40 and 48-50. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

45 Explanatory memorandum, pp. 5-6, 8-9, 11, 14-15, 16-18 and 20-21.

1.56 The committee notes that the *Guide to Framing Commonwealth Offences*[46] 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:

- 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.

1.57 It is not apparent that the matters included in the offence-specific defences[47] in the bill would meet these criteria. Consequently, they appear to be matters that are more appropriately included as elements of the relevant offences.

1.58 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.

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

47 Such as whether information has already been communicated, or made available, to the public, or whether information relates to an operation that has concluded, does not relate to the identity of a participant in the operation, concerns corruption or misconduct in relation to the operation, or whether notice was given 24 hours prior to the disclosure of the information.

Legislation Amendment (Sunsetting Review and Other Measures) Bill 2018

Purpose	This bill seeks to amend various Acts, including the *Legislation Act 2003* (Legislation Act) and the *Acts Interpretation Act 2001* (Acts Interpretation Act) to: • implement those recommendations of the *Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003* that require legislative action; and • make minor and technical amendments to the Legislation Act and the Acts Interpretation Act to clarify their operation, resolve inconsistencies between provisions and simplify language.
Portfolio	Attorney-General's
Introduced	House of Representatives on 28 June 2018

Parliamentary oversight of delegated legislation[48]

1.59 The bill seeks to amend the *Legislation Act 2003* (Legislation Act) and the *Acts Interpretation Act 1901* (Acts Interpretation Act), among others, to implement certain recommendations of the *Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003* (Sunsetting Review Report).

1.60 In August 2017, the committee, the Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee) and the Parliamentary Joint Committee for Human Rights (Human Rights Committee) made a joint submission to the Sunsetting Review.[49] The committee notes that the amendments proposed by the bill would, if enacted, address a number of concerns articulated in the joint submission, as well as other concerns previously raised by the committee and by the Regulations and Ordinances Committee, and improve oversight of delegated legislation more generally.

1.61 In particular, the committee welcomes amendments to the bill that seek to:

- clarify the meaning of 'sitting day' in the Acts Interpretation Act; and

48 Schedule 1, item 2 and Schedule 2, item 11. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

49 Submission to the *Review of the Sunsetting Framework Under the Legislation Act 2003*, August 2017, available at https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/sunsetting-review-submissions/Standing-Committee-for-the-Scrutiny-of-Ordinances,-Parliamentary-Joint-Committee-on-Human-Rights-(combined-submission).PDF

- amend the operation of section 15D of the Legislation Act to ensure that the section does not adversely impact on parliamentary oversight.

Clarification of the definition of 'sitting day'

1.62 The joint submission noted that an issue periodically arises as to whether a sitting day expires where the Senate has suspended and then resumes sitting the following calendar day. This issue is particularly important to the management and oversight of delegated legislation, as a number of matters in the Legislation Act are provided for by reference to a specified number of sitting days.[50]

1.63 Item 2 of the bill seeks to insert a new section 2M into the Acts Interpretation Act, which would usefully clarify that:

- a sitting day, in relation to a House of the Parliament, is a day on which that House actually sits;[51]
- where a House sits without adjourning on a previous day, the period during which the House continues to sit (with or without a suspension) on a later day is taken to be part of that previous day;[52] and
- a House is taken to have adjourned if the Parliament is prorogued, the House is dissolved, or the House (if it is the House of Representatives) expires.[53]

Amendments to section 15D of the Legislation Act 2003

1.64 Section 15D of the Legislation Act currently provides that, if the First Parliamentary Council (FPC) is satisfied that there is a mistake, omission or other error in the Federal Register of Legislation (FRL) consisting of an error in the text of an Act or legislative instrument, or of a compilation of an Act or instrument, the FPC must correct the error as soon as possible. The FPC must also include on the FRL a statement outlining the correction in general terms.

1.65 The committee considered section 15D when it was proposed to be inserted by the Acts and Instruments (Framework Reform) Bill 2014.[54] The committee raised concerns as to whether the operation of that section might insufficiently subject the exercise of legislative power to parliamentary scrutiny, and queried in particular why,

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50 For example, section 38 of the Legislation Act requires the Office of Parliamentary Council to arrange for a copy of each registered legislative instrument to be delivered to each House of Parliament to be laid before each house (tabled) within six sitting days following registration. Section 42 of that Act provides that a notice of motion to disallow a legislative instrument must be given within 15 sitting days after the instrument is tabled in the relevant House.

51 Proposed subsection 2M(1).

52 Proposed subsection 2M(2).

53 Proposed subsection 2M(3).

54 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014,* pp. 1-4.

when the FPC corrects an instrument on the FRL under that section, the correction could not be detailed in specific rather than in general terms..[55]

1.66 The Senate Regulations and Ordinances Committee also raised concerns in relation to the use of section 15D to 'correct' legislative instruments.[56] In the view of that committee, using an administrative process to correct an instrument after it has been tabled in Parliament has the potential to seriously undermine parliamentary scrutiny.[57] In this regard, the committee has noted that there is currently no requirement that any 'corrected' instrument be re-tabled in Parliament and thereby brought to the attention of parliamentarians. Moreover, the tabling of a 'corrected' version of an instrument does not affect the applicable disallowance period, which commences on the day the *original* version of the relevant instrument is tabled in Parliament. In light of these concerns, the Regulations and Ordinances Committee has consistently recommended that section 15D be amended to address these concerns.[58]

1.67 Item 11 of the bill seeks to amend section 15D. The amendments would clarify the application of that section and seeks to insert new section 15DA into the Legislation Act. Significantly, that section would provide that:

- where the FPC rectifies an instrument under section 15D, the FPC must arrange for the correct version of the relevant instrument to be laid before each House of the Parliament within six sitting days after the rectification;[59]
- where an instrument is re-tabled following rectification by the FPC, the instrument becomes subject to disallowance under the Legislation Act from the date on which the rectified version of the instrument is tabled;[60] and

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55 Ultimately, the committee left to the Senate as a whole the appropriateness of only requiring the FPC to outline a correction in general terms, including any impacts this approach might have on access to and understanding of the law. See Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, p. 13.

56 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 1 of 2018*, pp. 23-26; *Delegated legislation monitor 3 of 2018,* p. 66-72; *Delegated legislation monitor 5 of 2018*, pp. 35-37; *Delegated legislation monitor 6 of 2018*, pp. 94-98.

57 This is because, in the period between the initial tabling of the incorrect version of the instrument and the tabling of the corrected version, members and senators do not have the opportunity to consider the correct version of the instrument. Further, after having considered the original version of the instrument, members and senators may not be aware that the instrument has been corrected.

58 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 3 of 2018,* p. 72; *Delegated legislation monitor 6 of 2018,* pp. 97-98.

59 Proposed subsection 15DA(2).

60 Proposed subsection 15DA(3).

- where a notice of motion to disallow an instrument has already been given in a House of the Parliament at the time the rectified version of the instrument is tabled, and the notice has not been withdrawn or otherwise disposed of, the notice is taken to have been given on the sitting day after the correct version of the instrument is tabled.[61]

1.68 These amendments would appear to make substantial improvements to parliamentary oversight of delegated legislation, and would appear to address the concerns raised by the Regulations and Ordinances Committee. In particular, the amendments would ensure that parliamentarians are made aware of any rectifications to an instrument that has previously been tabled, and would preserve Parliament's capacity to consider the full text of an instrument during the applicable disallowance period.

1.69 The committee welcomes the amendments proposed by the bill, which would appear to address a number of the concerns previously articulated by this committee and the Regulations and Ordinances Committee. In particular, the committee welcomes those amendments relating to:

- **introducing a definition of 'sitting day' in the *Acts Interpretation Act 1901*, which the committee considers is likely to deliver additional certainty with respect to the management and oversight of delegated legislation; and**
- **the operation of section 15D of the *Legislation Act 2003*, which the committee considers would be likely to preserve and improve parliamentary oversight of delegated legislation in circumstances where an instrument is rectified following its initial registration on the Federal Register of Legislation.**

61 Proposed paragraph 15DA(3)(e).

Office of National Intelligence Bill 2018

Purpose	This bill seeks to establish the Office of National Intelligence (ONI) as an independent statutory agency. The ONI would subsume the role, functions and staff of the Office of National Assessments
Portfolio	Prime Minister
Introduced	House of Representatives on 28 June 2018

Reversal of the evidential burden of proof[62]

1.70 Clauses 42 to 44 seek to create a number offences related to the unauthorised communication or recording of information or matters, and to the unauthorised dealing with records, in relation to information, matters and records that were acquired or prepared on behalf of the Office of National Integrity (ONI) in connection with its functions, or that relate to the performance by the ONI of its functions. The maximum penalties for these offences range from imprisonment for three years to imprisonment for 10 years.

1.71 The bill also seeks to provide a number of exceptions (offence-specific defences) to these offences, stating that the relevant offences do not apply:

- to information or a matter, or to a record, that has already been communicated or made available to the public with the authority of the Commonwealth;[63]
- if the person communicates the information or matter to, or deals with or makes a record for, an Inspector-General of Intelligence and Security (IGIS) official for the purpose of the official exercising a power, or performing a function or duty, as an IGIS official;[64] or
- if the communication was for the purposes of any legal proceedings arising out of or otherwise related to clause 43,[65] or was in accordance with any requirement imposed by law.[66]

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62 Clauses 42 to 44 and clause 46. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

63 See subclauses 42(2), 43(2) and 44(3).

64 See subclauses 42(3), proposed paragraph 43(3)(c) and subclause 44(4).

65 Clause 43 seeks to create an offence concerning the communication of ONI information by certain persons with the intention of causing harm to national security or endangering the health or safety of another person, or knowledge that this will or is likely to occur.

66 See proposed paragraphs 43(3)(a) and (b).

1.72 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.

1.73 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, interfere with this common law right.

