The Senate

Standing Committee for the Scrutiny of Bills

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TABLE OF CONTENTS

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.

Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018

Purpose	This bill seeks to amend the *Corporations Act 2001* to increase enforcement and recovery options relating to unpaid employee entitlements when a corporate employer becomes insolvent
Portfolio	Treasury
Introduced	House of Representatives on 20 September 2018

Reversal of the evidential burden of proof[1]

1.1 Item 8 of the bill seeks to repeal and replace subsection 596AB(1) and (2) of the *Corporations Act 2001* (Corporations Act) with new subsections 596AB(1), (1A), (1B) and (1C), which seek to make it an offence for a person to enter into, or cause a company to enter into, a relevant agreement or a transaction, intending that, or reckless as to whether, the agreement or transaction will avoid or prevent the recovery of employee entitlements or significantly reduce the entitlements that can be recovered.

1.2 Proposed section 596AB(2B) seeks to create an offence-specific defence to the above offences which provides that the offences do not apply if the relevant agreement or the transaction is entered into under:

- a compromise or arrangement between the company and its creditors or a class of its creditors, or its members or a class of its members, that is approved by a court under section 411 of the Corporations Act; or
- a deed of company arrangement (DOCA) executed by the company.

1.3 Proposed subsection 596AB(2C) creates a second defence to the offences in proposed subsection 596AB(1A) and (1C), which provides that the offences do not

1 Schedule 1, item 8, proposed subsections 596AB(2B) and (2C). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

apply if a liquidator or provisional liquidator causes the relevant agreement or the transaction to be entered into in the course of winding up the company.[2]

1.4 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.

1.5 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 to raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.6 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.

1.7 The committee also notes that the *Guide to Framing Commonwealth Offences*[3] 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 costly for the prosecution for the prosecution to disprove than for the defendant to establish the matter.

1.8 In relation to the defences in proposed subsection 596AB(2B), the explanatory memorandum states that it is appropriate for the defendant to bear the evidential burden, because the matters in that subsection would be peculiarly within the knowledge of the defendant. The explanatory memorandum states that this is because the defendant would almost always be company officers or persons with a strong connection to the company, be involved in court processes related to the relevant compromise or arrangement, be parties to a DOCA, or have access to relevant company records and documents. It further states that it would be significantly more difficult and costly for the prosecution to disprove the matters in proposed subsection 596AB(2B) than for the defendant to establish those matters.[4]

1.9 In relation to the defences in proposed subsection 596AB(2C), the explanatory memorandum states that it is appropriate for the defendant to bear the evidential burden. The explanatory memorandum states that this is because it would

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2 Proposed paragraphs 596AC(7)(a) and (b) set out identical defences to the civil penalty provisions in proposed subsection 596AC(1), (2), (3) and (4).

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

4 Explanatory memorandum, pp. 22-23.

be peculiarly within the defendant's knowledge as to why and when a relevant agreement or transaction was entered into in the course of the company's winding up. It further states that it would be significantly more difficult and costly for the prosecution to disprove these matters.[5]

1.10 However, while the committee acknowledges that the defendants may be able to raise evidence in relation to the matters in proposed subsections 596AB(2B) and (2C) (such as whether a compromise or agreement was approved by a court, entered into under a DOCA or in the course of winding up), it is unclear that those matters would be *peculiarly* within the defendants' knowledge, such as to make it appropriate to reverse the burden of proof.

1.11 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 proposed subsections 596AB(2B) and (2C), in circumstances where the matters do not appear to be peculiarly in the defendants' knowledge.

5 Explanatory memorandum, p. 24.

Criminal Code Amendment (Food Contamination) Bill 2018

Purpose	This bill sought to amend the *Criminal Code Act 1995* to: • increase penalties for existing offences; • create new offences in the Criminal Code that will apply where a person is reckless as to whether they will cause public alarm or anxiety, economic loss or harm or a risk of harm to public health; and • amend the existing definition of 'public infrastructure'
Portfolio	Attorney-General
Introduced	House of Representatives on 20 September 2018 and received Royal Assent on 21 September 2018

Significant penalties[6]

1.12 The bill sought to amend the *Criminal Code Act 1995* (Criminal Code) to strengthen protections in relation to harms caused by food contamination. In this respect, the bill sought to:

- increase the penalties that may be imposed for a number of offences relating to food contamination from 10 to 15 years' imprisonment;[7]
- create new offences relating to food contamination, punishable by 10 years' imprisonment.[8] The conduct underlying the new offences is the same as the conduct underlying the existing offences in the Criminal Code. However, the fault element for the new offences is recklessness, rather than intention; and
- amend the definition of 'public infrastructure' in section 82.2 of the Criminal Code.[9] This extends existing offences relating to sabotage in Division 82 of the Criminal Code to food intended for public consumption. These offences are punishable by between 7 and 25 years' imprisonment.

6 Schedule 1, Part 1, items 2, 3, 4, 5, 8, 9, 10, 11, 14, 16, 17 and 18. Schedule 1, Part 2, items 21 and 22. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

7 See Schedule 1, items 2, 4, 8, 10, 14 and 17. The relevant offences, which currently appear in sections 380.2 to 380.4 of the Criminal Code, relate to contaminating food, threatening to contaminate food, and making false statements about food contamination.

8 See Schedule 1, items 3, 5, 9, 11, 15 and 18.

9 See Schedule 1, items 21 and 22.

The committee considers that the penalties increased, created or applied by the bill are very significant. The committee's expectation is that a detailed justification for the imposition of significant penalties, especially if those penalties involve imprisonment, would be included in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in other Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties of a similar kind or of a similar seriousness. This should include a consideration of…other comparable offences in Commonwealth legislation'.[10]

1.13 In this instance, the explanatory memorandum provides a detailed justification for the penalties increased, created or applied by the bill, by reference to the significance of the relevant conduct and the need to protect Australian consumers and safeguard the Australian economy. However, the explanatory memorandum provides no information regarding penalties that may be imposed for similar offences in other Commonwealth legislation.

1.14 As set out above, the committee has concerns regarding the magnitude of the penalties that may be imposed for offences relating to food contamination, particularly in the absence of information in the explanatory memorandum regarding penalties imposed for comparable offences under other Commonwealth legislation.

1.15 However, in light of the fact that the bill has passed both Houses of Parliament, the committee makes no further comment on this matter.

10 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 39.

Higher Education Support (Charges) Bill 2018

Purpose	This bill seeks to impose an annual charge on all higher education providers whose students are entitled to HECS-HELP assistance or FEE-HELP assistance under the *Higher Education Support Act 2003*
Portfolio	Education and Training
Introduced	House of Representatives on 19 September 2018

Charges in delegated legislation[11]

1.16 The bill seeks to amend the *Higher Education Support Act 2003* (HESA) to impose an annual charge on all higher education providers whose students are entitled to HECS-HELP or FEE-HELP assistance under the HESA.

1.17 Subclause 7(1) provides that the amount of higher education provider charge for a year is the amount (including a nil amount) prescribed by the regulations for that year, or worked out for that year in accordance with a method prescribed by the regulations. As such, the bill provides for the rate of a tax to be determined by the regulations.

1.18 The explanatory memorandum states that:

> The approach of setting the amount of the charge for a year in a legislative instrument will ensure that the charge is flexible enough to ensure that the Commonwealth recovers the likely costs of administration of HELP, as the cost of administration increases or decreases.[12]

1.19 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).[13] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, where there is any possibility that a charge could be characterised as general taxation, the committee considers that guidance in relation to the level of a charge should be included on the face of the primary legislation. The committee notes the statement in the explanatory memorandum that it is intended that the charges will reflect the cost recovery process. The

11 Clause 7. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

12 Explanatory memorandum, p. 6.

13 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

committee also notes that subclause 7(2) provides that before the Governor-General makes such regulations the minister must be satisfied that the effect of the regulations will be to recover no more than the Commonwealth's likely costs in connection with the administration of the HESA.

1.20 However, no guidance is provided on the face of the bill limiting the imposition of the charge in this way (rather, it is limited to whether the minister is satisfied of certain matters), nor are maximum charges specified. Where charges are to be prescribed by regulation the committee considers that, at a minimum, some guidance in relation to the method of calculation of a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.21 The committee requests the minister's advice as to why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of a maximum charge can be specifically included in the bill.

Higher Education Support Amendment (Cost Recovery) Bill 2018

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* (the Act) to: • implement an application fee for applications for approval as higher education providers whose students are entitled to FEE-HELP assistance under the Act; and • reflect the introduction of an annual charge on higher education providers under the Higher Education Support (Charges) Bill 2018
Portfolio	Education and Training
Introduced	House of Representatives on 19 September 2018

Significant matters in delegated legislation[14]

1.22 Part 2 of Schedule 1 seeks to amend the *Higher Education Support Act 2003* to provide for the administration of a higher education provider charge imposed under the Higher Education Support (Charges) Bill 2018 (Charges Bill). Under the Charges Bill, the charge will be an amount prescribed by regulations or as worked out in accordance with the manner prescribed by the regulations.[15]

1.23 Proposed subsection 19-66(2) provides that the Higher Education Provider Guidelines (the Guidelines) may make provision for a range of matters relating to the administration of the higher education provider charge, including:

- penalties for late payment of the higher education provider charge;[16] and
- the review of decisions made under the Guidelines in relation to the collection or recovery of the charge.[17]

1.24 The committee's view is that significant matters, such as the amount of a penalty or the review of decisions relating to the collection and recovery of the higher education provider charge, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that a legislative instrument, made by the executive, is not subject to the full

14 Schedule 1, Part 2, item 3, proposed subsection 19-66(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

15 Explanatory memorandum, p. 2.

16 At proposed paragraph 19-66(2)(d).

17 At proposed paragraph 19-66(2)(g).

range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.25 In this instance, the explanatory memorandum does not provide an explanation as to why it is necessary to leave any of the matters set out under proposed subsection 19-66(2) to delegated legislation and merely restates the operation of the provision.[18] The committee also notes that proposed subsection 19-66(2) would allow the Guidelines to include options for review of such decisions, but does not *require* the Guidelines to include review rights.

1.26 The committee seeks the minister's advice as to why it is considered necessary and appropriate to provide that the rate of a penalty for late payment and the right of review of decisions made in relation to the collection or recovery of higher education provider charges may be set out in delegated legislation.

1.27 The committee also seeks the minister's advice as to why, if it is considered appropriate to leave such matters to delegated legislation, the bill does not require that the Guidelines make review rights available.

18 Explanatory memorandum, p. 8.

Higher Education Support Amendment (VET FEE-HELP Student Protection) Bill 2018

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* to introduce a discretionary power for the secretary to re-credit a person's FEE-HELP balance to provide a remedy for VET FEE-HELP students who incurred debts as a result of inappropriate conduct by VET providers
Portfolio	Education and Training
Introduced	House of Representatives on 20 September 2018

Significant matters in delegated legislation[19]

1.28 The bill seeks to provide a remedy for students who incurred debts under the VET FEE-HELP loan scheme as a result of inappropriate conduct by training providers or agents of those providers.

1.29 Proposed subsection 46AA(1) seeks to allow the secretary to re-credit a person's FEE-HELP balance with an amount equal to the amounts of VET FEE-HELP assistance that the person received for a VET unit of study with a VET provider, if the secretary is satisfied that:

- the person has either not completed the requirements for the unit or, under the VET guidelines, is taken not to have completed those requirements; and
- having regard to any matters prescribed by the VET guidelines, it is reasonably likely that the VET provider or agent engaged in inappropriate conduct towards the person in relation to the unit, or the VET course of study of which the unit forms a part.

1.30 Proposed subsection 46AA(2) provides that the VET guidelines may prescribe the circumstances which constitute inappropriate conduct.

1.31 The committee's view is that significant matters, such what constitutes inappropriate conduct in the context of a student loan re-crediting scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes in this regard that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in making changes through an amending bill.