1.74 While in this instance 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.

1.75 With respect to the defences relating to information already being available to the public with the authority of the Commonwealth, the explanatory memorandum states that it is 'far more reasonable' to require the defendant to point to evidence that information is in the public domain as the defendant would have had this in mind at the time of disclosure, rather than require the Commonwealth to prove beyond reasonable doubt that the information is not in the public domain.[67]

1.76 With respect to the defences relating to a person communicating information to an IGIS official, or dealing with or making a record for an IGIS official, the explanatory memorandum states that the defences will ensure that the IGIS is able to provide effective oversight and that ONI employees and others can make disclosures of wrongdoing (including public interest disclosures) to IGIS officials. However, the explanatory memorandum either does not address the appropriateness of reversing the evidential burden, or provides the same justification as is provided in relation to the defence discussed above.[68]

1.77 Finally, the explanatory memorandum does not address the defences relating to communications being made for the purposes of legal proceedings relating to section 43 or in accordance with any requirement imposed by law.[69]

1.78 The committee notes that the *Guide to Framing Commonwealth Offences*[70] 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:

- it is peculiarly within the knowledge of the defendant; and

67 Explanatory memorandum, pp. 37, 41.

68 Explanatory memorandum, pp. 37, 41.

69 Explanatory memorandum, p. 38.

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

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

1.79 It is not apparent that the matters in the defences outlined above would be peculiarly within the defendant's knowledge. Nor is it apparent that those matters would be significantly more difficult or costly for the prosecution to disprove than for the defendant to establish. In this regard, it appears that a number of the matters, such as whether information has already been communicated or made available to the public with the authority of the Commonwealth, or whether a communication occurred in accordance with any requirement imposed by law, appear to be matters more appropriately included as an element of the relevant offences.

1.80 In addition, the committee notes that subclause 46(1) provides that none of the secrecy offences discussed above will apply to a person who is an IGIS official and who engages in the relevant conduct for the purposes of exercising powers, or performing functions or duties, as an IGIS official. Subclause 46(2) provides that a defendant will not bear an evidential burden in relation to this defence, despite subsection 13.3(3) of the *Criminal Code Act 1995*. The explanatory memorandum states that it is considered appropriate that the prosecution bear the evidential burden in relation to the matters in subclause 46(1) as IGIS officials may not be able to discharge an evidential burden without breaching the strict secrecy obligations to which they are subject.[71]

1.81 While the committee welcomes the inclusion of this defence, including the fact that the evidential burden will be placed on the prosecution in this instance, the explanatory materials do not explain why it is considered necessary to provide such a defence for IGIS officials only. It is therefore not clear to the committee why it would not also be appropriate to provide an equivalent defence for other government officials who may be required to deal with ONI information in the course of performing their official functions or duties. While the committee notes that a number of elements of the offences ensure that communication made by an ONI staff member in the course of their duties will not be criminalised, this does not appear to apply to other officials in other departments who may have access to ONI information in the course of their duties.

1.82 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to the matters in proposed subclauses 42(2) and (3), 43(2) and (3) and 44(3) and (4). The committee's consideration of the appropriateness of a provision which reverses the

71 Explanatory memorandum, p. 42.

burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[72]

1.83 The committee also requests the advice of the Prime Minister and the Attorney-General as to the appropriateness of amending the bill to include a general defence to the offences in clauses 42 to 44 for all government officials who engage in relevant conduct for the purpose of exercising powers, or performing functions or duties, as a government official.

Delegated legislation not subject to disallowance
Significant matters in delegated legislation
Privacy[73]

1.84 The bill seeks to provide the ONI with broader functions than those of the current Office of National Assessments (ONA). These functions would include assembling, correlating and analysing information in relation to non-international matters of political, strategic or economic significance to Australia,[74] and collecting information that is available to the public.[75] The bill also seeks to provide the ONI with additional powers to require other Commonwealth agencies to provide information, documents or things relevant to international matters of political, strategic or economic significance to Australia or related domestic aspects of such matters,[76] and to empower Commonwealth authorities and intelligence agencies to provide such information.[77] These provisions raise concerns about the extent to which the privacy of individuals may be compromised in the course of the ONI carrying out its functions.

1.85 The explanatory memorandum states that it can be expected that the ONI will collect and use more personal information than the ONA currently does,[78] but also states that the secrecy provisions contained in the bill are intended to protect personal information by prohibiting its unauthorised communication or handling.[79] In addition, subclause 53(1) provides that the Prime Minister must make privacy rules

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

73 Clauses 7, 37 to 39 and 53. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i),(iv) and (v).

74 Proposed paragraph 7(1)(d).

75 Proposed paragraph 7(1)(g).

76 Clause 37.

77 Clauses 38 and 39.

78 Explanatory memorandum, p. 7.

79 Explanatory memorandum, p. 9, and clauses 42 to 46.

regulating the collection of identifiable information as part of its open source collection function,[80] and regulating the communication, handling and retention by the ONI of identifiable information generally. The bill defines 'identifiable information' as information or an opinion about an identified, or reasonably identifiable, Australian citizen or permanent resident, whether or not the information is true and whether or not the information is recorded in a material form.[81]

1.86 Subclauses 53(3) and (4) provide that, in making privacy rules, the Prime Minister must have regard to the need to ensure that the privacy of Australian citizens and permanent residents is preserved as far as is consistent with the proper performance by the ONI of its functions. Those clauses also provide that the Prime Minister must consult with the Director-General of the ONI, the Inspector-General of Intelligence and Security and the Attorney-General prior to making the privacy rules. In addition, subsection 53(5) provides that the ONI must not collect or communicate identifiable information except in accordance with the privacy rules.

1.87 However, subclause 53(8) provides that the privacy rules are not legislative instruments. As a result, the privacy rules would not be subject to the usual disallowance and sunsetting procedures and publication on the Federal Register of Legislation. The explanatory memorandum states that this subclause is intended to operate as a substantive exemption from the requirements of the *Legislation Act 2003*, as the privacy rules may contain information relating to national security that is not suitable for public dissemination.[82]

1.88 The committee considers that significant matters, such as the content of rules intended to protect the privacy of Australian citizens and permanent residents, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum does not directly address the question of why it is appropriate to include such matters in delegated legislation. The committee notes that the explanatory memorandum does state that, although it is anticipated that the privacy rules will generally be made public, they

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80 Proposed paragraph 7(1)(g) provides that one of the ONI's functions is to collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public.

81 See definition under 'identifiable information' under clause 4. The explanatory memorandum notes that this definition is similar to the definition of personal information under the *Privacy Act 1988*. The explanatory memorandum also explains that the *Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018* seeks to exempt the ONI from the operation of the Privacy Act, and also exempt a range of government agencies with intelligence roles or functions from the Privacy Act with respect to the provision to the ONI of personal information (see p. 44).

82 Explanatory memorandum, p. 45.

may also contain information relating to national security that is not suitable for public dissemination.[83]

1.89 It is not clear to the committee why at least high-level guidance cannot be included in the primary legislation to regulate the collection of identifiable open source information and the communication, handling and retention by the ONI of identifiable information. It is also not clear why, if it is intended that the privacy rules will generally be made public, any rules containing more technical matters cannot be made as legislative instruments, noting the possibility of providing the rule maker with the discretion to ensure that any guidance relating to sensitive national security information is issued by way of a non-legislative instrument.

1.90 The committee requests the detailed advice of the Prime Minister and the Attorney-General as to:

- **the appropriateness of amending the bill to provide high-level regulation of the collection of identifiable open source information and the communication, handling and retention by the Office of National Intelligence of identifiable information; and**
- **why it is necessary to declare the entirety of the privacy rules not to be a legislative instrument (and therefore not subject to the usual disallowance and sunsetting procedures under the *Legislation Act 2003*), given that it is intended that they will generally be made public.**

83 Explanatory memorandum, p. 45.

Therapeutic Goods Amendment (2018 Measures No. 1) Bill 2018

Purpose	This bill seeks to amend the *Therapeutic Goods Act 1989* to: • introduce mandatory reporting requirements for sponsors of prescription medicines to report shortages of, and any decision to permanently discontinue, their products; • enable standards to adopt other documents as in force from time to time; • enable the secretary to require priority pathway applicants to provide supporting information; • amend health practitioner notifications under the Special Access Scheme; and • vary registered medicines through notification
Portfolio	Health
Introduced	House of Representatives on 28 June 2018

Incorporation of external material into the law[84]

1.91 Item 2 of Schedule 2 seeks to amend section 10 of the *Therapeutic Goods Act 1989* (the Act) to provide that, despite section 14(2) of the *Legislation Act 2003*, the minister may make an order specifying a standard for therapeutic goods or classes of therapeutic goods, or a variation of such an order, by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

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

- raises the prospect of changes being made to the law in the absence of parliamentary scrutiny, (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

84 Schedule 2, item 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

- 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).

1.93 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 the law.

1.94 The issue of access to material incorporated into the law by reference to external documents 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 has published a detailed report on this issue. This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

1.95 In this instance, the explanatory memorandum states that it is necessary to allow material to be incorporated from time to time so as to prevent therapeutic goods standards from referring to out-dated documents and becoming out of sync with international best practice,[85] and also states that it is intended that the proposed power will be used to align the regulation of therapeutic goods with international best practice in relation to product safety and quality by requiring compliance with or references to other documents such as standards issued by the International Organization for Standards, the European Union or Australian Standards.[86] The explanatory memorandum also includes examples of the types of documents that may be incorporated and notes that, while these documents are available online, in some cases an access fee applies. The explanatory memorandum finally states that it is expected that sponsors and manufacturers of therapeutic goods would have access to and be familiar with such documents.[87]

1.96 The committee notes this detailed explanation and that the incorporated documents are likely to be readily accessible to those most directly affected by the standards. However, the committee emphasises that its consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all individuals who may be interested in or affected by the law.

85 Explanatory memorandum, p. 18.

86 Explanatory memorandum, p. 17.

87 Explanatory memorandum, p. 18.

1.97 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of incorporating material that may not be freely and readily available to all those interested in the law.