1.32 In this instance, the explanatory memorandum states:

19 Schedule 1, item 3, proposed subsections 46AA(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

> The ability for the VET Guidelines to prescribe matters that the Secretary must have regard to will ensure there is consistency in the Secretary's exercise of his/her discretion and also provide the Secretary with flexibility to consider a range of matters.[20]

1.33 However, the committee is concerned that there is no specific guidance on the face of the bill as to the matters that may be prescribed in the guidelines. Further, the committee notes that it has not generally accepted consistency or flexibility as sufficient justification for making provision for significant matters in delegated, rather than primary, legislation.

1.34 The committee also notes that existing guidelines made under paragraph 46A(1)(c) of the HES Act[21] specify a broad range of conduct by VET providers and their agents that may constitute 'unacceptable conduct' for the purposes of re-crediting a VET FEE-HELP balances. The conduct appears to relate largely to inappropriate inducements and misleading information.[22] It is not clear to the committee that the matters set out in the existing guidelines, and the matters that may be set out in any new guidelines, could not be set out in primary legislation.

1.35 The committee seeks the minister's more detailed advice as to why it is considered necessary and appropriate to leave to delegated legislation the matters that may constitute inappropriate conduct for the purposes of re-crediting VET FEE-HELP loan amounts.

20 Explanatory memorandum, p. 11.

21 That is, the Higher Education Support (VET) Guideline 2015 [F2015L02124]

22 For example, publishing information suggesting VET FEE-HELP is not a loan (section 49); inappropriate marketing (section 50); inappropriate inducements (section 52); failure to provide VET FEE-HELP notices (section 53); failure to publish fees (section 58).

Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018

Purpose	This bill seeks to amend various Acts in relation to telecommunications, computer access warrants and search warrants to: • introduce new provisions that will allow law enforcement and security agencies to secure assistance from key providers in the communications supply chain both within and outside Australia; and • increase agencies' ability to use a range of measures, including: - a new authority for Commonwealth, State and Territory law enforcement agencies to obtain computer access warrants; - expanding the ability of law enforcement agencies to collect evidence from electronic devices; - a new authority for the Australian Border Force to request a search warrant in respect of a person for the purposes of seizing a computer or data storage device; and - providing immunities from civil liability for cooperating with ASIO
Portfolio	Home Affairs
Introduced	House of Representatives on 20 September 2018

Broad discretionary powers
Significant matters in delegated legislation
Privacy (Schedule 1)[23]

1.36 Schedule 1 of the bill seeks to amend the *Telecommunications Act 1997* (Telecommunications Act) to establish a legislative framework under which a 'designated communications provider' (provider) may be requested or required to undertake a range of actions in order to assist law enforcement, intelligence and security agencies. The explanatory memorandum explains that this framework is intended 'to better deal with the challenges posed by ubiquitous encryption'.[24]

23 Schedule 1, item 7, various proposed sections. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

24 Explanatory memorandum, p. 2.

Proposed section 317C sets out a broad range of circumstances in which a person is considered to be a provider for the purposes of the proposed framework, and also sets out the 'eligible activities' of the person in each case.[25] The explanatory memorandum states that the definition of 'designated communications provider' is intended to include the 'full range of participants in the global communications supply chain', has been written in 'technologically neutral language to allow for new types of entities and technologies to fall within its scope as the communications industry evolves', and includes both individuals and bodies corporate.[26]

1.37 The proposed framework includes three means by which providers may be requested or required to do certain acts or things: a technical assistance request, a technical assistance notice, or a technical capability notice. Such requests and notices may only be issued to a provider, and may only relate to the eligible activities of the provider.[27] The acts or things the provider is requested or required to do must be directed either towards giving help to the relevant agency, or towards ensuring a provider is capable of giving help to the relevant agency, in the performance of a function or exercise of a power, insofar as the power or function relates to a relevant objective.

1.38 A technical assistance request may be issued by the respective Director-General of the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), or the Australian Signals Directorate (ASD), or the chief officer of an interception agency.[28] Compliance by a provider with a technical assistance request is voluntary.[29]

1.39 A technical assistance notice may be issued by the Director-General of ASIO or the chief officer of an interception agency, while a technical capability notice may be issued by the Attorney-General at the request of the Director-General of ASIO or the chief officer of an interception agency.[30] Compliance with both types of notice is

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25 Schedule 1, item 7, proposed section 317C.

26 Explanatory memorandum, p. 35.

27 Schedule 1, item 7, proposed subsections 317G(1), 317l(1) and 317T(1).

28 Schedule 1, item 7, proposed subsection 317G(1). Proposed section 317B defines 'interception agency' to include: the Australian Federal Police, the Australian Commission for Law Enforcement Integrity, the Australian Crime Commission, the police force of a state or the Norther Territory, the Independent Commission Against Corruption of New South Wales, the New South Wales Crime Commission, the Law Enforcement Conduct Commission of New South Wales, the Independent Broad-based Anti-corruption Commission of Victoria, the Crime and Corruption Commission of Queensland, the Independent Commission Against Corruption (SA) and the Corruption and Crime Commission (WA). Proposed section 317ZM defines 'chief officer' with respect to each interception agency.

29 Schedule 1, item 7, proposed section 317HAA.

30 Schedule 1, item 7, proposed subsections 317(1) and 317T(1).

compulsory, and a failure to comply, to the extent that a provider is capable of complying, would be subject to a significant civil penalty of up to 47,619 penalty units (approximately $10 million) for a body corporate and 238 penalty units (approximately $50,000) for an individual.[31]

1.40 The explanatory memorandum states that the increasing use of encryption 'has significantly degraded law enforcement and intelligence agencies' ability to access communications and collect intelligence, conduct investigations into organised crime, terrorism, smuggling, sexual exploitation of children and other crimes, and detect intrusions into Australian computer networks.'[32] As such, the explanatory memorandum states that Schedule 1 of the bill introduces 'a new, graduated approach to industry assistance', as the communications industry is in a unique position to assist in dealing with the challenges posed by encryption.[33] However, the committee considers that a number of aspects of the proposed framework raise scrutiny concerns with respect to whether the proposed powers to issue requests and notices are appropriately limited.

Acts or things that may be specified in a request or notice

1.41 Proposed subsection 317E(1) contains a definition of 'listed acts or things' which a provider may be requested or required to do under the proposed framework. This includes:

- removing one or more forms of electronic protection that are or were applied by, or on behalf of, the provider;
- providing technical information;
- installing, maintaining, testing or using software or equipment;
- ensuring that information obtained in connection with the execution of a warrant or authorisation is given in a particular format;
- facilitating or assisting access to a range of facilities, equipment, software and devices;
- assisting with the testing, modification, development or maintenance of a technology or capability;
- notifying particular kinds of changes to, or developments affecting, eligible activities of the provider, if the changes are relevant to the execution of a warrant or authorisation;

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31 Schedule 1, item 7, proposed section 317ZB. Proposed section 317ZA deals separately with a failure by a carrier or a carriage service provider to comply with a requirement under either type of notice and relies on pecuniary penalty provisions set at a similar level under Part 31 of the *Telecommunications Act 1997*.

32 Explanatory memorandum, p. 2.

33 Explanatory memorandum, p. 3.

- modifying, or facilitating the modification of, any of the characteristics of a service provided by the designated provider;
- substituting, or facilitating the substitution of, a service provided by the designated communications provider for another service provided by the provider or a service provided by another provider; or
- an act or thing done to conceal the fact that a thing has been done covertly in the performance of a function, or the exercise of a power in certain circumstances.[34]

1.42 The bill provides that the acts or things specified in a technical assistance request or a technical assistance notice may include, *but are not limited to*, these listed acts or things.[35] It also provides that the specified acts or things must be in connection with the eligible activities of the provider and be by way giving help to, or be directed at a provider being capable of giving help to, the relevant agency in relation to the performance of a function or the exercise of a power insofar as it relates to a relevant objective.[36]

1.43 The explanatory memorandum does not provide a justification as to why it is necessary to allow a technical assistance request or a technical assistance notice to specify acts or things beyond those acts or things listed in proposed section 317E. The explanatory memorandum does state that, although acts or things beyond those specified under proposed section 317E may be specified in the request or notice, these additional acts or things must be 'of the same kind, class or nature as those listed.'[37] However, the bill does not appear to limit the additional acts or things that may be specified under a request or notice in the manner set out in the explanatory memorandum.

1.44 With respect to technical capability notices, proposed section 317T provides that a provider can be given a written notice that requires the provider to do one or more specified acts or things that must be for one of the following two purposes:

(a) be directed towards ensuring the provider is capable of giving 'listed help' to ASIO or an interception agency in relation to the performance of a function or exercise of a power insofar as it relates to a relevant objective.[38] In order to constitute 'listed help', the relevant acts or things must be in connection with the provider's eligible activities, and

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34 Proposed subsection 317E(2) provides that an act or thing done to conceal the fact that a thing has been done covertly does not include making a false or misleading statement, or engaging in dishonest conduct.

35 Schedule 1, item 7, proposed subsections 317G(6) and 317L(3).

36 Schedule 1, item 7, proposed paragraphs 317G(6)(a) and (b) and 317L(3)(a) and (b).

37 Explanatory memorandum, pp. 45, 47 and 53.

38 Schedule 1, item 7, proposed paragraph 317T(2)(a).

must either consist of acts or things listed under proposed paragraphs 317E(1)(b)-(j)[39] or be one or more acts or things of a kind determined by the minister, by legislative instrument, under proposed subsection 317T(5); or

(b) be by way of giving help to ASIO or an interception agency in relation to the performance of a function or exercise of a power insofar as it relates to a relevant objective.[40] The acts or things that may be specified under the notice mirror those for technical assistance requests and technical assistance notices—that is, the notice may specify, but is not limited to, those acts or things listed under proposed section 317E.[41]

1.45 In relation to proposed subsection 317T(5), the committee's view is that significant matters, such as the acts or things a provider may be required to do under a technical capability notice (particularly where compliance with such a notice is subject to a civil penalty of up to $10 million), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.46 In this instance, the explanatory memorandum notes that proposed subsection 317T(5) would allow the minister to list further areas with respect to which capabilities under a notice may be built, in addition to those listed acts or things in proposed section 317E. It further states that this is necessary due to the dynamic nature of the communications industry and the need to ensure that law enforcement and security agencies retain the ability to address crime and national security threats notwithstanding advances in technology.[42]

1.47 The bill requires the minister to have regard to a number of matters when making a determination under proposed subsection 317T(5): the interests of law enforcement, the interests of national security, the objects of the Act, the likely impact of the determination on providers, and any other matters the minister considers relevant.[43] The explanatory memorandum states that it is expected that the minister will consult with industry before tabling an instrument.[44] However, the bill does not contain any specific consultation obligations in relation to such a legislative instrument.

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39 Proposed paragraph 317E(1)(a), which relates to removing one or more forms of electronic protection that are or were applied by, or on behalf of, the provider, is excluded from the list of acts or things that may be specified under a technical capability notice.

40 Schedule 1, item 7, proposed subsection 317T(2).

41 Schedule 1, item 7, proposed subsection 317T(7).

42 Explanatory memorandum, p. 52.

43 Schedule 1, item 7, proposed subsection 317T(6)

44 Schedule 1, item 7, proposed subsection 317T(6), and explanatory memorandum, p. 53.

1.48 Where the Parliament delegates its legislative power in relation to significant matters, such as the acts or things a provider may be required to do under a technical capability notice, 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. In this regard, the committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.[45]

1.49 The committee is concerned that the 'acts or things' that may be specified under technical assistance requests, technical assistance notices and technical capability notices, may not be effectively limited by the bill and that the proposed framework thereby gives decision makers a broad discretion in relation to the acts or things that may be specified. In addition, the committee is concerned that what constitutes giving 'listed help' under a technical capability notice can be expanded by way of delegated legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

Relevant objectives in relation to which a provider may be requested or required to do an act or thing

1.50 As noted above, the bill requires that the acts or things specified in a request or notice must be by way of giving help to, or ensuring a provider is capable of giving help to, the relevant agency in the performance of a function or exercise of a power in relation to a relevant objective. In the case of a technical assistance notice or a technical capability notice, these objectives are:

- enforcing the criminal law and laws imposing pecuniary penalties; or
- assisting the enforcement of the criminal laws in force in a foreign country; or
- safeguarding national security.[46]

45 See sections 18 and 19 of the *Legislation Act 2003*.

46 Schedule 1, item 7, proposed paragraphs 317L(2)(c), and 317T(3).

1.51 The relevant objectives for a technical assistance request similarly include enforcing the criminal law and laws imposing pecuniary penalties, or assisting the enforcement of the criminal laws in force in a foreign country, but also include: the interests of Australia's national security, the interests of Australia's foreign relations or the interests of Australia's national economic well-being.[47]

1.52 The explanatory memorandum states that 'criminal law' includes any Commonwealth, state or territory law that makes a particular behaviour an offence punishable by a fine or imprisonment, and that 'enforcing the criminal law' includes the process of investigating a crime and prosecuting suspects, as well as 'precursory and secondary intelligence gathering activities that support the investigation and prosecution of suspected offences.[48] The explanatory memorandum also states that 'pecuniary penalties' includes penalties for breaches of Commonwealth, state or territory law that are not prosecuted criminally or that impose a penalty as an administrative alternative to prosecution, but is not intended to include small-scale administrative fines.[49] The explanatory memorandum further states that including 'assisting in the enforcement of criminal laws in force in a foreign country' as an objective is intended to ensure Australia can meet its international obligations under the Council of Europe Convention on Cybercrime or the *Mutual Assistance in Criminal Matters Act 1987*.[50]

1.53 The explanatory memorandum states that the additional objectives specified in relation to technical assistance requests (that is, the interests of Australia's national security, the interests of Australia's foreign relations or the interests of Australia's national economic well-being) reflect the functions of Australia's intelligence and security agencies, and that it is intended to support voluntary technical assistance requests made by intelligence and security agencies (but not voluntary technical assistance requests made by other interception agencies).[51]

1.54 The committee notes that the objectives relating to the enforcement of the criminal law and laws imposing pecuniary penalties, and assisting the enforcement of foreign criminal laws, may allow a large number of agencies to use the proposed framework to request or require providers to do certain acts or things when investigating or prosecuting even very minor offences or breaches of the law subject to a pecuniary penalty. It therefore appears that the proposed framework is not limited to investigating only serious offences relating to organised crime, terrorism, smuggling, and sexual exploitation of children, as identified in the explanatory

47 Schedule 1, item 7, proposed paragraph 317G(5).

48 Explanatory memorandum, pp. 44, 47 and 53-4.

49 Explanatory memorandum, p. 44.

50 Explanatory memorandum, pp. 44-45.

51 Explanatory memorandum, p. 45.

memorandum.[52] The committee further notes that this already broad range of objectives is further expanded in the case of voluntary technical assistance requests to matters that are not related to enforcing the law or national security but to the interests of Australia's foreign relations or national economic well-being. The explanatory memorandum provides no guidance as to the range of activities these latter objectives might encompass.[53]

Decision-making criteria

1.55 The bill provides that the decision maker authorised to give a technical assistance notice or a technical capability notice must not give such a notice unless he or she is satisfied that the requirements that would be imposed by the notice are reasonable and proportionate, and that compliance with the notice is practicable and technically feasible.[54] In considering whether the requirements imposed by a notice are reasonable and proportionate, the bill also requires the decision maker to have regard to:

- the interests of national security;
- the interests of law enforcement;
- the legitimate interests of the provider to whom the notice relates;
- the objectives of the notice;
- the availability of other means to achieve the objectives of the notice;
- the legitimate expectations of the Australian community relating to privacy and cybersecurity; and
- such other matters (if any) as the relevant decision maker considers relevant.[55]

1.56 The explanatory memorandum states that these decision-making criteria are 'designed to ensure that providers cannot be required to comply with excessively burdensome or impossible assistance measures'.[56] However, the committee notes that, while the decision maker would be required to consider these matters in determining whether the requirements imposed by a notice are reasonable and proportionate, 'satisfaction' for the purposes of the test is a 'subjective state of mind of the administrative decision maker',[57] and not an objective test.

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52 Explanatory memorandum, p. 2.

53 Explanatory memorandum, p. 44.

54 Schedule 1, item 7, proposed sections 317P and 317V.

55 Schedule 1, item 7, proposed sections 317RA and 317ZAA.

56 Explanatory memorandum, p. 49 and 57-58.

57 Explanatory memorandum, p. 49.

1.57 The explanatory memorandum states that, in deciding whether compliance with the requirements imposed by a notice are practicable and technically feasible, the decision maker must consider the systems utilised by the relevant provider and the provider's expertise, and would need to consider material information given to the agency by the provider.[58] The explanatory memorandum also states that it is expected that 'the agency would be engaged in a dialogue with the provider prior to issuing a notice' and the decision maker may also 'make inquiries with other persons who have relevant experience and technical knowledge.'[59]

1.58 However, the committee notes that while proposed section 317W requires the Attorney-General to conduct a consultation process prior to issuing a technical capability notice, the bill does not require a similar process be conducted in relation to technical assistance notices. The explanatory memorandum states that, because a technical capability notice would require a provider to 'build something that goes beyond current business requirements', the decision-making thresholds, particularly those of proportionality and reasonableness, will be raised.[60] However, no information is given as to why similar consultation obligations have not been included in relation to technical assistance notices. While noting that technical assistance notices are intended to be limited to requiring forms of assistance that a provider is already capable of providing, it is not clear to the committee why it would not be appropriate to include in the bill a consultation requirement similar to that set out for technical capability notices, given the difficulty for decision makers in assessing the full consequences of requiring a provider to do certain acts or things in such a highly complex and technical environment.

Privacy

1.59 Proposed subsection 317ZH(1) provides that a technical assistance notice or technical capability notice has no effect to the extent to which it would require a provider to do an act or thing for which a warrant or authorisation under specified laws is required. These laws include the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the *Surveillance Devices Act 2004* (SD Act), the *Crimes Act 1914* (Crimes Act), the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Intelligence Services Act 2001* (IS Act), or any other law of the Commonwealth, State or Territory. Proposed subsection 317ZH(3) also provides that a technical assistance notice or technical capability notice has no effect to the extent that it would require a designated communications provider to either use a surveillance device or access data held in a computer within the meaning of the SD Act, if a law of a State or Territory requires a warrant or authorisation for that use or access. The explanatory memorandum states that these provisions are intended to

58 Explanatory memorandum, p. 49.

59 Explanatory memorandum, p. 49.

60 Explanatory memorandum, p. 55.

ensure that neither type of notice can be used as an alternative to gaining a warrant or authorisation under Commonwealth, State or Territory law.[61]

1.60 While the proposed framework does not itself appear to provide a means of accessing the content of private information and communications, it is nevertheless intended to facilitate and enhance the ability of agencies to utilise information gained under warrant or authorisation regimes that raise significant scrutiny concerns in their own right. The committee has previously discussed the potential for inappropriately framed warrant regimes to trespass on personal rights and liberties, including in relation to the warrant and authorisation regimes set out in the Acts listed in paragraph 1.59 above.[62] Relevantly, the committee has expressed concern about warrant regimes that: do not adequately guard against the seizure of material unrelated to an investigation; do not adequately protect third parties; authorise covert access to material and thereby deny individuals the opportunity to protect privileged information or to challenge the grounds on which access has been granted; and are not subject to adequate judicial oversight.[63] A range of similar issues are raised below with regard to provisions in the bill that propose to modify or establish computer access warrants (see discussion at paragraphs 1.88 to 1.121). The committee's scrutiny concerns in relation to the breadth of the proposed framework outlined above are heightened, given its intended use in conjunction with such warrant regimes.

1.61 The committee seeks the minister's detailed advice as to:

- **why it is considered necessary and appropriate to allow 'acts or things', other than those specified under proposed section 317E, to be specified under a technical assistance request, a technical assistance notice, and a technical capability notice (insofar as the acts or things are by way of giving help to ASIO or an interception agency);**[64]
- **why it is considered necessary and appropriate to expand what constitutes 'listed help' by delegated legislation, and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the bill in relation to a determination made under proposed subsection 317T(5) (with compliance with such obligations a condition of the validity of the legislative instrument);**[65]

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61 Explanatory memorandum, pp. 68-69.

62 Senate Standing Committee for the Scrutiny of Bills, *Entry, Search and Seizure Provisions in Commonwealth Legislation*, 4 December 2006, pp. 308-316.

63 Senate Standing Committee for the Scrutiny of Bills, *Entry, Search and Seizure Provisions in Commonwealth Legislation*, 4 December 2006, pp. 308-316.

64 Schedule 1, item 7, proposed subsections 317G(6), 317L(3) and 317T(7).

65 Schedule 1, item 7, proposed subsection 317T(5).

- **why it is considered appropriate that a request or notice may be issued in relation to the performance or exercise of a function or power relating to the enforcement of *any* criminal law (including any foreign criminal law) or law imposing *any* level of pecuniary penalty, noting that this would allow agencies to use the proposed framework in relation to very minor offences or breaches of the law;**[66]
- **why it is considered appropriate to allow a technical assistance request to be issued (and therefore immunity given to providers) in relation to the performance or exercise of a function or power relating to the interests of Australia's 'foreign relations' or 'national economic well-being';**[67] **and**
- **the appropriateness of including in the bill a requirement that consultation with a provider be conducted prior to issuing a technical assistance notice, similar to the requirement under proposed section 317W in relation to a technical capability notice.**

Exclusion of judicial review (Schedule 1)[68]

1.62 Item 1 of Schedule 1 seeks to amend the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) so as to exempt decisions made under proposed Part 15 of the Telecommunications Act—that is, decisions in relation to the proposed assistance framework, as outlined above—from the operation of the ADJR Act.

1.63 Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a justification for the exclusion. In this instance, the explanatory memorandum states that decisions made under proposed Part 15 of the Telecommunications Act will 'deal with highly sensitive information relevant to agency capabilities or ongoing investigations and will involve matters of high policy importance, like national security, where judgments are best made by the executive arm of government'.[69] The explanatory memorandum also explains that judicial review will be available in the High Court under the Commonwealth Constitution, and in the Federal Court by operation of section 39B(1) of the *Judiciary Act 1903* (Judiciary Act).[70]

66 Schedule 1, item 7, proposed subsections 317G(5) and 317T(3), and proposed paragraph 317L(2)(c).

67 Schedule 1, item 7, proposed subsection 317G(5).

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

69 Explanatory memorandum, p. 29.

70 Explanatory memorandum, p. 29.

1.64 However, the committee notes that the ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the Judiciary Act). The ADJR Act also provides for the right to reasons in some circumstances. From a scrutiny perspective, the committee considers that the proliferation of exclusions from the ADJR Act should be avoided. The committee also notes that the justification provided in the explanatory memorandum for excluding judicial review under the ADJR Act is more commonly a justification for excluding *merits* review,[71] and does not appear to adequately explain the need to exclude judicial review under the ADJR Act. The committee notes that it is possible to exclude classes of decisions from the requirement that reasons be provided under section 13 of the ADJR Act if this is considered necessary to protect sensitive information from disclosure.

1.65 The committee also notes that, although compulsory notices under the framework may be issued in relation to national security objectives, they may also be issued in relation to objectives relating to the enforcement of the criminal law (including foreign offences) and laws imposing pecuniary penalties. Therefore it does not appear that decisions made under proposed Part 15 would always involve matters relevant to national security.

1.66 The committee requests the minister's detailed explanation of why it is considered appropriate to exclude judicial review under the *Administrative Decisions (Judicial Review) Act 1977* in relation to decisions made under proposed Part 15 (industry assistance) (noting that it is already possible to prevent the disclosure of sensitive information by excluding classes of decisions from the requirement to provide reasons under the ADJR Act).