Treasury Laws Amendment (Financial Sector Regulation) Bill 2018

Purpose	This bill seeks to amend *Financial Sector (Shareholdings) Act 1998* and the *Banking Act 1959* to: • increase from 15 per cent to 20 per cent the ownership restriction applying to life insurance and general insurance companies, authorised deposit-taking institutions and relevant holding companies; • create a streamlined path for owners of qualifying domestically incorporated companies with assets less than the relevant threshold applying to become a financial sector company; and • enable the Australian Prudential Regulation Authority to grant a new entrant to the banking sector a time limited ADI licence
Portfolio	Treasury
Introduced	House of Representatives on 28 June 2018

Significant matters in delegated legislation

Consultation prior to making delegated legislation[88]

1.98 Item 12 of Schedule 1 seeks to insert a new subsection 14(1) in the *Financial Sector (Shareholdings) Act 1998* (the Act) which would allow the Treasurer to grant an application for a person to hold a stake in a financial sector company greater than 20 per cent if the applicant satisfies the Treasurer this would be in the national interest or that criteria set out under proposed subsection 14A(1) are met in relation to the applicant and the company. The relevant criteria are that the applicant is a fit and proper person to hold a stake in the company greater than 20 per cent and that the company meets the criteria set out under proposed subsection 14A(3) or (4). Proposed subsection 14A(2) states that the rules may prescribe matters that must be considered in determining whether a person is a fit and proper person for the purposes of granting or revoking an approval to hold a stake greater than 20 per cent.[89] No guidance as to who will be considered a fit and proper person is provided in the primary legislation.

88 Schedule 1, item 16, proposed subsection 14A(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

89 See item 27 in relation to decisions to revoke an approval.

1.99 The committee's view is that significant matters, such as the matters to be considered under a fit and proper person test, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification for leaving all of the content of the fit and proper person test to be prescribed in the rules, rather than set out in primary legislation.

1.100 In addition, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

1.101 In this instance, the explanatory memorandum states that the government expects that the Australian Prudential Regulatory Authority (APRA) will consult with industry prior to finalising a legislative instrument relating to the fit and proper person test.[90] The explanatory memorandum also notes that ministerial consent would be required prior to APRA making any legislative instruments under the Act, in accordance with the general rule-making powers proposed under item 45.[91]

1.102 While the committee notes that the government expects APRA to undertake consultation with industry prior to making a legislative instrument with respect to the fit and proper person test, the bill does not contain a positive requirement that such consultation must take place. The committee also does not consider that the requirement that the minister's consent be gained prior to a rule being made amounts to an adequate consultation obligation as it does not require consultation with those who are likely to be affected by the test.

1.103 Finally, the committee also notes that the fit and proper person test is to be included in 'rules' rather than in 'regulations'. The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in the committee's *First Report of 2015*.[92] In relation to this matter, the committee has noted that regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel (OPC). Therefore, if significant matters are to be provided for in delegated legislation (rather than primary legislation) the committee considers they should at least be

90 Explanatory memorandum, p. 9.

91 Explanatory memorandum, p. 9.

92 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp. 21-35.

provided for in regulations, rather than other forms of delegated legislation which are subject to a lower level of executive scrutiny.[93]

1.104 The committee seeks the Treasurer's advice as to:

- **why it is considered necessary and appropriate to leave all of the content of the fit and proper person test to be prescribed in delegated legislation; and**
- **whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).**

93 See also Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 17 of 2014*, 3 December 2014, pp. 6–24.

Bills with no committee comment

1.105 The committee has no comment in relation to the following bills which were introduced into the Parliament between 25 – 28 June 2018:

- Customs Tariff Amendment (Incorporation of Proposals) Bill 2018;
- Commonwealth Inscribed Stock Amendment (Restoring the Debt Ceiling) Bill 2018;
- Export Control Amendment (Equine Live Export for Slaughter Prohibition) Bill 2018;
- Fair Work Amendment (A Living Wage) Bill 2018;
- Fair Work Amendment (Restoring Penalty Rates) Bill 2018;
- Freedom of Speech Legislation Amendment (Censorship) Bill 2018;
- Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018;
- Modern Slavery Bill 2018;
- Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018;
- Regional Rural and Remote Education Commissioner Bill 2018;
- Telecommunications Amendment (Giving the Community Rights on Phone Towers) Bill 2018; and
- Telecommunications Legislation Amendment Bill 2018

Commentary on amendments and explanatory materials

Foreign Influence Transparency Scheme Bill 2017
[Digest 1 & 3/18]

1.106 On 26 June 2018 the House of Representatives agreed to 126 Government amendments, the Attorney-General (Mr Porter) presented supplementary and replacement explanatory memoranda and the bill was read a third time.

1.107 In *Scrutiny Digest 1 of 2018* and *Scrutiny Digest 3 of 2018* the committee raised a number of concerns about the bill. Some of these amendments appear to address some, but not all, of the committee's scrutiny concerns.

1.108 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017
[Digest 1 & 4/18]

1.109 On 26 June 2018 the House of Representatives agreed to 154 Government amendments, the Attorney-General (Mr Porter) presented supplementary and replacement explanatory memoranda and the bill was read a third time.

1.110 In *Scrutiny Digest 1 of 2018* and *Scrutiny Digest 4 of 2018* the committee raised a number of concerns about the bill. Some of these amendments appear to address some, but not all, of the committee's scrutiny concerns.

1.111 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

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

- Copyright Amendment (Service Providers) Bill 2017;[94]
- Corporations Amendment (Asia Region Funds Passport) Bill 2018;[95]

94 On 25 June 2018 the Minister for Urban Infrastructure and Cities (Mr Fletcher) presented an addendum to the explanatory memorandum.

95 On 25 June 2018 the House of Representatives agreed to four Government amendments, the Minister for Small and Family Business, Workplace and Deregulation (Mr C A S Laundy) presented a supplementary explanatory memorandum and the bill was read a third time.

- Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017;[96]
- Taxation Administration Amendment (Corporate Tax Entity Information) Bill 2018;[97]
- Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018.[98]

96 On 27 June 2018 the House of Representatives agreed to two Government amendments, the Assistant Minister to the Deputy Prime Minister (Mr Pitt) presented a further addendum to the explanatory memorandum and a supplementary explanatory memorandum and the bill was read a third time.

97 On 25 June 2018 the Senate agreed to two Australian Greens amendments and the bill was read a third time.

98 On 27 June 2018 the House of Representatives agreed to one Government amendment, the Minister for Veterans' Affairs (Mr D J Chester) presented a supplementary explanatory memorandum and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

Health Legislation Amendment (Improved Medicare Compliance and Other Measures) Bill 2018

Purpose	This bill seeks to amend various Acts in relation to health by implementing measures to support recovery arrangements for Medicare debts owed to the Commonwealth
Portfolio	Health
Introduced	House of Representatives on 23 May 2018
Bill status	Received Royal Assent on 29 June 2018

Limitation on merits review[1]

2.2 In *Scrutiny Digest No. 6 of 2018*[2] the committee requested the minister's advice as to why it is considered necessary to limit the right to make an application to the AAT to circumstances where a garnishee notice has been given in relation to the debt to which a reconsidered decision relates.

Minister's response[3]

2.3 The minister advised:

> In relation to the first issue (see paragraphs 1.59 - 1.62 of the Digest), it should be noted that all existing debt provisions in the *Health Insurance Act 1973* (the HIA) are subject to internal review only. The introduction of a review right to the Administrative Appeals Tribunal (AAT) in instances

1 Schedule 1, item 14, proposed subsection 129ACB(8); Schedule 3, item 16, proposed subsection 129AAJ(8) and item 29, proposed subsection 129AEC(3); Schedule 4, item 10, proposed subsection 56D(8) and item 11, proposed subsection 56G(4); and Schedule 5, item 5, proposed subsections 99ABD(9) and 99ABG(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 6 of 2018*, at pp. 19-20.

3 The minister responded to the committee's comments in a letter 28 June 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest No. 8 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

where a garnishee notice has been issued is considered to be a proportionate safeguard on the introduction of the new garnishee power. As a safeguard against over-reach, the issue of a garnishee order will only be used where providers fail to enter into repayment arrangements after 90 days and no other options are available. Creating a right to external review by the AAT of decisions to issue a garnishee order is an important additional safeguard, over and above internal review.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that all existing debt provisions are subject to internal review only, and that creating a right to external review by the Administrative Appeals Tribunal (AAT) in instances where a garnishee notice has been issued is considered to be a proportionate safeguard.

2.5 However, the committee notes that the minister's response does not directly address its original question as to why it is considered necessary to limit the right to make an application to the AAT to circumstances where a garnishee notice has been given in relation to the debt to which a reconsidered decision relates. The committee considers that this proposed limitation is not adequately justified by the fact that no external merits review is available in relation to existing debt provisions. It remains unclear to the committee why it is necessary to limit the circumstances in which an application to the AAT may be made.

2.6 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Strict liability offences[4]

2.7 In *Scrutiny Digest No. 6 of 2018*[5] the committee considered that it may be appropriate for the explanatory memorandum to be amended to include an explanation of what the legitimate grounds are for penalising persons lacking fault in respect of the offence under proposed subsection 20BB(4) that explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[6]

4 Schedule 3, item 4, proposed subsection 20BB(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 6 of 2018*, at pp. 19-20.

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

Minister's response

2.8 The minister advised:

> The second issue relates to the strict liability offence in proposed subsection 20BB(4) of the HIA (see paragraphs 1.63 - 1.66 of the Digest). The existence of a valid referral is a precondition for providers to bill certain items in the Medical Benefits Schedule (MBS). However, for the convenience of patients and providers, there is no requirement to submit copies of referrals with claims for Medicare benefits relating to those MBS items.
>
> Proposed section 20BB applies to allied health professionals and other Medicare providers and mirrors the current section 20BA of the HIA which applies to medical specialists. The provisions align because the Bill is intended to standardise administrative arrangements across the three Acts which it amends so that doctors (and other Medicare providers), pharmacists and dentists have the same requirements to retain and produce documents supporting their claims, and the same penalties if they do not. The strict liability offence attracts a fine only, not a prison sentence. Accordingly, the insertion of a strict liability offence is reasonable, necessary and proportionate to achieving the purposes of the Bill.
>
> The explanatory memorandum also makes it clear that the offence in proposed s. 20BB:
>
> - does not apply if the person has a reasonable excuse;
> - is subject to a defence of 'honest and reasonable mistake of fact' under the Criminal Code; and
> - is not punishable by imprisonment but carries a maximum fine of 5 penalty units (currently $1,050).
>
> The Bill is currently before the Senate and debate is expected to resume on Thursday, 28 June 2018. Given the tight time frame, and that there are no legal interpretation issues which could usefully be addressed, I do not propose to make any amendments to the explanatory material currently before the Senate.

Committee comment

2.9 The committee thanks the minister for providing this additional information. The committee notes the minister's advice that the bill seeks to standardise administrative requirements and to apply the same penalties to a failure to meet these requirements, and that the minister does not propose to make any amendments to the explanatory material accompanying the bill as he considers that there are no issues of legal interpretation that could usefully be addressed.

2.10 However, the committee notes that the minister's response does not address the committee's original concern that the explanatory memorandum does not contain an explanation of what the legitimate grounds are for penalising persons

lacking fault in respect of the proposed offence. The committee therefore reiterates its original concerns that the explanatory materials accompanying the bill do not provide an adequate justification for the strict liability offence in proposed subsection 20BB(4).

2.11 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Migration (Validation of Port Appointment) Bill 2018

Purpose	This bill seeks to confirm the validity of the appointment of a proclaimed port in the Territory of Ashmore and Cartier Island contained in the Commonwealth of Australia Gazette No. GN 3, 23 January 2002
Portfolio	Home Affairs
Introduced	House of Representatives on 20 June 2018
Bill status	Before the House of Representatives

Retrospective validation[7]

2.12 In *Scrutiny Digest No. 7 of 2018*[8] the committee requested the minister's detailed advice as to:

- the basis of the legal challenges to the validity of the 2002 appointment and the general arguments raised by the applicants in those cases;
- the number of persons who entered the relevant waters of the Territory of Ashmore and Cartier Islands since 23 January 2002 to date. In particular, how many of these people, if any:
  - are yet to have their asylum applications finally determined;
  - have been granted a protection visa;
  - are in offshore detention;
  - have had their applications refused but remain in Australia;
- how the persons in each of the categories above would have been treated if the 2002 appointment had not been made, and the extent of any detriment such persons may suffer if the 2002 appointment is retrospectively validated; and
- the fairness of applying the bill to persons who have instituted proceedings but where judgment is not delivered before commencement of the Act (noting that such persons may be liable to an adverse costs order).

7 Clauses 3 and 4. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 7 of 2018*, at pp. 1-4.

Minister's response[9]

2.13 The minister advised:

The basis of the legal challenges to the validity of the 2002 appointment and the general arguments raised by the applicants in those cases

On 11 July 2018, the Federal Circuit Court handed down two decisions regarding the matters of *DBC16 v Minister for Immigration and Border Protection & Anor* [2018] and *DBB16 v Minister for Immigration and Border Protection & Anor* [2018], finding the 2002 instrument of appointment (the Appointment) to be invalid.

The validity of the Appointment was challenged on two grounds:

- that the Appointment is void for uncertainty as the result of the omission of a latitudinal coordinate in the description of the area of the proclaimed port; and
- that the Appointment was beyond the power of the Minister under paragraph 5(5)(a) of the *Migration Act 1958* (the Act) to appoint a "port" within the Territory of Ashmore and Cartier Islands as a proclaimed port.

The Court rejected the first ground.

In relation to the second ground however, the applicants were successful in contending that no actual port exists within the Territory of Ashmore and Cartier Islands. The applicants were also successful in arguing that due to the invalidity, they were not 'unauthorised maritime arrivals' (UMAs) and consequently were not 'fast track applicants' within the meaning of the Act.

The number of persons who entered the relevant waters of the Territory of Ashmore and Cartier Islands since 23 January 2002 to date. In particular, how many of these people, if any:

- *are yet to have their asylum applications finally determined;*
- *have been granted a protection visa;*
- *are in offshore detention;*
- *have had their applications refused but remain in Australia*

How the persons in each of these categories would have been treated if the 2002 appointment had not been made and the extent of any detriment such persons may suffer if the 2002 appointment is retrospectively validated

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9 The minister responded to the committee's comments in a letter 19 July 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest No. 8 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

No persons will suffer a detriment if the validity of the Appointment is confirmed by passage of the Bill. Enactment of the Bill will merely confirm that the actions taken in relation to persons who entered the waters of the proclaimed port, by reference to their status as UMAs, were valid and effective.

The Appointment is critical to determining the status of persons as UMAs under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013. In addition, those who became UMAs by reason of having entered the proclaimed port between 13 August 2012 and 1 June 2013, also became 'fast track applicants' under the Act.

Subject to any appeal, the successful challenge to the Appointment means that the affected persons did not enter Australia at an excised offshore place and are not therefore, UMAs under the Act. For some, this also means that they are not fast track applicants under the Act. However, the affected persons still entered Australia without a visa that was in effect, thereupon becoming unlawful non-citizens subject to immigration detention.

By reinstating the validity of the Appointment, the Bill does not impose any new obligations or detriment on affected persons. Instead, it maintains the status quo in relation to the processing of UMAs and, where relevant, fast track applicants under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.

The fairness of applying the Bill to persons who have instituted proceedings but where judgment is not delivered before commencement of the Act (noting that such persons may be liable to an adverse costs order):

Government policy around the management of UMAs has been highly effective in responding to the enduring threat of maritime people smuggling and protecting the integrity of Australia's migration framework. The government considers it unacceptable for individuals to seek to rely on minor and inadvertent omissions in the wording of the Appointment in an attempt to undermine this policy. In order to maintain public confidence in our border protection arrangements, it is imperative that we uphold the original intent of the Appointment. For these reasons it is appropriate for the Bill to apply to persons who have instituted proceedings but where judgment has not been delivered before the provisions commence.

With respect to the Committee's comment regarding an adverse costs order, we consider it highly unlikely that such an order would result from a court's rejection of an attack on the validity of the Appointment alone. In practice, this issue is likely to be one of several grounds raised in proceedings so in the event that an adverse costs order is made, there are likely to be a number of other factors which would contribute to the making of such an order.

Committee comment

2.14 The committee thanks the minister for this response. The committee notes the minister's advice that, by validating the 2002 appointment of a proclaimed port in the Ashmore and Cartier Islands, the bill does not impose any new obligations or detriment on affected persons. The committee also notes the advice that the bill will merely confirm that actions taken in relation to persons who entered the waters of the proclaimed port, by reference to their status as unauthorised maritime arrivals (UMAs), were valid and effective.

2.15 However, the committee notes that the minister's response does not address the committee's question as to the number of persons who entered the relevant waters since 23 January 2002. The response also fails to articulate how many such persons, if any, are yet to have asylum applications finally determined, have been granted a protection visa, are in offshore detention, or have had asylum applications refused but remain in Australia.

2.16 The committee also notes that media reports indicate that over 1600 asylum cases may need to be revisited owing to the finding by the Federal Circuit Court that the 2002 appointment was invalid.[10] Retrospectively validating the 2002 appointment would substantially limit affected persons' ability to challenge their classification as UMAs. As noted in the committee's initial comments, whether or not a person is classified as a UMA is of great significance to how their rights and obligations under the migration law are to be determined and how their applications may be processed. Consequently, it is not apparent to the committee that the bill would not detrimentally affect any persons.

2.17 The committee further notes the minister's advice that the government considers it unacceptable for individuals to seek to rely on 'minor and inadvertent omissions' in the wording of the 2002 appointment to undermine government migration policy, and that it is necessary to uphold the original intent of the appointment in order to maintain confidence in Australia's border protection arrangements.

2.18 While noting this advice, the committee reiterates that a fundamental principle of the rule of law is that the governors, like the governed, are bound by the law and cannot exceed their legal authority. In this respect, and irrespective of any underpinning policy intent, when the (then) minister made the 2002 appointment he exceeded his powers under the migration law. Consequently, the appointment was invalidly made. This has been confirmed by the Federal Circuit Court.[11] Retrospectively altering the 2002 appointment, even if only to reflect its original

10 See e.g. Doherty, Ben, *Australia sailed asylum seekers to remote reef to prevent them accessing mainland*, in *The Guardian* (24 July 2018).

11 See *DBD16 v Minister for Immigration & Anor* [2018] FCCA 1801.

policy intent, has the potential to undermine the rule of law and, as outlined above, may cause detriment to a number of affected persons.

2.19 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of retrospectively validating:

- **the 2002 appointment of the Territory of Ashmore and Cartier Islands as a proclaimed port; and**
- **all things done under the Migration Act at any time prior to the commencement of the bill that would be invalid or ineffective directly or indirectly because of the terms of the 2002 appointment.**

Space Activities Amendment (Launches and Returns) Bill 2018

Purpose	This bill seeks to amend the *Space Activities Act 1998* to: • broaden the regulatory framework to include arrangements for launches from aircraft in flight and launches of high power rockets; and • reduce barriers to participation in the space industry, by amending approval processes and insurance requirements for launches and returns
Portfolio	Jobs and Innovation
Introduced	House of Representatives on 30 May 2018
Bill status	Before the House of Representatives

Incorporation of external material into the law[12]

2.20 In *Scrutiny Digest No. 6 of 2018*[13] the committee requested the minister's advice as to:

- why it is necessary and appropriate that the rules incorporate documents as in force or existing from time to time, rather than as in force or existing at a particular time (for example, when the rules are made);
- the type of documents that it is envisaged may be applied, adopted or incorporated by reference in rules made under proposed section 110; and
- whether these documents will be made freely available to all persons interested in the law.

Minister's response[14]

2.21 The minister advised:

> *Why is it necessary and appropriate that the rules incorporate documents as in force or existing from time to time, rather than as in force or existing at a particular time (for example, when the rules are made)?*

12 Schedule 1, item 187, proposed subsection 110(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 6 of 2018*, at pp. 46-47.

14 The minister responded to the committee's comments in a letter received 27 July 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest No. 8 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

Section 110 of the Bill provides a general rule-making power. Rules will be disallowable legislative instruments. Several rules are proposed in relation to a number of subjects including defining high power rockets, fees and insurance, and requirements for licences and permits.