Immunity from liability (Schedule 1)[72]

1.67 Proposed paragraphs 317G(1)(c) and (d), and proposed section 317ZJ, state that a provider (or an officer, employee or agent of the provider) that does an act or thing in accordance/compliance with, or in good faith purportedly in accordance/ compliance with, a technical assistance request, technical assistance notice or

71 In this regard, the committee notes that decisions of a 'high political content' may justify excluding merits review. See Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.22]-[4.30].

72 Schedule 1, item 7, proposed paragraph 317G(1)(c), and proposed section 317ZJ. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

technical capability notice is not subject to any civil liability for, or in relation to, the act or thing.[73]

1.68 These provisions seek to remove any common law right to bring an action to enforce legal rights if a provider has acted in compliance or purported compliance with a request or notice, unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve a personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.69 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation of the need to provide immunity from civil liability in relation to technical assistance notices and technical capability notices. In relation to technical assistance requests, the explanatory memorandum merely states, by way of an example, that the immunity would protect a provider that is asked to give details of the development of a new service or technology from liability for any breach of intellectual property rights.[74]

1.70 The committee's scrutiny concerns in relation to these provisions are heightened because, as discussed above at paragraphs 1.41 to 1.49, the acts or things that a provider may be requested or required to do under the framework is not exhaustively set out in the bill. The full range of acts or things in relation to which a provider may be granted immunity from civil liability therefore remains unclear.

1.71 The committee requests the minister's advice as to why it is considered necessary and appropriate to provide immunity from civil liability to designated communications providers with respect to any act or thing done in accordance or compliance with a technical assistance request, technical assistance notice or a technical capability notice (noting that the acts or things that may be specified under a request or notice are not exhaustively set out in the bill).

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73 Note, Schedule 1, item 7, proposed subsections 317ZJ(2) and (4), contain an additional limitation that the immunity for acting in good faith in purported compliance with the notice only applies where the act or thing done is in connection with any or all of the eligible activities of the provider.

74 Explanatory memorandum, p. 43.

Reversal of evidential burden of proof (Schedule 1)[75]

1.72 Proposed subsection 317ZF(1) seeks to make it an offence for specified persons to reveal technical assistance notice information, technical capability notice information or technical assistance request information, or information obtained in accordance with a request or notice, where the person obtained the information in connection with their function under proposed Part 15 of the Telecommunications Act. Proposed subsections 317ZF(3), (5) to (11) and (13) provide exceptions (offence-specific defences) to this offence, stating that the offence does not apply if the disclosure was made in specified circumstances. The offence carries a maximum penalty of imprisonment for five years.

1.73 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.

1.74 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.75 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. The reversals of the evidential burden of proof in proposed subsections 317ZF(3), (5) to (11) and (13) have not been addressed in the explanatory materials.

1.76 As the explanatory materials do not 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 this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[76]

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75 Schedule 1, item 7, proposed subsections 317ZF(3), (5) to (11) and (13). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

Broad discretionary powers (Schedule 1)[77]

1.77 Proposed section 317ZK sets out the bases on which a provider would be required to comply with a technical assistance notice or a technical capability notice. Proposed subsection 317ZK(3) provides that a provider must comply with a requirement on the basis that the provider neither profits from, nor bears the reasonable costs of, complying with a requirement unless the provider and a costs negotiator otherwise agree.

1.78 Proposed paragraphs 317ZK(1)(c) to (e) provide that proposed section 317ZK does not apply where the relevant decision maker[78] is satisfied that it would be contrary to the public interest for this section to apply to a requirement under the notice. Proposed subsection 317ZK(2) provides that, in deciding whether it would be contrary to the public interest for the section to apply to a requirement, the relevant decision maker must have regard to:

- the interests of law enforcement;
- the interests of national security;
- the objects of the Act;
- the extent to which compliance with the requirement will impose a regulatory burden on the provider;
- the reasons for the giving of the technical assistance notice or technical capability notice, as the case requires; and
- such other matters (if any) as the relevant decision maker considers relevant.

1.79 The explanatory memorandum states that in some circumstances 'it will not be appropriate to compensate a provider subject to a notice; for example, where it has been issued to remediate a risk to law enforcement or security interests that has been recklessly or wilfully caused by a provider'.[79] The committee notes that proposed subsection 317ZK(15) also provides that proposed section 317ZK has no effect to the extent to which its operation would result in an acquisition of property otherwise than on just terms.[80]

1.80 While noting that the bill specifies a number of matters to which the relevant decision maker must have regard when making this decision, the committee

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77 Schedule 1, item 7, proposed subsection 317ZK(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

78 The Director-General of ASIO or chief officer of an interception agency in the case of a technical assistance notice, and the Attorney-General in the case of a technical capability notice.

79 Explanatory memorandum, p. 71.

80 Explanatory memorandum, p. 71.

considers that the bill would nevertheless grant decision makers a broad discretion not to apply the general rule that the provider need only comply with a notice on a no profit, no loss basis. The committee also notes the example provided in the explanatory memorandum of when it may not be appropriate to compensate a provider subject to a notice, but considers that it may be more appropriate to specify such circumstances in the bill rather than leaving it to the discretion of the relevant decision makers.

1.81 The committee's scrutiny concerns in relation to this broad discretionary power are heightened by a number of factors. First, it does not appear that decisions under proposed Part 15 would be subject to any form of merits review or to judicial review under the ADJR Act (see discussion above at paragraphs 1.62 to 1.66). Providers would therefore have limited means of seeking review of a decision that it would not be in the public interest to compensate them for complying with a requirement under a notice. Second, it is not clear to the committee that a provider can reasonably be expected to know whether particular actions would cause a risk to law enforcement or security interests, given that law enforcement and security agencies often operate covertly. While the example cited in the explanatory memorandum states that it would be appropriate to not compensate a provider where they acted 'recklessly or wilfully' to cause a risk law enforcement or security interests, the bill does not limit the discretion granted to decision makers in this way.

1.82 The committee requests the minister's more detailed advice as to:

- **the circumstances in which it is considered it would not be appropriate to compensate a provider that is subject to a technical assistance notice or technical capability notice; and**
- **why (at least high-level) guidance as to the circumstances in which proposed section 317ZK will not apply cannot be included in the bill.**

Broad delegation of administrative power (Schedule 2)[81]

1.83 Currently, section 24 of the ASIO Act provides that the Director-General of ASIO, or a senior position holder, may approve 'a person' or a class of persons as people authorised to exercise powers under certain warrants or powers to conceal access. As such, this allows for a broad delegation of administrative power to a relatively large class of persons, with no specificity as to their qualifications or attributes (and no requirement that the person be employed by ASIO). Items 2 and 3 of Schedule 2 seek to add new powers enabling ASIO to conceal activities undertaken under certain warrants to the list of powers that may be delegated in this way.

81 Schedule 2, items 2 and 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

1.84 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.85 In this instance, the explanatory memorandum states that these items provide:

> a safeguard against the arbitrary exercise of the range of activities permitted by the new subsection by requiring the person or class of persons exercising the authority to be approved by the Director-General personally.[82]

1.86 However, given there is no limit on who may be appointed to exercise these coercive powers, it does not appear to the committee that this provides any sort of legislative safeguard. The explanatory memorandum provides no information as to why it is considered necessary to be able to delegate these powers to 'any person' or any class of persons.

1.87 The committee requests the minister's advice as to why it is considered necessary to allow for the delegation of ASIO's authority in relation to the concealment of activities undertaken under certain warrants to 'any person' or class of persons, and the appropriateness of amending the bill to provide some legislative guidance as to the categories of people to whom those powers might be delegated.

Coercive powers
Privacy (Schedules 2 to 5)[83]

1.88 ASIO currently has the power to obtain covert computer access warrants, which enable it to use technology to collect information directly from 'computers', either remotely or physically. The definition of 'computer' is intended to include mobile phones, laptops, tablets and smart watches, and any system that uses computers or computing technology as their functional basis.[84] A computer access

82 Explanatory memorandum, p. 79.

83 Schedules 2 to 5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

84 Such as security systems, internet protocol cameras and digital video recorders. See explanatory memorandum, pp. 88, 131, and 137.

warrant can be issued by the Attorney-General under section 25A of the ASIO Act; however, if ASIO seeks to intercept material for the purposes of executing the computer access warrant, it must currently obtain a telecommunications interception warrant under the TIA Act.

1.89 Schedule 2 seeks to amend the ASIO Act and the TIA Act to allow ASIO to intercept communications for the purpose of executing a computer access warrant, removing the need to obtain a second warrant for that purpose. It also seeks to amend the ASIO Act to allow ASIO to temporarily remove a computer from premises and to take steps to conceal access to a computer after the warrant has expired.

1.90 Schedule 2 also seeks to amend the SD Act to provide computer access warrants for Commonwealth, State and Territory law enforcement agencies to covertly access computers to: investigate a relevant federal offence[85] or foreign offence under a mutual assistance authorisation;[86] assist in the location and safe recovery of a child;[87] assist in the investigation of an offence suspected of being committed by a staff member of an agency that is the target of an integrity operation;[88] or where a control order is in force against a person. Proposed section 27E provides that, in addition to authorising the doing of specified things in relation to a target computer, a computer access warrant may also authorise entering specified premises (or other premises to gain access to the specified premises), removing a computer, adding, copying or deleting certain data and intercepting certain communications. The warrant must also authorise the use of force against persons and things necessary and reasonable to do the things specified in the warrant, and authorises anything reasonably necessary to be done to conceal the fact that any thing has been done in relation to a computer.

1.91 In addition, Schedules 3 and 4 seek to empower law enforcement agencies and the Australian Border Force (ABF) to access private communications and other information on a device using a range of methods. Currently, when executing a warrant under the Crimes Act and the *Customs Act 1901* (Customs Act), an executing officer must be physically located at the search premises to access data held on computers at the premises. The amendments in Schedules 3 and 4 would enable law enforcement agencies and the ABF to remotely access 'account-based data', and to

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85 'Relevant offence' is defined in section 6 of the *Surveillance Devices Act 2004* as including an offence against the law of the Commonwealth that is punishable by a maximum term of imprisonment of three years or more or life.

86 'Mutual assistance authorisation' means an authorisation under subsection 15CA(1) of the *Mutual Assistance in Criminal Matters Act 1987*.

87 Where there is a recovery order in force, as defined in section 6 of the *Surveillance Devices Act 2004.*

88 Which relates to an offence that is suspected of being committed by a staff member of a target agency.

compel any person to assist them to access certain devices (Schedule 5 would also enable ASIO to compel a person to assist in accessing data on devices subject to an ASIO warrant). Schedule 4 would also enable a judicial officer to issue a warrant authorising an ordinary search or frisk search of a person for a computer or data storage device (for example, a smart phone) held in their possession.[89]

1.92 The committee considers that the authorisation of coercive search powers has the potential to unduly trespass on personal rights and liberties. Indeed, the need to properly scrutinise entry, search and seizure powers was the basis on which the Senate in 1978 moved towards establishing this committee.[90] As such, the committee considers it essential that legislation enabling coercive search powers be tightly controlled, with sufficient safeguards to protect individual rights and liberties.

Authorisation of coercive powers

1.93 As noted above, Schedule 2 proposes to allow Commonwealth, State and Territory law enforcement agencies to apply for covert computer access warrants under the SD Act. Proposed subsection 27A(7)[91] provides that an application for such a warrant may be made to an eligible judge or to a nominated member of the Administrative Appeals Tribunal (AAT). Section 13 of the SD Act provides that a nominated AAT member can include any member of the AAT, including full time and part-time senior members and general members. Part-time senior members and general members can only be nominated if they have been enrolled as a legal practitioner for at least five years. The committee has had a long-standing preference that the power to issue search warrants should only be conferred on judicial officers. In light of the extensive personal information that could be covertly accessed from an individual's computer or device, the committee would expect a detailed justification be given as to the appropriateness of conferring such powers on AAT members, particularly part-time senior members and general members. In this instance, the explanatory memorandum provides no such justification.

Interception of communications

1.94 Schedule 2 seeks to make amendments to the ASIO Act[92] and the SD Act[93] to permit ASIO or law enforcement agencies to intercept communications if it is for the purposes of doing anything specified in a computer access warrant. In addition,

89 Schedule 4, item 5, proposed section 199A.

90 Senate Standing Committee on the Scrutiny of Bills, *Twelfth Report of 2006: Entry, Search and Seizure Provisions in Commonwealth Legislation,* 4 December 2006, p. 317.

91 See Schedule 2, item 49. See also Schedule 2, item 145, which would enable a judge or nominated AAT member to grant a computer access warrant in relation to an international assistance authorisation.

92 See Schedule 2, items 6, 11 and 13.

93 See Schedule 2, item 49, proposed paragraph 27E(2)(h).

items 120 to 131 of Schedule 2 seek to make amendments to the TIA Act to enable information intercepted by ASIO or law enforcement agencies under a computer access warrant to be used in limited circumstances.

1.95 The committee notes that there are restrictions proposed on the use of material intercepted during the execution of a computer access warrant. The proposed amendments to the TIA Act provide that such information can only be communicated, used, recorded or given as evidence if:

- it is for a purpose of doing a thing authorised by a computer access warrant;
- the information relates to the involvement of a person in activities that present a significant risk to a person's safety; or
- the information relates to the involvement of a person in activities: acting for, or on behalf of a foreign power; posing a risk to operational security; relating to the proliferation of weapons of mass destruction; or contravening a UN sanction enforcement law.[94]

1.96 However, despite the limitation on the use that may be made of any intercepted communications, the committee considers that the interception of communications over a telecommunications system has the potential to unduly trespass on personal rights and liberties, particularly the right to privacy, and as such, the committee would expect the explanatory materials to soundly justify this power.

1.97 In relation to the new computer access warrants under the SD Act, the explanatory materials do not specifically justify the need to intercept communications. Rather, the explanatory memorandum notes that the use, recording and communication of such information is restricted as where agencies want to gain intercept material for its own purpose they must obtain an interception warrant under the TIA Act.[95] In relation to the exceptions to the general prohibition on dealing in computer access information, the explanatory memorandum also notes that these exceptions would allow intercepted information to be used or communicated for a purpose reasonably incidental to the purposes of carrying out a computer access warrant and if the information relates to the involvement of a person in activities that generally exist in life threatening or emergency situations.[96]

1.98 In relation to ASIO's powers, the statement of compatibility explains that it is currently 'almost always necessary for ASIO to undertake limited interception for the purposes of executing a computer access warrant', and as such, ASIO currently has to obtain a second warrant if it intercepts material when executing that warrant:

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94 See Schedule 2, item 124, proposed sections 63AB and 63AC.

95 Statement of compatibility, p. 18.

96 Explanatory memorandum, p. 121.

> The current arrangements cause administrative inefficiency by requiring ASIO to prepare two warrant applications, addressing different legal standards, for the purpose of executing a single computer access warrant. The process requires the Attorney-General to consider each application separately and in accordance with each separate criterion.
>
> The amendments will mean ASIO will be able to obtain a single computer access warrant, which authorises an officer to undertake all activities that are required to give effect to that warrant. The amendments enhance the operational efficiency of ASIO to collect intelligence in Australia's interest.[97]

1.99 However, the committee notes that the threshold for ASIO to obtain a computer access warrant is significantly lower than the threshold required to obtain an interception warrant under the TIA Act. Under section 25A of the ASIO Act, the Attorney-General may issue a computer access warrant:

- if satisfied that there are reasonable grounds for believing that access to the data will substantially assist ASIO to collect intelligence in accordance with the ASIO Act;
- in respect of a matter that is important in relation to security.

1.100 In contrast, when seeking an interception warrant under section 9 of the TIA Act, the Attorney-General must be satisfied that:

- the telecommunications service is being used by, or is the means for sending or receiving communications from or to, a person who is engaged in, or suspected of being engaged in, activities prejudicial to security, or the service itself is being used for purposes prejudicial to security; and
- the interception will assist ASIO in carrying out its functions of obtaining intelligence relating to security.

1.101 As such, removing the need for ASIO to gain a separate interception warrant lowers the threshold for obtaining access (albeit limited) to intercepted information. While the committee notes that the statement of compatibility states that the current arrangements cause operational inefficiency, it has not generally considered a desire for administrative convenience to be a sufficient basis for trespassing on personal rights and liberties. The committee notes that it would be possible for the legislation to provide for a single warrant process but at a higher threshold for the grant of the warrant. The committee also reiterates its preference for the power to issue search warrants to be conferred on judicial officers, whereas in the case of computer access warrants issued under the ASIO Act, the power is conferred on a member of the executive.

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97 Statement of compatibility, pp. 15-16.

Use of coercive powers without a warrant

1.102 Schedule 2 to the bill sets out a range of circumstances in which coercive action can be taken without a warrant, namely in emergency circumstances and in order to conceal access to a computer.

1.103 Item 50 seeks to amend section 28 of the SD Act to allow law enforcement officers to apply to an appropriate authorising officer for an emergency authorisation for access to data held in a target computer if the officer reasonably suspects that there is an imminent risk of serious violence to a person or substantial damage to property, access to the data is immediately necessary to deal with the risk, the circumstances are serious and urgent, and it is not practicable to apply for a computer access warrant. 'Appropriate authorising officer' is defined in section 6A of the SD Act, and includes the head or deputy head of the agency, but also certain executive level officers. Item 52 would also allow for emergency authorisations in relation to a child recovery order, while item 54 would enable emergency authorisations to be made where it is considered immediately necessary to prevent the loss of evidence related to certain investigations.

1.104 Within 48 hours after an emergency authorisation is given, the appropriate authorising officer must apply to a judge or nominated AAT member for approval of the giving of the emergency authorisation.[98] However, if the judge or AAT member refuses to approve the emergency authorisation, in making an order as to how information obtained under an invalid authorisation is to be dealt with, proposed subsection 35A(6) provides that the manner of dealing with the information must not involve the destruction of that information.

1.105 As a computer access warrant can involve significant coercive powers (for example, the ability to covertly access data held on particular computers, enter premises and use force), the committee is particularly concerned that such powers only be authorised under a warrant issued by a judicial officer. Allowing a law enforcement agency to authorise its own actions under an emergency authorisation has the potential to unduly trespass on the right to privacy, and as such the committee would expect the explanatory materials to provide a detailed justification for such provisions. In this instance, the statement of compatibility provides no such justification, and the explanatory memorandum merely restates the provision. Further, no information is provided as to when it may be impractical to apply to a judge or nominated AAT member (noting that proposed section 27B[99] would allow an application for a warrant to be made by telephone, fax, email or any other means of communication). In relation to the use of information obtained under an emergency authorisation, the explanatory memorandum states that the judge or

98 See Schedule 2, items 61 and 62 which seek to amend section 33 of the *Surveillance Devices Act 2004*.

99 Schedule 2, item 49.

member 'may not order that such information be destroyed because such information, while improperly obtained, may still be required for a permitted purpose, such as an investigation'.[100] It is not clear to the committee what the justification is for retaining information coercively and covertly obtained by a law enforcement officer in circumstances that have not been approved by a judge or AAT member.

1.106 The committee notes that Schedule 2 of the bill also proposes to give ASIO[101] and law enforcement agencies[102] the power to act to conceal their activities after a warrant has ceased to be in force. These provisions authorise the agencies to do anything reasonably necessary to conceal the fact that anything has been done under a warrant, enter premises, remove anything to conceal things, add, copy, delete or alter data and intercept communications, at any time while the warrant is in force or within 28 days after it ceases to be in force. In addition, the bill provides that if concealment activities have not been done within 28 days after the warrant ceases to be in force, those things can be done at the earliest time after that 28 day period in which it is reasonably practicable.[103] In effect, this allows coercive action to be taken which has not been authorised under an existing warrant. The statement of compatibility explains why the concealment powers are necessary in relation to ASIO:

> ASIO cannot always reliably predict whether, or when, it will be able to safely retrieve its devices without compromising a covert security intelligence operation. For example, a person may unexpectedly relocate their computer or device prior to the expiry of the warrant, precluding ASIO from taking the necessary steps to conceal the fact that it had accessed the device under warrant until the computer or device is available to be access again.
>
> Once the warrant has expired ASIO may not be able to obtain a further computer access warrant to undertake retrieval and concealment activities, as retrieving and concealing would (by definition) not necessarily meet the statutory threshold of 'substantially assisting the collection of intelligence'.[104]

1.107 The explanatory memorandum similarly states in relation to law enforcement agencies:

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100 Explanatory memorandum, p. 108.

101 See Schedule 2, items 7, 8 and 12.

102 See Schedule 2, item 49, proposed subsection 27E(7).

103 Schedule 2, item 7, proposed paragraph 25A(8)(k); item 8, proposed paragraph 27A(3C)(k); item 12, proposed paragraph 27E(6)(k); and item 49, proposed paragraph 27E(7)(k).

104 Statement of compatibility, p. 17.

> The period of time provided to perform these concealment activities recognises that, operationally, it is sometimes impossible to complete this process within 28 days of a warrant expiring. The requirement that the concealment activities be performed 'at the earliest time after the 28-day period at which it is reasonably practicable to do so' acknowledges that this authority should not extend indefinitely, circumscribing it to operational need.[105]

1.108 However, while the committee acknowledges there may be difficulties in knowing when the process of concealment may be complete, there are scrutiny concerns in allowing agencies to exercise coercive powers after a warrant has ceased to be in force. The committee notes that it would be possible to have a separate statutory process for applying for a new warrant to allow the agency to carry out concealment activities, which would remove concerns about not being able to meet the statutory threshold for obtaining a new computer access warrant, but would ensure coercive powers are undertaken under an existing warrant.

Innocent third parties

1.109 The committee also has concerns that the coercive powers in the bill may adversely affect third parties who are not suspected of wrongdoing.

Entry onto third party premises

1.110 In particular, proposed paragraph 27E(2)(b) of the SD Act provides that a computer access warrant may authorise entering 'any premises' for the purposes of gaining entry to, or exiting, the specified premises. The explanatory memorandum explains that this may allow for entry into third party premises where there is no other way to gain access to the subject premises or where, for operational reasons, adjacent premises may be the best means of entry, or in emergency or unforeseen circumstances.[106] The committee notes there is nothing in the legislation that would require persons entering third party premises under these provisions to first seek the consent of the occupiers, or even announce their entry.

Access to third party computers and communications in transit

1.111 In addition, proposed paragraph 27E(2)(e) of the SD Act provides that a computer access warrant may authorise using any other computer or a communication in transit to access relevant data and, if necessary to achieve that purpose, to add, copy, delete or alter data in the other computer or communication in transit. These things can be done if, having regard to other methods to effectively obtain access, it is considered reasonable to do so. The explanatory memorandum states that this 'ensures that law enforcement agencies can effectively use a third party computer or a communication in transit'. It goes on to state:

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105 Explanatory memorandum, p. 99.

106 Explanatory memorandum, p. 96.

> The power to add, copy, delete or alter other data can only be used where necessary for the purpose of obtaining access to relevant data held in the target computer. This provision recognises that in some cases direct access to a target computer will be difficult or even impossible. The use of third party computers and communications in transit to add, copy, delete or alter data in the computer or the communication in transit may facilitate that access.
>
> In recognition of the privacy implications for third parties, in authorising the warrant the Judge or nominated AAT member must have regard to any other method of obtaining access to the relevant data which is likely to be as effective as accessing a third party's computer. This does not require all other methods of access to be exhausted, but rather allows the Judge or AAT member to take into account the circumstance before him or her and balance the impact on privacy with the risk of detection.[107]

1.112 However, the committee notes that proposed paragraph 27E(2)(e) does not specifically require the judge or nominated AAT member to consider the privacy implications for third parties of accessing third party computers or communications in transit.[108] In particular, the committee notes that the provision would enable the addition, copying, deletion or alteration of a third party's data if necessary to access the target data. Proposed section 27E(5) provides that this does not authorise the addition, deletion or alteration of data or doing of any thing that would materially interfere with, interrupt or obstruct the lawful use of other persons of a computer, unless it is necessary to do anything specified in the warrant (i.e. if necessary for concealment),[109] or which would otherwise cause material loss or damage to other persons lawfully using a computer. However, the committee notes that this restriction would not prevent 'copying' of a third party's data, and would allow for the destruction of their data if necessary to carry out the warrant.