It is necessary and appropriate that the proposed rules incorporate documents as in force or existing from time to time to increase the flexibility of the instrument to respond to the rapidly evolving nature of space technologies (therefore supporting the growth of the sector), and the need to agilely review and update insurance in response to safety and market interests.

The type of documents that are envisaged may be applied, adopted, or incorporated by reference in rules made under proposed section 110?

The Australian Space Agency envisages documents such as the Flight Safety Code and the Maximum Probable Loss Methodology being applied, adopted, or incorporated by reference into the proposed rules. These documents are currently defined in the *Space Activities Regulations 2001.*

For example, the Bill makes it clear that the definition for 'high power rocket' will be prescribed by the rules. This provides the flexibility for the definition to be readily updated when necessary to maintain currency with changing practice. It is anticipated that this proposed rule will incorporate by reference the Flight Safety Code. The Flight Safety Code may also be incorporated by reference in proposed rules dealing with the application process for (for example) launches to space; as it sets out requirements for applicants to demonstrate that their proposed launch activities will be safe and effective. Flexibility is needed in case safety requirements change.

The Bill provides that the insurance required for each launch or return will be specified in the rules, noting that the amount will not exceed $100 million. Moving the detail of the insurance requirements to the rules allows for greater flexibility to update requirements as the nature of space activities evolves. It is anticipated that this proposed rule will incorporate by reference the Maximum Probable Loss Methodology as this is a method for determining insurance requirements based on risks and potential consequences during phases of flight of space vehicles beginning at ignition and ending either on orbit, impact or recovery.

The Bill also provides for a person making an application for a licence, permit or authorisation to pay the Commonwealth the relevant fee prescribed by the rules. The proposed rules will also further set out the basis on which the Minister may exercise discretion to waive or partially waive a fee. It is anticipated that these proposed rules will not incorporate any documents by reference.

Whether these documents be made freely available to all persons interested in the law?

All documents applied, adopted, or incorporated by reference into the rules will be made freely available on the Australian Space Agency website.

> Where documents relate to licensing they will be identified on the Australian Business Licence and Information Service website.
>
> All explanatory statements will include information about the incorporated documents, and where they can be freely accessed in accordance with the Guideline on incorporation of documents published by the Standing Committee on Regulations and Ordinances.

Committee comment

2.22 The committee thanks the minister for this response. The committee notes the minister's advice that it is necessary and appropriate for the rules to incorporate documents as in force or existing from time to time, as this would increase the rules' flexibility to respond to the rapidly evolving nature of space technologies and the need to quickly and efficiently review and update insurance arrangements in response to safety and market interests.

2.23 The committee further notes the minister's advice that all documents applied, adopted or incorporated by reference will be made freely available on the Australian Space Agency website, and that documents relating to licencing will be identified on the Australian Business Licence and Information Service website.

2.24 Finally, the committee notes the minister's advice that all explanatory statements will include information about the incorporated documents and where they can be freely accessed, in accordance with the Senate Standing Committee on Regulations and Ordinances' *Guideline on incorporation of documents*.

2.25 The committee requests that the key information provided by the minister 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*).

2.26 In light of the information provided, and noting in particular that all incorporated documents will be made freely available on the Australian Space Agency website, the committee makes no further comment on this matter.

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

Purpose	This bill seeks to amend various Acts relating to taxation, superannuation, competition and consumers Schedules 1 to 6 seek to: • allow the Commissioner to issue directions to pay unpaid superannuation guarantee and undertake superannuation guarantee education courses where employers fail to comply; • allow the Commissioner to disclose more information about superannuation guarantee non-compliance to affected employees; • extend Single Touch Payroll reporting to all employers; • enable regular reporting by superannuation funds; and • implement data matching in relation to welfare payments Schedule 7 seeks to enable the sharing and verification of tax file numbers Schedule 8 seeks to make a number of miscellaneous amendments and technical changes to various Acts Schedule 9 seeks to add three specifically-listed deductible gift recipients
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018
Bill status	Before the Senate

No-invalidity clause[15]

2.27 The committee initially scrutinised this bill in *Scrutiny Digest No. 5 of 2018* and sought the minister's advice.[16] The committee considered the minister's response in *Scrutiny Digest No. 6 of 2018*[17] and as the information provided by the minister did not adequately address the committee's concerns, the committee again requested the minister's detailed justification for the no-invalidity clause in proposed

15 Schedule 8, item 19, proposed subsection 353-30(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 5 of 2018*, at pp. 56-63.

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 6 of 2018*, at pp. 128-144.

subsection 353-30(4), which provides that the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal will not affect the validity of that decision.

Minister's response[18]

2.28 The minister advised:

> By way of background, Schedule 8 to the Bill includes amendments rewriting provisions relating to offshore information notices from the *Income Tax Assessment Act 1936* into Schedule 1 to the *Taxation Administration Act* 1953. The ongoing rewriting of the taxation laws has been continually progressed by successive Governments with a continuing focus on simplifying the expression of the taxation laws for the broad benefit of taxpayers and their advisers. These exercises are undertaken in close consultation with affected stakeholders. The detailed material included in the explanatory memorandum is generally limited to areas of policy change so as not to unintentionally alter the well-established meaning of, and judicial findings on, the existing law.
>
> The Committee has sought my views on proposed subsection 353-30(4) in Schedule 1 to the *Taxation Administration Act 1953* which, consistent with the existing provisions in the *Income Tax Assessment Act 1936,* requires the Commissioner of Taxation to provide a taxpayer with a written notice advising them of the Commissioner views, if:
>
> - the Commissioner has come to a view that the taxpayer has failed to comply with an offshore information notice[19]; and
> - the Commissioner is unlikely to consent to the information requested in the notice being admitted *to* evidence.[20]
>
> The subsection also includes what the Committee has referred to as a no-invalidity clause. The effect of this clause is that the Commissioner's failure to provide a written notice does not affect the validity of his decision to ultimately withhold consent to the admission of evidence in proceedings.
>
> Offshore information notices are an effective means by which the Commissioner can access information that is held outside Australia and are necessary for the Commissioner to properly administer and enforce Australia's taxation laws. Australia's offshore information rules are

18 The minister responded to the committee's comments in a letter received 8 August 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest No. 8 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

19 The automatic consequences of non-compliance being inadmissibility of certain information as evidence in Part IVC proceedings.

20 The Commissioner has broad discretion to allow information to be used as evidence despite non-compliance with an offshore information notice but must have regard to certain matter in doing so.

> modelled very closely on rules existing in many overseas jurisdictions. These rules reflect the inherent difficulties in tax authorities accessing information held in foreign jurisdictions where taxpayers have little incentive to comply because most domestic sanctions are unenforceable or very difficult and costly to enforce.
>
> My Department has looked into the history of the no-invalidity clause. They have ascertained that the clause was introduced to prevent sophisticated taxpayers, who are generally the recipients of offshore information notices, from attempting to avoid the sanctions of failing to comply with a notice by raising procedural technicalities during Part IVC proceedings.
>
> The inadmissibility of information as evidence is an automatic sanction for taxpayers who fail to comply with an offshore information notice. As the recipient of a notice, these taxpayers will be well aware of their actions in refusing or failing to comply with a notice and therefore will understand that they will not be able to admit information covered by that notice as evidence in any Part IVC proceedings without the Commissioner's consent. It is for this reason that taxpayers are unlikely to be detrimentally affected by a failure by the Commissioner to provide written notice of his views.
>
> In an unlikely situation in which a taxpayer did not receive a written notice and was detrimentally affected by the failure to receive a notice, this is best mitigated by the Court or Tribunal hearing the Part IVC proceedings as part of their case management, rather than as part of any separate proceeding. The outcome of a separate proceeding would not assist the taxpayer because any finding that the notice procedures were not followed would not result in the admissibility of the information.

Committee comment

2.29 The committee thanks the minister for this further response, and notes the minister's advice that the no-invalidity clause was originally introduced to prevent sophisticated taxpayers from attempting to avoid the sanctions that apply to a failure to comply with an offshore information notice by raising 'procedural technicalities' during proceedings under Part IVC of the *Taxation (Administration) Act 1953* (Part IVC proceedings).

2.30 The committee also notes the minister's advice that a taxpayer is unlikely to be detrimentally affected by a failure to provide them with written notice of the matters in proposed subsection 353-30(4), as recipients of offshore information notices would be well aware of the consequences of non-compliance. The committee further notes the minister's advice that, were a taxpayer to be detrimentally affected because they did not receive notice, this detriment would best be mitigated by the Court or Tribunal hearing the Part IVC proceedings 'as part of their case management', as any finding in separate proceedings would not assist the taxpayer as it 'would not result in the admissibility of the information' in any event.

2.31 However, it is not clear to the committee that all taxpayers would necessarily be aware that a failure to comply with requirements in relation to offshore information notices would likely have evidential consequences. In this regard, the committee notes that proposed subsection 353-25(2) also provides that an offshore information notice is not invalid merely because it does not set out the consequences of non-compliance. It appears possible that a taxpayer could therefore receive a valid notice, yet remain unaware, both when receiving the initial notice, and if not given a notice of the Commissioner's views, of the potential evidentiary consequences of failing to comply (noting also that a failure to comply also applies to requests that the taxpayer is not able to comply with).

2.32 It is also unclear to the committee that any such detrimental effects would be able to be mitigated by a Court or Tribunal as part of its case management processes, given the express statutory prohibition in proposed section 353-30(2) on the admission of information covered by an offshore information notice in Part IVC proceedings without the consent of the Commissioner. The committee also notes that judicial review of a decision not to consent to the admission of such information could result in the decision being remitted to the Commissioner for reconsideration, which could provide the taxpayer with a further opportunity to seek the Commissioner's consent to the admission of the information. It is therefore not apparent to the committee that the outcome of a separate proceeding would not be able to assist the taxpayer.

2.33 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including a no-invalidity clause in proposed subsection 353-30(4), noting that the operation of that clause has the potential to detrimentally affect taxpayers' ability to present their case in review or appeal proceedings under the *Taxation Administration Act 1953*.

Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018

Purpose	This bill seeks to amend Acts in relation to taxation and superannuation Schedule 1 seeks to provide for a one-off 12-month amnesty to employers to self-correct superannuation guarantee noncompliance Schedule 2 seeks to amend the *Superannuation Guarantee (Administration) Act 1992* to allow individuals to avoid unintentionally breaching their concessional contributions cap Schedule 3 seeks to ensure that the non-arm's length income rules for superannuation entities apply in certain circumstances Schedule 4 seeks to amend the total superannuation balance rules
Portfolio	Treasury
Introduced	House of Representatives on 24 Ma y 2018
Bill status	Before the Senate

Availability of merits review[21]

2.34 In *Scrutiny Digest No. 6 of 2018*[22] the committee requested the minister's advice as to:

- whether decisions by the Commissioner to disqualify a person from the amnesty in relation to superannuation guarantee shortfalls would be subject to merits review; and
- if not, the characteristics of such decisions that would justify excluding merits review.

Minister's response[23]

2.35 The minister advised:

21 Schedule 1, item 13, proposed subsections 74(4) and (5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 6 of 2018*, at pp. 48-49.

23 The minister responded to the committee's comments in a letter received 13 July 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest No. 8 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

Schedule 1 of the Bill provides a one-off 12-month amnesty with reduced penalties and fees to encourage employers to disclose historical superannuation guarantee (SG) non-compliance and pay any SG charge imposed in relation to the disclosed SG shortfall. To further encourage payment of SG, the amnesty allows employers who qualify for the amnesty to claim tax deductions for payments of SG charge and contributions made to offset SG charge made during the amnesty period. Requiring employers to pay the SG charge allows the Commissioner of Taxation (Commissioner) to ensure that employees are paid their full SG entitlement.

The Commissioner may, by written notice, disqualify an employer from the beneficial treatment provided by the amnesty if the employer has failed to pay to the Commissioner any SG charge imposed on the disclosed SG shortfall on or before the day the SG charge becomes payable, or has failed to enter into and comply with a payment arrangement in relation to that amount. The effect of such a notice is that the employer ceases to qualify, and is taken to have never qualified, for the amnesty in relation to the SG shortfall for the quarters for which the SG charge has not been paid. In such cases, the Commissioner can unwind any benefits that have accrued to the employer under the amnesty by amending the assessments of the employer.

The standard objection processes set out in Part IVC of the *Taxation Administration Act 1953* generally provide for merits review of tax administration decisions. However, this review process does not apply to decisions of the Commissioner to disqualify an employer from the amnesty.

Generally, decisions involving the exercise of administrative discretion that may materially affect an individual's interest would be subject to merits review. However, in this context disqualification can only occur based on objective circumstances. That is, an employer should cease to qualify for the amnesty if the employer has failed to pay or enter into and comply with a payment arrangement. These conditions are purely factual and there is no determination or opinion that the Commissioner must form. The amendments provide the Commissioner with discretion about whether to issue a disqualification notice only where such objective circumstances are present.

In this context, the exercise of discretion may only be used in favour of an employer to avoid potentially harsh or unintended outcomes arising from a strict operation of the law. For example, an employer that pays SG charge one day after the due date would technically have failed to comply with a payment arrangement. Rather than automatically disqualify such an employer from the beneficial treatment provided by the amnesty, administrative flexibility is provided to allow the Commissioner to accommodate instances of minor or technical non-compliance with the conditions of the amnesty where those conditions have been complied with in substance. This provides practical flexibility for the Australian

Taxation Office (ATO) to administer arrangements for payment in a manner consistent with the ATO's existing debt recovery policy.

Committee comment

2.36 The committee thanks the minister for this response. The committee notes the minister's advice that decisions by the Commissioner to disqualify an employer from the amnesty in relation to superannuation guarantee shortfalls (SG amnesty) would not be subject to merits review because the disqualification can only occur based on objective (purely factual) circumstances.

2.37 The committee also notes the minister's advice that there is no determination or opinion that the Commissioner must form as to whether an employer has ceased to qualify for the amnesty, and the advice that the amendments provide the Commissioner with discretion as to whether to issue a disqualification notice only where the relevant objective circumstances are present.

2.38 The committee further notes the minister's advice that the Commissioner's discretion may only be exercised in favour of an employer to avoid potentially harsh or unintended outcomes arising from the strict operation of the law. The committee notes the advice that this would include ensuring that employers are not disqualified from the SG amnesty due only to minor or technical noncompliance with conditions of the amnesty where those conditions have been complied with in substance.

2.39 The committee requests that the key information provided by the minister 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*).

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

Underwater Cultural Heritage Bill 2018

Purpose	This bill seeks to provide for the protection and conservation of Australia's underwater cultural heritage
Portfolio	Environment and Energy
Introduced	House of Representatives on 28 March 2018
Bill status	Before the House of Representatives
Bill status	Before the Senate

Forfeiture[24]

2.41 The committee initially scrutinised this bill in *Scrutiny Digest No. 5 of 2018* and sought the assistant minister's advice.[25] The committee considered the assistant minister's response in *Scrutiny Digest No. 6 of 2018*[26] and requested the assistant minister's further detailed advice, with reference to the relevant principles as set out in the *Guide to Framing Commonwealth Offences,*[27] as to why the proposed forfeiture provision does not incorporate safeguards consistent with those contained in the *Proceeds of Crime Act 2002* to protect the interests of innocent third parties, noting that innocent third parties could include owners of any vessels, equipment or articles that were used or involved in the commission of an offence, or contravention of a civil penalty provision, without their knowledge.

Assistant Minister's further response[28]

2.42 The assistant minister advised:

> *Forfeiture*
>
> The Committee requests further detailed advice, with reference to the relevant principles as set out in the Guide to Framing Commonwealth Offences, as to why the proposed forfeiture provision does not expressly incorporate safeguards to protect the interests of innocent third parties.

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24 Clause 47. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 5 of 2018*, at pp. 73-80.

26 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 6 of 2018*, at pp. 157-182.

27 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 45–47.

28 The assistant minister responded to the committee's comments in a letter dated 10 July 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest No. 8 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

> I have considered the Committee's further request for detailed advice, and reaffirm that the Bill safeguards the interests of third parties by allowing a court to determine whether to make a forfeiture order, in circumstances where the court has found that a person has contravened a civil penalty provision or has been convicted of an offence under the Bill. Further detailed advice in relation to the protection of innocent third parties' rights will be included in an addendum to the explanatory memorandum.
>
> *Addendum to explanatory memorandum*
>
> The Committee has requested key information, provided in my previous response to the Committee dated 31 May 2018, to be included in the explanatory memorandum to the Bill. I agree with this request and confirm that this information will be included in an addendum to the explanatory memorandum, to be tabled when the Bill is debated in the Senate.

Committee comment

2.43 The committee thanks the assistant minister for this response. The committee notes the assistant minister's further advice that it is considered that the bill safeguards the interests of third parties by allowing a court to determine whether to make a forfeiture order and that further detailed advice in relation to the protection of the rights of innocent third parties will be included in an addendum to the explanatory memorandum. Finally, the committee notes the assistant minister's advice that other key information provided in the previous response will also be included in the addendum to the explanatory memorandum.

2.44 While the committee welcomes the assistant minister's undertaking to provide further detailed advice on this matter in an addendum to the explanatory memorandum, the committee notes this advice has not been provided in the assistant minister's response. In addition, amendments to the explanatory memorandum will not, of itself, address the committee's scrutiny concerns that there appears to be a lack of legislative protections for innocent third parties in the proposed forfeiture provision. The committee reiterates that it considers it may be appropriate, with appropriate modifications, to include similar safeguards to those set out in the *Proceeds of Crime Act 2002* in relation to forfeiture, including that:

- a person with an interest in the property should be given written notice of an application to forfeit that property;
- an affected person should be able to appear and give evidence at a hearing to forfeit property;
- an innocent party should be able to have their property excluded from a forfeiture order; and

- a person should be able to be compensated for innocently held interest in property that is subsequently forfeited.[29]

2.45 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of a forfeiture provision that does not incorporate safeguards consistent with those contained in the *Proceeds of Crime Act 2002* to protect the interests of innocent third parties.

29 See Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 46–47.

Unexplained Wealth Legislation Amendment Bill 2018

Purpose	This bill seeks to amend the *Proceeds of Crime Act 2002* (POC Act) to: • extend the scope of the Commonwealth unexplained wealth restraining orders and unexplained wealth orders to all Territory offences and relevant offences as specified by participating States; • allow participating State and Territory agencies to access Commonwealth information gathering powers under the POC Act for the investigation or litigation of unexplained wealth matters under State or Territory unexplained wealth legislation; and • amend the way in which recovered proceeds are shared between the Commonwealth, states and territories and foreign law enforcement entities. The bill also seeks to amend the *Telecommunications (Interception and Access) Act 1979* to enable Commonwealth, Territory and participating states law enforcement agencies to use, communicate and record lawfully intercepted information in relation to unexplained wealth investigations and proceedings.
Portfolio	Home Affairs
Introduced	House of Representatives on 20 June 2018
Bill status	Before the House of Representatives

Exemption from disallowance[30]

2.46 In *Scrutiny Digest No. 7 of 2018*[31] the committee requested the minister's justification for exempting declarations made under proposed subsection 14F(4) from disallowance under the *Legislation Act 2003*.

30 Schedule 1, item 2, proposed subsection 14F(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

31 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 7 of 2018*, at pp. 5-6.