1.113 The committee also notes that there are similar provisions in Schedules 3[110] and 4[111] relating to law enforcement agencies and the ABF remotely accessing computers under the Crimes Act and Customs Act. In addition, a number of other

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107 Explanatory memorandum, pp. 96-97.

108 The committee notes that proposed paragraph 27C(2)(c) provides that, in determining whether to issue a computer access warrant, the judge or AAT member must have regard to the extent to which the privacy of any person is likely to be affected. However, this is limited to deciding whether to issue the warrant in the first instance, and not to the type of things that are authorised by the warrant.

109 Statement of compatibility, p. 18.

110 Schedule 3, item 3, proposed paragraphs 3F(2A)(c) and 3F(2B)(c) and subsection 3F(2C); item 6A, proposed paragraphs 3K(5)(c) and 3K(6)(c).

111 Schedule 4, item 4A, proposed paragraph 199(4)(c) and subsection 199(4B); item 5, proposed paragraph 199B(2)(c) and subsection 199B(3).

provisions in Schedule 3[112] authorise relevant law enforcement officers to use a computer found in the course of a search or use a telecommunications facility or other electronic equipment for the purpose of obtaining 'account-based data' in relation to 'a person who uses or has used' the computer found in the course of the search. The explanatory materials do not explain why it is necessary to be able to obtain the account-based data of *any* person who has ever used the target computer. In addition, 'account-based data' is broadly defined, and would appear to include the data of third parties who have links with an individual who is the subject of a search warrant. The explanatory memorandum states:

> Account-based data in relation to a person includes data associated with an account for an electronic service with end-users that is held by the person. This could be data associated with an email service, a Facebook account, an Instagram account, a Reddit subscription, a Twitter profile, a log-in to a commentary section on a news website or messaging services such as WhatsApp, Signal, and Telegram.
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> A person is taken to hold an account with the electronic service if they use, pay or manage an account, whether or not the account is in a particular name of a person or whether a person actually created the account. A person who inherits an account, establishes an account in a false name, shares an account, has an account established in their name, or attempts to anonymise an account, is still taken to hold the account
>
> The definition of account-based data in relation to a person is not limited to the person who holds an account.
>
> Account-based data in relation to a person also includes data associated with an account for an electronic service with end-users that is used or is likely to be used be the person. This could include data associated with an account held by another person (such as a family member, friend or business associate) but utilised by the first-mentioned person.[113]

1.114 The explanatory materials do not provide any justification for the expansion of these coercive search powers to include potentially substantial amounts of personal data of persons who are not the subject of the warrant.

Compelling third parties to provide information

1.115 Schedules 2 to 5[114] also introduce or amend existing provisions that make it an offence for a person not to comply with an assistance order. An assistance order can be made to a judge or AAT member (or in the case of ASIO, to the Attorney-

112 Schedule 3, item 3, proposed subparagraph 3F(2B)(a)(v) and item 6A, proposed subparagraph 3K(6)(a)(v).

113 Explanatory memorandum, p. 130.

114 Schedule 2, item 114, proposed section 64A; Schedule 3, item 9; Schedule 4, item 18; Schedule 5, item 3, proposed section 34AAA.

General), and it can provide that any specified person is required to provide any information or assistance that is reasonable or necessary to allow the relevant officer to access, copy or convert data held in any target computer or relevant device. Such orders can be made if there are reasonable grounds for suspecting that access to data held in the computer is necessary for the relevant investigation.[115] Such orders can be made in relation to the person who is suspected of the relevant activity, but can also be made against the following persons, so long as they have relevant knowledge of the target computer or device or related computer network or measures used to protect data in that computer of device:

- the owner or lessee of the computer or device;
- an employee or contractor of the owner or lessee of the computer or device;
- any person who uses or has used the computer or device; or
- a person who is or was a system administrator for the system including the computer or device.

1.116 A person who is capable of complying with the order but omits to do so would be subject to penalties of up to five to ten years imprisonment (see the committee's comments regarding the significance of these penalties at paragraphs 1.134 to 1.140 below). These provisions could result in a person not suspected of any wrongdoing being compelled to provide information which could lead to access to their own personal information held on a computer or device. The explanatory materials provide limited justification for impacting on the privacy of third parties in this way. In relation to amendments in Schedules 3 and 4, the statement of compatibility states that the ability to compel assistance is critical to Australia's national security 'and ensures that law enforcement have the tools necessary to be able to protect Australians',[116] as it will provide access to information 'which may otherwise be inaccessible or unintelligible'.[117] The statement of compatibility further states that the requirement for a judicial officer to authorise the warrants provides an important safeguard.[118] In relation to Schedule 5, the statement of compatibility notes that the types of assistance that ASIO may seek under these amendments

115 Or to assist in the location and safe recovery of a child; or to assist the conduct of an integrity operation; or to substantially assist in relation to control order matters; or to prevent the loss of evidence: see Schedule 2, item 114, proposed section 64A. Or where there are reasonable grounds to suspect evidential material is held in the computer or storage device: see Schedule 3, item 9, existing paragraph 3LA(2)(a) of the *Crimes Act 1914* and Schedule 4, item 18, existing paragraph 201A(2)(a) of the *Customs Act 1901*. Or the Attorney-General is satisfied on reasonable grounds access is for the purpose of obtaining certain foreign intelligence: see Schedule 5, item 3, proposed paragraphs 34AAA(2)(a) and (b).

116 Statement of compatibility, p. 22.

117 Statement of compatibility, p. 26.

118 Statement of compatibility, p. 22 and 26.

include 'compelling a target or a target's associate to provide the password, pin code, sequence or fingerprint necessary to unlock a phone'.[119] The committee reiterates that it would expect the explanatory materials to provide greater justification when introducing coercive powers that could substantially impact on innocent third parties.

Control orders

1.117 The proposed new computer access warrants under the SD Act would enable a law enforcement officer to apply for a warrant if a control order is in force in relation to a person and the officer suspects on reasonable grounds that access to data held in a computer would substantially assist in, among other things, determining whether the control order has been, or is being, complied with.[120] The committee has previously raised scrutiny concerns about control orders, noting that the control order regime constitutes what is generally acknowledged to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction. In contrast, control orders provide for restraint on personal liberty without there being any criminal conviction (or without even a charge being laid) on the basis of a court being satisfied on the balance of probabilities that the threshold requirements for the issue of the orders have been satisfied. Protections of individual liberty built into ordinary criminal processes are necessarily compromised by control orders (at least, as a matter of degree). As such, given the committee's scrutiny concerns with control orders more broadly, enabling a computer access warrant to be issued where it may assist in determining whether the control order itself has been complied with, raises scrutiny concerns.

1.118 The committee also notes that a computer access warrant can be granted in relation to control orders simply if it would substantially assist a law enforcement officer to 'determine' if the control order has been complied with. This is in contrast to the requirements for warrants issued to investigate a relevant offence, which require the officer to suspect that access to the data is 'necessary' to enable evidence to be obtained of the commission of a relevant offence or the identity or location of offenders (not simply to determine if the offence has been committed). The committee notes that it is an offence to contravene a control order, punishable by imprisonment of up to five years,[121] and as such, an investigation in relation to whether a person has committed the offence of contravening a control order could be investigated under a computer access warrant for offence investigations more broadly. As such, it is unclear to the committee why it is necessary to separately, and on a lower threshold, enable a law enforcement officer to obtain a warrant to determine if a control order is being complied with.

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119 Statement of compatibility, p. 27.

120 Schedule 2, item 49, proposed subsection 27A(6).

121 Section 104.27 of the *Criminal Code Act 1995*.

1.119 In addition, the committee notes that item 119 of the bill would allow information obtained under a computer access warrant issued because an interim control order was in force to continue to be used even where the control order is subsequently declared void. Proposed section 65B of the SD Act[122] provides that such information could continue to be used, communicated or published if the person reasonably believes doing so is necessary to prevent or reduce the risk of a terrorist act or serious harm to a person or serious damage to property, but also for a purpose related to a preventative detention order (PDO). The committee is particularly concerned that such information may be used for purposes relating to PDOs. PDOs are administrative orders made, in the first instance, by a senior Australian Federal Police member, which authorise an individual to be detained without charge, and without a necessary intention to charge the subject with any offence. The committee considers PDOs raise scrutiny concerns as they permit a person's detention by the executive without charge or arrest.

1.120 The committee notes that the use of information obtained in circumstances where a court has declared a control order to be void and of no effect, may have serious implication for personal rights and liberties. As such, the committee would expect a comprehensive justification for allowing the use of such material after the order has been declared void. In this instance, the explanatory memorandum merely restates part of the effect of the amendment (without noting the use for the purposes of a PDO),[123] and does not justify why such information should continue to be able to be used after a control order has been declared void.

1.121 The committee seeks the minister's detailed advice as to:

- **why the categories of persons eligible to issue computer access warrants should not be limited to persons who hold judicial office;**[124]
- **the appropriateness of lowering the threshold for ASIO to access intercepted communications, noting that administrative convenience is not generally an acceptable basis for doing so;**[125]
- **why it is necessary and appropriate to enable law enforcement officers to access computer data without a warrant in certain emergency situations (noting the coercive nature of these powers and the ability to seek a warrant via the telephone, fax or email);**[126]

122 As proposed to be amended by Schedule 2, item 119.

123 Explanatory memorandum, p. 118.

124 See Schedule 2, item 49. See also Schedule 2, item 145.

125 See Schedule 2, items 6, 11 and 13.

126 See Schedule 2, items 50-76.

- **the appropriateness of retaining information obtained under an emergency authorisation that is subsequently not approved by a judge or AAT member;**[127]
- **the appropriateness of enabling ASIO and law enforcement agencies to act to conceal any thing done under a warrant *after* the warrant has ceased to be in force, and whether the bill could be amended to provide a process for obtaining a separate concealment of access warrant if the original warrant has ceased to be in force;**[128]
- **the effect of Schedules 2-5 on the privacy rights of third parties and a detailed justification for the intrusion on those rights, in particular:**
  - **why there is no requirement that a person executing a computer access warrant must first seek the consent of the occupier or, at a minimum, announce their entry, before entering third party premises;**[129]
  - **why proposed paragraph 27E(2)(e) (and identical provisions in Schedules 3-4) does not specifically require the judge or nominated AAT member to consider the privacy implications for third parties of authorising access to a third party computer or communication in transit;**[130]
  - **why proposed subsection 27E(5) (and identical provisions in Schedules 3 and 4) does not include a prohibition on 'copying' of third party data, or at a minimum, a requirement that copies of any third party data be destroyed if it contains no relevant investigative value;**[131]
  - **why it is necessary to authorise relevant law enforcement officers to use a computer found in the course of a search or a telecommunications facility or other electronic equipment for the**

127 See Schedule 2, item 76, proposed section 35A(6).

128 See Schedule 2, items 7, 8, 12 and 49, proposed subsection 27E(7).

129 Schedule 2, item 49, proposed paragraph 27E(2)(b).

130 Schedule 2, item 49, proposed paragraph 27E(2)(e). Schedule 3, item 3, proposed paragraphs 3F(2A)(c) and 3F(2B)(c); item 6A, proposed paragraphs 3K(5)(c) and 3K(6)(c). Schedule 4, item 4A, proposed paragraph 199(4)(c); item 5, proposed paragraph 199B(2)(c).

131 Schedule 2, item 49, proposed subsection 27E(5). Schedule 3, item 3, proposed subsection 3F(2C); item 6A, proposed subsection 3K(7). Schedule 4, item 4A, proposed subsection 199(4B); item 5, proposed subsection 199B(3).

purpose of obtaining 'account-based data' in relation to any person who uses or has ever used the relevant computer;[132]

- **the necessity for the definition of 'account based data' to include the data of potentially innocent third parties who have links with an individual who is the subject of a search warrant;**[133]

- **why it is necessary and appropriate to enable a law enforcement officer to obtain a computer access warrant simply to 'determine' whether a control order has been complied with, when breach of a control order is an offence and, as such, there is already a power for the officer to obtain a warrant when there is a reasonable suspicion that an offence is being or is likely to be committed;**[134]
- **why it is necessary and appropriate to allow the use of information obtained under a computer access warrant that was granted on the basis that an interim control order was in force in circumstances where the control order is subsequently declared by a court to be void.**[135]

Presumption of innocence: certificate constitutes prima facie evidence (Schedules 2 and 5)[136]

1.122 Subsection 34AA(1) of the ASIO Act currently provides that the Director-General or Deputy Director-General of ASIO may issue a written certificate, setting out such facts as he or she considers relevant with respect to acts or things done by, or on behalf of, ASIO, in connection with a relevant warrant or in accordance with a relevant authorising provision.[137] Subsection 34AA(4) provides that, 'in a proceeding', a certificate issued under subsection (1) is prima facie evidence of the matters it certifies (meaning that a defendant or respondent in any proceeding would need to raise evidence to rebut the matters set out in the certificate). Items 17 and 18 of Schedule 2 to the bill seek to amend subsection 34AA(5) of the ASIO Act to add new

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132 Schedule 3,item 3, proposed paragraph 3F(2B)(v) and item 6A, proposed subparagraph (6)(a)(v).

133 Schedule 3, item 2, proposed section 3CAA.

134 Schedule 2, item 49, proposed subsection 27A(6).

135 Schedule 2, item 119.

136 Schedule 2, items 17, 18 and 119A; and Schedule 5, item 2, proposed section 21A. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

137 'Relevant authorising provision' and 'relevant warrant' are defined in proposed subsection 34AA(5).

subsections[138] to the definition of 'relevant authorising provision', the effect of which would be to empower the Director-General or Deputy Director-General to issue evidentiary certificates in relation to acts or things done in order to conceal the fact that any thing has been done under a computer access warrant.

1.123 In addition, currently subsection 62(1) of the SDA provides that an appropriate authorising officer for a law enforcement officer may issue a written certificate setting out any facts he or she considers relevant with respect to things done by the law enforcement officer in connection with particular matters.[139] Subsection 62(2) provides that a certificate issued under subsection 62(1) is admissible in evidence in any proceedings as prima facie evidence of the matters it certifies. Item 112 of Schedule 2 to the bill seeks to amend this provision to add a new paragraph 62(1)(c), the effect of which would be to enable an evidentiary certificate to be issued in connection with information obtained from access to data under a computer access warrant or an emergency access authorisation.

1.124 Finally, item 2 of Schedule 5 seeks to insert a new section 21A into the ASIO Act, which provides that in certain circumstances a person or body is not subject to any civil liability for, or in relation to, conduct that involves providing assistance to ASIO. Proposed subsection 21A(1)(b) relevantly provides that, in order for the immunity conferred by proposed subsection 21A(1) to apply, the Director-General must be satisfied that the relevant conduct is likely to assist ASIO in the performance of its functions. Proposed subsection 21A(8) provides that the Director-General may give a certificate in writing, certifying one or more facts relevant to the question of whether the Director-General was satisfied on reasonable grounds that particular conduct was likely to assist ASIO, and proposed subsection 21A(9) provides that, in any proceedings that involve determining whether the immunity applies, a certificate given under proposed subsection 21A(8) is prima facie evidence of the facts it certifies.

1.125 The committee notes that where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceeding. While a person still retains a right to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The issue of evidentiary certificates therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common-law right to be presumed innocent until proven guilty. In this instance, the committee is concerned that the provisions outlined above could place a significant and potentially insurmountable burden on persons seeking to challenge the validity of

138 Proposed subsections 25A(8), 27A(3C) and 27E(6).

139 For example, things done by a law enforcement officer in connection with the execution of a warrant, in accordance with an emergency authorisation, or in accordance with a tracking device authorisation.

actions taken by law enforcement agencies under warrants, as well as things done to conceal those actions. For example, if a certificate was issued under section 31AA(1) of the ASIO Act in relation to things done to conceal covert access undertaken by ASIO, a person wishing to challenge the lawfulness of the matters in the certificate would be required to raise evidence to rebut these matters, however, as they relate to covert access and concealment of that access, raising such evidence may be extremely difficult.

1.126 The committee also notes that evidentiary certificates issued under subsection 34AA(1) of the ASIO Act and subsection 62(1) of the SD Act would be taken as prima facie evidence in any proceeding. However, the nature of the proceedings in which such certificates are intended to be used remains unclear to the committee, and the explanatory memorandum provides no information in this regard. The committee is concerned that the use of such certificates could trespass on individuals' rights, particularly if it related to circumstances where a certificate is taken as evidence of matters relevant to a person's culpability for an offence.

1.127 Noting the burden that the issue of an evidentiary certificate may place on a person wishing to challenge the validity of actions taken by law enforcement agencies and officials, and the potential to trespass on individuals' rights, the committee would expect a detailed justification for the powers to issue evidentiary certificates identified above (including the expansion of those powers) to be included in the explanatory materials.

1.128 In relation to items 17 and 18 of Schedule 2, and proposed subsection 21A(8) of Schedule 5, the explanatory memorandum provides no such justification. It merely restates the operation and effect of the relevant provisions.[140] In relation to item 112 of Schedule 2, the explanatory memorandum states:

> Evidentiary certificates are intended to streamline the court process by reducing the need to contact numerous officers and experts to give evidence on routine matters. Evidentiary certificates also assist agencies to protect sensitive capabilities.[141]

1.129 However, the committee does not generally consider streamlining court processes to be sufficient justification for conferring powers to issue evidentiary certificates in relation to things done in connection with information obtained under a warrant. Moreover, the explanatory memorandum does not explain how evidentiary certificates protect 'sensitive capabilities' or what these are.

1.130 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states, in relation to criminal proceedings, that evidentiary certificates:

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140 Explanatory memorandum, pp. 84 and 142.

141 Explanatory memorandum, p. 115.

> are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.[142]

1.131 The Guide further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.[143]

1.132 In this instance, it is not clear that the matters in evidentiary certificates issued under the provisions identified above would be sufficiently removed from the main facts at issue in relevant proceedings.

1.133 As the explanatory materials do not address, or do not adequately address, these issues, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to expand the circumstances in which evidentiary certificates may be issued under the *Australian Security Intelligence Organisation Act 1979* and the *Surveillance Devices Act 2004* to include the matters identified above;**
- **the circumstances in which it is intended that evidentiary certificates would be issued, including the nature of any relevant proceedings; and**
- **the impact that issuing evidentiary certificates may have on individuals' rights and liberties, including on the ability of individuals' to challenge the lawfulness of actions taken by law enforcement agencies.**

Significant penalties (Schedules 2 to 5)[144]

1.134 As outlined above at paragraphs 1.115 to 1.116, Schedules 2-5 introduce or amend existing provisions that make it an offence for a person not to comply with an assistance order. An assistance order can provide that any specified person is required to provide any information or assistance that is reasonable or necessary to allow the relevant officer to access, copy or convert data held in any target computer or relevant device. In relation to the new offence of a failure to comply with an assistance order made under the SD Act, the penalty is proposed to be set at 10 years imprisonment or 600 penalty units, or both.[145] Under section 3LA of the

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142 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 54.

143 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 55.

144 Schedule 2, item 114, proposed subsection 64A(8); Schedule 3, item 9; Schedule 4, item 18; and Schedule 5, item 3, proposed subsection34AAA(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

145 Schedule 2, item 114, proposed subsection 64A(8).

Crimes Act a failure to comply with an assistance order is currently subject to a maximum penalty of 2 years imprisonment while under section 201A of the Customs Act a person would be subject to a maximum of 6 months imprisonment. The amendments in Schedules 3 and 4 seek to amend these maximum penalties to five years or 300 penalty units, or where the offence being investigated is a serious offence or serious terrorism offence, to 10 years imprisonment or 600 penalty units or both.[146] Finally, the new offence in Schedule 5, of failing to comply with an assistance order to assist ASIO, would be subject to a maximum of five years imprisonment or 300 penalty units, or both.[147]

1.135 The committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. These provisions impose the possibility of significant custodial penalties (respectively five years and 10 years imprisonment). In this instance, the statement of compatibility states in relation to the increase in penalties under the Crimes Act and Customs Act that the current penalty 'is of insufficient gravity to incentivise compliance with the assistance obligation'.[148] The explanatory memorandum also states:

> The intention of raising the penalty for the simple offence is to reflect the significant harm to investigations and prosecutions caused by a person failing to assist law enforcement access computers and data storage devices covered by an order issued under section 3LA.
>
> …
>
> The new aggravated offence reflects the gravity of non-compliance with an investigation into a serious offence. Given the current penalties for committing an offence against section 3LA, there is no incentive for a person to comply with an order if they have committed an offence with a higher penalty and evidence is available on their device.[149]

1.136 The explanatory memorandum explains that the proposed penalty under the SD Act 'is consistent with the amended penalty in Schedule 3',[150] while the penalty set in Schedule 5 has not been justified in the explanatory materials.

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146 Schedule 3, item 9 and Schedule 4, item 18.

147 Schedule 5, item 3, proposed subsection 34AAA(4).

148 Statement of compatibility, pp. 22 and 26.

149 Explanatory memorandum, p. 133 and 139.

150 Explanatory memorandum, p. 117.

1.137 In effect, the justification for the substantial increase in penalties appears to have two elements to it. In relation to third parties who are not the subject of an investigation the justification appears to be that the higher penalty will provide a greater incentive to comply with the order. However, it is not clear to the committee that a person would be more likely to comply with an assistance order if subject to a significantly higher penalty, given the potential for imprisonment that currently exists. The second element of the justification appears to be that a person who is suspected of having committed an offence would be more likely to comply with an assistance order if the penalty were higher, as otherwise they would weigh up the possibility of conviction for the offence (which would be possible based on the information they provided under the assistance order) compared to conviction for the failure to assist. However, it does not appear that the bill or the existing provisions in the amended Acts specifically override the common law privilege against self-incrimination. As such, it is the committee's understanding that a person who may be suspected of an offence could refuse to comply with the assistance order and at any trial for the offence could claim the common law privilege against self-incrimination. As such, it would appear to the committee that increasing the penalty for failing to comply with the assistance order would not necessarily have any effect on a suspect's decision as to whether to provide the required assistance.

1.138 The committee also notes, as set out above, that its usual expectation in relation to the setting of a penalty in legislation is that those penalties would be justified by reference to similar offences in Commonwealth legislation. No such comparable offences and penalties have been set out in the explanatory materials.

1.139 The committee therefore seeks the minister's detailed justification for setting a penalty of five to 10 years imprisonment for a failure to comply with an assistance order, by reference to comparable Commonwealth offences.

1.140 The committee also seeks the minister's advice as to whether it is intended that the offence of a failure to comply with an assistance order would abrogate the common law privilege against self-incrimination (and if not, why the explanatory memorandum suggests the higher penalty is to incentivise a suspect to comply with the order).