Minister's response[32]

2.47 The minister advised:

> The Committee has sought a justification for exempting declarations made under proposed subsection 14F(4) of the *Proceeds of Crime Act 2002* (the POC Act) from disallowance under the *Legislation Act 2003.* This subsection allows the Minister to declare by legislative instrument that a State is not a *'cooperating State',* preventing this State from gaining particular benefits under the new equitable sharing arrangements at Schedule 5 to the Unexplained Wealth Legislation Amendment Bill 2018 (the Bill).
>
> The exemption from disallowance at proposed subsection 14F(5) is justifiable as an instrument made under proposed subsection 14F(4) is intended to facilitate the operation of the National Cooperative Scheme on Unexplained Wealth (the Scheme), which would involve the Commonwealth and one or more States. It is vital that the Commonwealth Parliament should not, as part of a legislative instruments regime, be permitted to unilaterally disallow instruments that are part of a multilateral scheme. This principle is enshrined in subsection 44(1) of the *Legislation Act 2003.*
>
> A State's ongoing participation in the Scheme as a *'cooperating State'* is intended to facilitate continued good faith negotiations with the Commonwealth and encourage the State to fully commit to the Scheme at a later date. The Minister's ability to remove this status by legislative instrument is vital in ensuring that a State cannot continue to indefinitely benefit from the equitable sharing arrangements where it has demonstrated it has no intention of re-engaging with the Scheme.
>
> If there is a risk that such an instrument would be disallowed, this would jeopardise the ongoing effectiveness of the Scheme. The exemption from disallowance therefore supports the Scheme and should be preserved.

Committee comment

2.48 The committee thanks the minister for this response. The committee notes the minister's advice that the exemption from disallowance is justifiable as an instrument made under proposed subsection 14F(4) is intended to facilitate the operation of the National Cooperative Scheme on Unexplained Wealth (the scheme), which involves the Commonwealth and one or more States. The committee also notes the advice that it is vital that the Commonwealth Parliament should not be permitted to unilaterally disallow instruments that are part of a multilateral scheme as this could undermine the ongoing effectiveness of the scheme.

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32 The minister responded to the committee's comments in a letter dated 12 July 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest No. 8 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

2.49 The committee requests that the key information provided by the minister 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*).

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

Privilege against self-incrimination[33]

2.51 In *Scrutiny Digest No. 7 of 2018*[34] the committee sought the minister's detailed advice as to the appropriateness of abrogating the privilege against self-incrimination, including in the absence of a 'derivative use' immunity provision.

Minister's response

2.52 The minister advised:

> The Committee has pointed out that, under proposed paragraph 5(1)(a) to Schedule 1 of the POC Act, a person will not be permitted to rely on the privilege against self-incrimination to excuse themselves from producing a document sought through a production order.
>
> Part 9.5.3 of the Guide to Framing Commonwealth Offences (the Guide) provides that it may be appropriate to override the privilege against self-incrimination where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence.[35]
>
> In some unexplained wealth matters, relevant information on property may only be obtainable from persons who have had some connection to criminal conduct. This may be the individual who committed the original crime, a financial institution that dealt with property suspected of being proceeds of an offence or professional intermediaries responsible for laundering the property through legal structures.
>
> Allowing these individuals to rely on the privilege against self-incrimination would frustrate the operation of production orders and, in many cases, would prevent law enforcement from gathering the information required to support the unexplained wealth action.

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33 Schedule 4, item 6 proposed Schedule 1, clause 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

34 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 7 of 2018*, at pp. 8-9.

35 The Guide to Framing Commonwealth Offences can be found at https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx

Combatting unexplained wealth and, as a result, serious and organised crime groups, provides a benefit that outweighs the loss to personal liberty produced through the abrogation of the privilege against self-incrimination.

Nevertheless, the proposed production orders are designed to minimise the impact on a person's privilege against self-incrimination.

Production orders must be made by the courts, and a magistrate retains the discretion not to make a production order under subclause 1(1) of proposed Schedule 1 of the Act.

A production order under paragraph 1(3)(a) can also only require the production of documents which are in the possession, or under the control, of a corporation or are used, or intended to be used, in the carrying on of a business. The narrow scope of these orders minimises the possibility that the privilege will be abrogated, as corporations do not benefit from the privilege and documents which do not relate to the carrying on of a business cannot be produced.

Documents gained through production orders that would otherwise attract a claim of privilege also cannot be used against the person who produced them in criminal proceedings under subclause 5(2). This 'use immunity' will continue to apply to subsequent disclosures of the information contained in the documents under proposed subclause 18(3).

It should also be noted that the abrogation of the privilege against self-incrimination in proposed paragraph 5(1)(a) of Schedule 1 to the POC Act already exists for production orders under existing paragraph 206(1)(a) of the Act. These aspects of Commonwealth law have not been changed, but have merely been extended to States and Territories that participate in the Scheme.

The abrogation of the privilege against self-incrimination at paragraph 5(1)(a) can therefore be justified on the basis that it is necessary to ensure the effectiveness of unexplained wealth laws, and provides a public benefit that outweighs the loss of the privilege against self-incrimination.

…

Legal professional privilege and privilege against self-incrimination - Derivative use immunity

The Committee has sought advice on why a derivative use immunity has not been included to prevent information indirectly obtained from production orders from being used in proceedings against the person.

Applying a derivative use immunity to civil investigations would defeat the central purpose of production orders under subparagraph 1(6)(a)(i) of proposed Schedule 1 to the POC Act, which is to gain information required to determine whether to take further civil action, including investigative action, under State and Territory *'unexplained wealth legislation'.*

> If a derivative use immunity was applied to criminal investigations, this would have the potential to severely undermine the existing ability of authorities to investigate and prosecute serious criminal conduct.
>
> For example, if a derivative use immunity was included, where an investigator in a criminal matter could potentially have access to privileged material, the prosecution may be required to prove the provenance of all subsequent evidentiary material before it can be admitted. This creates an unworkable position wherein pre-trial arguments could be used to inappropriately undermine and delay the resolution of charges against the accused.
>
> This would be contrary to the aims of the existing production order regime, the proposed production order regime and the associated information sharing provisions under existing section 266A of the POC Act and proposed clause 18 of Schedule 1 to the POC Act.
>
> These provisions only allow for the derivative use and sharing of produced documents where the documents are shared with a specific authority for a legitimate purpose. For example, a document obtained under a production order may be given to an investigative authority of a State under item 3 of subclause 28(2) only if the person giving this document believes on reasonable grounds that the document will assist in the prevention, investigation or prosecution of an offence punishable by at least 3 years or life imprisonment.
>
> It is also pertinent to note that production orders do not affect the inherent power of the court to manage criminal prosecutions and civil proceedings that are brought before it where it finds that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the defence of an accused.
>
> The abrogation of the privilege against self-incrimination and legal professional privilege therefore remains appropriate in the absence of a 'derivative use' immunity, as including this immunity would not be appropriate and the derivative use of documents obtained through a production order is suitably restricted.

Committee comment

2.53 The committee thanks the minister for this response. The committee notes the minister's advice as to why it is necessary to abrogate the privilege against self-incrimination—including that, in some unexplained wealth matters, relevant information on property may only be obtainable from persons who have some connection to criminal conduct. The committee also notes the advice that allowing such persons to rely on the privilege against self-incrimination would frustrate the operation of production orders and, in many cases, prevent law enforcement from gathering the information required to support the unexplained wealth action.

2.54 In relation to why a 'derivative use' immunity has not been included in the bill (or elsewhere in the POC Act) the committee notes the minister's advice that

applying such an immunity to civil investigations would defeat the central purpose of production orders, which is to gain information required to determinate whether to take further civil action (including investigative action) under State and Territory unexplained wealth legislation. The committee notes it will generally be more concerned about the absence of a derivative use immunity with respect to criminal proceedings. However, in this case the absence of a derivative use immunity with respect to civil proceedings is also concerning. This is because information indirectly obtained from a person through coercive powers could then be used against them to confiscate their property. This raises concerns as to whether such measures unduly trespass on rights and liberties.

2.55 The committee also notes the minister's advice that if a 'derivative use' immunity was applied to criminal investigations, this could 'severely undermine the existing ability of authorities to investigate and prosecute serious criminal conduct', as the prosecution may be required to prove the provenance of evidentiary material before it could be admitted. The committee notes the advice that this could result in pre-trial arguments that could undermine and delay the resolution of charges against the accused. The committee also notes the advice that a derivative use immunity would be contrary to the aims of the production order regime and associated information-sharing provisions under both existing provisions of the POC Act and amendments to that Act proposed by the bill.

2.56 However, the committee reiterates that the privilege against self-incrimination is an important common-law right, and any abrogation of the privilege represents a significant loss to personal liberty. The committee accepts that the privilege against self-incrimination may be overridden where there is a compelling justification for doing so. However, the committee considers that any justification for abrogating the privilege will be more likely to be considered appropriate if accompanied by both a use and derivative use immunity.[36] The committee notes that not including a derivative use immunity can undermine the effectiveness of a use immunity as it allows investigators to disregard the usual features of the accusatorial justice system and compel a potential accused to provide information that could be indirectly used to incriminate them. In this regard, the committee notes it raised concerns regarding the abrogation of the privilege against self-incrimination in the context of the absence of a derivative use immunity in the POC Act when it was first introduced.[37]

2.57 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this

36 A use and derivative provides that the information or documents produced or answers given, or anything obtained as a direct (use immunity) or indirect (derivative use) consequence of the production of the information or documents, is not admissible in evidence in most proceedings.

37 See Senate Standing Committee for the Scrutiny of Bills, *Eighth report of 2002*, pp. 333-338.

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*).

2.58 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination, in the absence of a derivative use provision.

Legal professional privilege[38]

2.59 In *Scrutiny Digest No. 7 of 2018*[39] the committee sought the minister's detailed advice as to the appropriateness of abrogating legal professional privilege, including in the absence of a 'derivative use' immunity provision.

Minister's response

2.60 The minister advised:

> The Committee has pointed out that, under proposed paragraph 5(1)(c) of Schedule 1 to the POC Act, a person will not be able to rely on legal professional privilege to excuse themselves from producing a document sought through a production order.
>
> The exceptional nature of the conduct which the Bill is seeking to address justifies the abrogation of this privilege. Legal professional privilege can obstruct the investigation of serious and organised criminal activity and can undermine the central purpose of the proposed production orders, namely the identification, location and quantification of property relevant to State and Territory unexplained wealth matters.
>
> Serious and organised crime groups frequently set up elaborate financial and legal structures to conceal or disguise their wealth. Lawyers can become unwittingly caught up in this process if they provide advice to a client on matters such as setting up a trust structure, incorporating a business or selling property.
>
> However, in other circumstances, lawyers may become professional facilitators. The use of legal practitioners to launder illicit funds is an internationally established money laundering method, and law enforcement have reported that it can be difficult in many cases to distinguish legitimate legal advice from advice given to intentionally frustrate the operation of future investigations.
>
> As production orders can be issued prior to restraint action or during a covert investigation, if legal professional privilege was not removed

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38 Schedule 4, item 6 proposed Schedule 1, item 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 7 of 2018*, at pp. 9-11.

> tension could also arise between a lawyer's professional obligations to their client and the fact that they could not take instructions to clarify or waive legal professional privilege from their client due to the non-disclosure requirements under proposed clause 16 of Schedule 1. The abrogation of legal professional privilege prevents this tension from arising.
>
> The Committee has also requested information on the safeguards attaching to any potential abrogation of legal professional privilege.
>
> Production orders must be made by the courts, and a magistrate retains the discretion not to make a production order under subclause 1(1) of proposed Schedule 1 of the Act.
>
> Documents gained through production orders that would otherwise attract a claim of privilege also cannot be used against the person who produced them in criminal proceedings under subclause 5(2). This 'use immunity' will continue to apply to subsequent disclosures of the information contained in the documents under proposed subclause 18(3).
>
> It should also be noted that the abrogation of legal professional privilege in proposed paragraph 5(1)(c) of Schedule 1 to the POC Act already exists for production orders under existing paragraph 206(1)(c) of the Act. These aspects of Commonwealth law have not been changed, but have merely been extended to States and Territories that participate in the Scheme.
>
> The abrogation of legal professional privilege can therefore be justified on the basis that it is necessary to address the exceptional conduct of organised crime groups, which frequently use this privilege to hide the origins of unexplained wealth.[40]

Committee comment

2.61 The committee thanks the minister for this response. The committee notes the minister's advice that the exceptional nature of the conduct which the bill seeks to address justifies the abrogation of legal professional privilege (LPP). In this regard, the committee notes the advice that the operation of LPP can obstruct the investigation of serious and organised criminal activity and may undermine the central purpose of the proposed production orders, as serious and organised crime groups frequently set up elaborate financial and legal structures to conceal or disguise their wealth, and lawyers may become involved (unwittingly or intentionally) in facilitating the operation of such structures. In this regard, the committee also notes the advice that it may be difficult to distinguish legitimate legal advice from advice given to intentionally frustrate the operation of investigations into unexplained wealth.

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40 See pp. 64-65 above for an extract of the minister's advice in relation to the absence of a derivative use immunity.

2.62 The committee further notes the minister's advice that, as production orders can be issued prior to restraint action or during a covert investigation, if LPP were not removed tension could arise between a lawyer's professional obligations to their client and the fact that they could not take instructions to clarify or waive privilege from their client due to the non-disclosure requirements in proposed Schedule 1 of the bill. The committee notes the advice that the abrogation of LPP prevents this tension from arising.

2.63 However, the committee reiterates that LPP is not merely a rule of substantive law but an important common-law right which is fundamental to the administration of justice. There is a long-standing principle that professional communications between a person and his or her legal adviser should be confidential. Any provisions that abrogate or seek to abrogate LPP will trespass on the rights of those affected, and the committee has always drawn such provisions to the attention of the Senate. In this context, the committee also reiterates its concerns set out at paragraph 2.56 about the absence of a derivative use immunity.

2.64 The committee requests that the key information provided by the minister 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*).

2.65 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of abrogating legal professional privilege, particularly in the absence of a derivative use provision.

Significant matters in delegated legislation[41]

2.66 In *Scrutiny Digest No. 7 of 2018*[42] the committee requested the minister's detailed justification for allowing regulations to prescribe classes of persons authorised to issue notices to financial institutions under clause 12 of proposed Schedule 1.

2.67 The committee also sought the minister's advice as to the appropriateness of amending the bill to specify the category of persons who may be empowered under the regulations to issue notices under clause 12 of proposed Schedule 1.

Minister's response

2.68 The minister advised:

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41 Schedule 4, item 6, proposed Schedule 1, paragraph 12(3)(d). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 7 of 2018*, at pp. 11-12.

The Committee has also requested a justification for allowing the regulations to prescribe classes of persons in a self-governing Territory authorised to issue notices to financial institutions under paragraph 12(3)(d) of proposed Schedule 1 to the POC ACT.

The regulation-making power at paragraph 12(3)(d) arose out of negotiations with the States and Territories and was created to ensure that the Scheme was sufficiently flexible to allow appropriate officials in the Territories to issue notices to financial institutions in unexplained wealth cases.

Defining a specific class of officials for the Australian Capital Territory (ACT) under paragraph 12(3)(d), however, was not possible as the ACT does not currently have an unexplained wealth scheme, and it is therefore not possible to define the characteristics of the appropriate official with sufficient certainty.

The operation of this regulation-making power will also be subject to the disallowance mechanism under section 42 of the *Legislation Act 2003* and the oversight of the Parliamentary Joint Committee on Law Enforcement under proposed clause 19 of Schedule 1 to the POC Act.

These oversight mechanisms will be informed by the Territories' obligation to provide annual reports to the Commonwealth on the operation of proposed Schedule 1 to the POC Act under clause 20 of this Schedule. These reports are required to be tabled in Parliament under subclause 20(2) of the Schedule.

Limitations on amending the bill

While the Bill is before Parliament amendments cannot be made to Schedules 1 and 4 to the Bill. This is because Schedules 1 and 4 to the Bill in their present form are currently being referred to the Commonwealth by the New South Wales Parliament in accordance with paragraph 51(xxxvii) of the Constitution (see Schedules 2 and 3 of the Unexplained Wealth (Commonwealth Powers) Bill 2018 (NSW)).

To preserve the constitutional basis of these Schedules, any amendments to their provisions would need to be made after the NSW referral and enactment of the Bill.

Once enacted, the provisions in the Bill could be amended pursuant to the amendment reference power at proposed section 14C of the POC Act, which will allow the Commonwealth Parliament to amend these provisions and still have them apply as a law of national application. Under the intergovernmental agreement, however, these amendments would also require the unanimous approval of the parties.

Committee comment

2.69 The committee thanks the minister for this response. The committee notes the minister's advice that the regulation-making power arose out of negotiations with the States and Territories, and was created to ensure that the scheme was

sufficiently flexible to allow appropriate officials in the Territories to issue notices to financial institutions in unexplained wealth cases.

2.70 The committee also notes the minister's advice that defining a specific class of officials for the Australian Capital Territory (ACT) was not possible as the ACT does not currently have an unexplained wealth scheme, and it is therefore not possible to define the characteristics of appropriate officials with sufficient certainty.

2.71 The committee further notes the minister's advice that such regulations would be subject to disallowance under the *Legislation Act 2003,* and the advice that the Territories would have an obligation to provide annual reports to the Commonwealth on the operation of proposed Schedule 1 to the POC Act (which will be required to be tabled in Parliament).

2.72 The committee requests that the key information provided by the minister 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*).

2.73 In light of the information provided, and the fact that regulations made for the purposes of proposed paragraph 12(3)(d) will be subject to disallowance, the committee makes no further comment on this matter.

2.74 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for Information.

Immunity from liability[43]

2.75 In *Scrutiny Digest No. 7 of 2018*[44] the committee requested the minister's advice as to why it is considered appropriate to confer immunity from civil and criminal liability in relation to certain actions (particularly without any requirement that the action be taken in good faith), such that persons would have no right to bring an action to enforce their legal rights.

Minister's response

2.76 The minister advised:

> The Committee has also requested a justification as to why, under subclause 14(1) of proposed Schedule 1 to the POC Act, it is considered appropriate to confer immunity from civil and criminal liability in relation

43 Schedule 4, item 6, proposed Schedule 1, clause 12. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

44 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 7 of 2018*, at p. 12.

to certain actions taken under a notice to a financial institution or under the mistaken belief that the action was required under the notice.

Subclause 14(1) replicates existing subsection 215(1) of the POC Act, which was introduced at the recommendation of the Australian Law Reform Commission.[45] The Commission found that financial institutions and their employees could expose themselves to civil and criminal liability for the mere act of providing financial information or documents to an authorised officer, even where they were compelled to do so.

On this basis, the Commission recommended that financial institutions and their employees should be protected from any action, suit or proceedings in relation to its or their response to a notice.

The Committee has also noted that this immunity will apply even if the relevant action was not taken in good faith. The breadth of the immunity, however, only extends to actions carried out under the notice or under the mistaken belief that the action was required under the notice.

Under subclauses 12 and 13 of proposed Schedule 1 to the POC Act, a notice must state the documents or information to be provided, the form and manner in which these are to be provided and may only permit documents or information to be provided to a specific authorised State/Territory officer.

Under subclauses 12 and 13 of proposed Schedule 1 to the POC Act, a notice must state the documents or information to be provided, the form and manner in which these are to be provided and may only permit documents or information to be provided to a specific authorised State/Territory officer.

Therefore it is appropriate that financial institutions and their employees should retain immunity from civil and criminal liability under subclause 14(1) as the immunity is appropriately restricted to actions taken under a particular notice and the immunity is necessary to ensure that these notices function as intended.

Committee comment

2.77 The committee thanks the minister for this response. The committee notes the minister's advice that, without an immunity, financial institutions and their employees could expose themselves to liability for the mere act of providing financial information and documents to an authorised officer—even where they were compelled to do so. The committee also notes the minister's advice that the immunity is limited to actions taken pursuant to a notice and actions taken under the mistaken belief that such actions were required under the notice.

45 *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987 (ALRC* Report 87) pp. 308-319.

2.78 The committee further notes the minister's advice that persons receiving a notice under proposed subclause 14(1) will be clearly informed of their obligations. Notices would state the documents and information required and the manner and form in which they are to be provided, and would only permit document or information to be provided to a specific authorised State or Territory officer. The committee notes the advice that, given the narrow nature of these obligations, the immunity will not protect an employee from civil and criminal liability if they deliberately engage in conduct that falls outside the parameters of the notice.

2.79 The committee requests that the key information provided by the minister 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*).

2.80 In light of the information provided, 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 Helen Polley
Chair

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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*.