Immunity from liability (Schedule 2 and 5)[151]

1.141 Section 313 of the Telecommunications Act currently imposes an obligation on carriers and service providers to give agencies 'such help is reasonably necessary' to enforce the criminal law and safeguard national security. Subsections 313(5) and (6) of that Act confer an immunity from liability on carriers and carriage service

151 Schedule 2, item 119A and Schedule 5, item 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

providers, and their officers, employees and agents, in relation to acts done or omitted to be done in good faith in connection with the provision of help. Item 119A of Schedule 2 to the bill seeks to amend this provision to insert a new paragraph (caa), which would provide that 'giving help' includes giving effect to authorisations under section 31A of the TIA Act to develop and test certain interception capabilities.[152]

1.142 The amendment proposed by item 119A would thereby extend the immunity conferred by subsections 313(5) and (6) to actions taken to give effect to authorisations (to develop and test interception capabilities) given under section 31A (including as amended). This removes any common law right to bring an action to enforce legal rights in relation to such actions unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.143 Item 2 of Schedule 5 to the bill also seeks to insert a new section 21A into the ASIO Act, relating to the provision of voluntary assistance to the Director-General. Proposed subsections 21A(1) and (5) provide that, in certain circumstances, a person or body is not subject to any civil liability for, or in relation to, conduct that involves:

- providing assistance to ASIO at the request of the Director-General;[153] or
- providing information or producing a document to ASIO, or making a copy of a document and giving it to ASIO.[154]

1.144 Proposed subsections 21A(1) and (5) would therefore remove any common law right to bring an action to enforce legal rights, with no requirement that actions are taken in good faith. The committee is concerned that these immunities may

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152 Section 31A of the *Telecommunications (Interception and Access) Act 1979* currently provides that the Attorney-General may authorise the interception of certain communications by employees of authorised security authorities. Schedule 2, item 123B of the bill seeks to amend section 31A to enable the Attorney-General to authorise security authorities to work with carriers to test interception technologies.

153 Schedule 5, item 2, proposed subsection 21A(1). The relevant circumstances are that the Director-General is satisfied on reasonable grounds that the conduct is likely to assist ASIO in the performance of its functions; the person engages in the conduct in accordance with the Director-General's request; and the conduct does not involve the commission of an offence or significant loss or damage to property.

154 Schedule 5, item 2, proposed subsection 21A(5). The relevant circumstances are that the person reasonably believes that the conduct is likely to assist ASIO in the performance of its functions; the conduct does not result in the commission of an offence or in significant loss of or serious damage to property; and the conduct is not covered by subsection 21A(1).

capture a broad range of conduct which would otherwise be actionable under the common law. For example, it appears that the immunity conferred by proposed subsection 21A(5) could extend to giving defamatory information to ASIO, so long as the person giving that information reasonably believes that the information would assist with the performance of ASIO's functions.

1.145 The committee expects that if a bill seeks to confer immunity from civil liability, particularly when such an immunity could affect individual rights, this should be soundly justified in the explanatory materials. In this instance, the explanatory memorandum provides no justification for the conferrals of immunity outlined above, merely restating the operation and effect of the relevant provisions.[155]

1.146 The committee requests the minister's advice as to why it is considered necessary and appropriate to confer immunity from civil liability in item 119A of Schedule 2 and item 2 of Schedule 5, such that affected persons would no longer have a right to bring an action to enforce their legal rights.

155 Explanatory memorandum, pp 118 and 141-142.

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018

Purpose	This bill seeks to implement design and distribution obligations and introduce a financial product intervention power for the Australian Securities and Investments Commission
Portfolio	Treasury
Introduced	House of Representatives on 20 September 2018

Broad delegation of legislative power[156]

1.147 Item 5 of Schedule 1 to the bill seeks to insert a new Part 7.8A into the *Corporations Act 2001* (Corporations Act), which seeks to impose design and distribution obligations in relation to certain financial products.[157]

1.148 Proposed subsection 994L(1) seeks to allow the Australian Securities and Investments Commission (ASIC), by notifiable instrument, to exempt a specified person or financial product from all or specified provisions of new Part 7.8A, or to declare that Part 7.8A applies to a specified person or financial product as if provisions of that Part were omitted, modified or varied. Similarly, proposed subsection 994L(2) seeks to allow ASIC, by legislative instrument, to exempt a specified class of persons or financial products from all or specified provisions of new Part 7.8A, or to declare that Part 7.8A applies to a specified class of persons or financial products as if provisions of that Part were omitted, modified or varied.

1.149 Proposed subsections 994L(1) and (2) would appear to allow delegated legislation to modify the operation of primary legislation, and to exempt certain persons and financial products from all or specified provisions of primary legislation.

1.150 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). The committee has significant scrutiny concerns with Henry VIII-type

156 Schedule 1, item 5, proposed section 994L. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

157 Examples of 'design obligations' and 'distribution obligations' are outlined at pages 15 and 16 of the explanatory memorandum. These obligations include making and reviewing target market determinations, ensuring that the distribution of a financial product, and advice and information in relation to that product, is consistent with the product's target market determination, and keeping relevant records.

clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.151 The committee will also have concerns about provisions that enable delegated legislation to exempt persons or entities from the operation of primary legislation, particularly where such provisions permit exemptions or modifications that apply to a broad range of entities or legislative provisions. This is because provisions of this kind may have the effect of limiting, or in some cases removing,[158] parliamentary scrutiny. The committee therefore expects a sound justification for the use of such provisions to be included in the explanatory memorandum.

1.152 In this instance, the explanatory memorandum, states:

> ASIC presently has exemption and modification powers concerning the disclosure regime for financial products. The amendments, in effect, replicate these existing provisions and apply them to the new design and distribution regime. The principles applicable to ASIC's existing exemption and modification powers with respect to the disclosure regime also apply in the context of the present amendments.
>
> The exemption and modification powers support the effective operation of the new regime. In particular, they provide ASIC with the flexibility to make exemptions and modifications to the regime should a need arise in future. For example, ASIC would be able to tailor the operation of the regime so as to avoid any unintended consequences that may arise with respect to a particular person or product.[159]

1.153 The committee notes that the proposed powers are intended to ensure that ASIC is able to tailor the operation of the new design and design and distribution regime so as to avoid any unintended consequences. However, the committee notes that it does not generally consider administrative flexibility, or consistency with other legislation, to be sufficient justification for broad delegations of legislative power (such as the power for delegated legislation to modify the operation of primary legislation). The committee is also concerned that the bill does not appear to set any limitation on ASIC's powers of modification and exemption. For example, the bill does not set out any conditions that must be satisfied before such powers are exercised.

1.154 Additionally, where Parliament delegates its legislative power in relation to significant legislative schemes (including the power to modify and exempt entities

158 For example, a notifiable instrument is not subject to the usual disallowance and sunsetting processes set out in the *Legislation Act 2003*.

159 Explanatory memorandum, pp. 34-35.

from the operation of primary legislation), the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity. The committee notes that no such requirements are currently set out in the bill.

1.155 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing ASIC by delegated legislation to modify and exempt persons and financial products from the operation of proposed Part 7.8A of the *Corporations Act 2001*.

Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018

Purpose	This bill seeks to amend various Acts relating to taxation to: • limit access to tax concessions for foreign investors by increasing the managed investment trust withholding rate on fund payments in certain circumstances; • amend thin capitalisation rules to prevent double gearing structures; • limit access to tax concessions for foreign investors by limiting the tax withholding tax exemption for superannuation funds for foreign residents; and • limit access to tax concessions for foreign investors by codifying and limiting the scope of the sovereign immunity tax exemption
Portfolio	Treasury
Introduced	House of Representatives on 20 September 2018

Exclusion of judicial review[160]

1.156 Schedules 1 and 5 to the bill seek to limit access to tax concessions for foreign investors, by increasing the managed investment trust (MIT) withholding rate attributable to non-concessional MIT income from 15 per cent to 30 per cent (the rate equal to the top corporate tax rate). Relevantly, non-concessional MIT income includes MIT cross staple arrangement income.[161]

1.157 Proposed section 12-439[162] seeks to create an exemption from the increased withholding rate in relation to approved 'economic infrastructure facilities'.[163] Proposed subsection 12-439(3) provides that an Australian government agency (other than the Commonwealth) may make an application to the Treasurer in respect of a facility, or an improvement to a facility, specified in the application. The

160 Schedule 1, item 14. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

161 In this regard, see explanatory memorandum, pp. 12-13.

162 Schedule 1, item 11.

163 Proposed subsection 12-439(5) defines 'economic infrastructure facility' as a facility that is any of the following: transport infrastructure; energy infrastructure; communications infrastructure; or water infrastructure.

Treasurer may approve the facility if satisfied that a number of specified criteria are met.[164] Where a facility or an improvement is approved by the Treasurer, any rent from land investment that is attributable to the facility or improvement will *not* be counted as MIT cross staple arrangement income, and will therefore not attract the higher withholding rate.

1.158 Item 14 of the bill seeks to amend the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to insert a new paragraph (gaaa) into Schedule 1. The effect of this amendment would be that the ADJR Act would not apply to decisions of the Treasurer under proposed section 12-439.

1.159 Where a provision excludes the operation of the ADJR Act, the committee would expect the explanatory memorandum to provide a sound justification for the exclusion. In this instance, the explanatory memorandum states:

> The Treasurer's decision to approve a facility, or an improvement to a facility, as an approved economic infrastructure facility is excluded from the operation of the *Administrative Decisions (Judicial Review) Act 1977* and therefore is not reviewable on its merits.
>
> The Treasurer's decision is not reviewable on its merits because key factors that must be taken into account when making a decision include whether:
>
> - the facility will significantly enhance the long-term productive capacity of the economy; and
> - approving the facility is in the national interest.
>
> Consideration of these factors involves complex questions of government policy that can have broad ranging implications for persons other than those immediately affected by the decision. Therefore, it is not appropriate for the decision to be subject to merits [review] under the *Administrative Decision (Judicial Review) Act 1977*.
>
> However, the Treasurer's decision will remain subject to judicial review under section 39B of the *Judiciary Act 1903*.[165]

1.160 This information indicates that decisions by the Treasurer under proposed section 12-439 may be decisions of a high political content. Consequently, it may be appropriate to exclude such decisions from *merits* review (for example, by the

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164 The criteria are specified in proposed subsection 12-439(4), and include: the facility is an economic infrastructure facility; estimated capital expenditure on the facility or improvement is $500 million or more; the facility or improvement is yet to be constructed; the facility or improvement will significantly enhance the long-term productive capacity of the economy; and improving the facility or improvement is in the national interest.

165 Explanatory memorandum, p. 29.

Administrative Appeals Tribunal).[166] However, the effect of the amendment in item 14 would be to exclude *judicial* review under the ADJR Act. The committee notes in this regard that the explanatory memorandum provides no specific justification for excluding judicial review. Moreover, noting that decisions of the Treasurer would remain subject to judicial review under the *Judiciary Act 1903* (Judiciary Act), it is unclear whether it is intended to exclude judicial review under the ADJR Act, or whether it is intended only to exclude merits review.

1.161 In this regard, the committee emphasises that the ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the Judiciary Act) and also provides for the right to reasons in some circumstances. From a scrutiny perspective, the committee considers that the proliferation of exclusions from the ADJR Act should be avoided.

1.162 The committee requests the minister's detailed justification for seeking to exclude judicial review under the *Administrative Decisions (Judicial Review) Act 1977* in relation to decisions by the Treasurer for an exemption for an economic infrastructure facility under proposed section 12-439.

166 See Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.22]-[4.30].

Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018

Purpose	This bill seeks to amend various Acts in relation to taxation to: • amend the Research and Development (R & D) Tax Incentive to encourage firms to increase the proportion of additional R & D expenditure; • ensure that R & D claimants are unable to inappropriately obtain a tax benefit from the program and that R & D offsets are recouped appropriately; • amend the guidance framework to provide certainty to applicants and streamline administration processes; • amend the capitalisation rules to entities; • ensure that offshore sellers of Australian hotel accommodation calculate their GST turnover in the same way as local sellers from 1 July 2019; • remove luxury car tax liability on cars re-imported into Australia following service, repair or refurbishment overseas from 1 January 2019; and • amend the definition of significant global entity
Portfolio	Treasury
Introduced	House of Representatives on 20 September 2018

Retrospective application[167]

1.163 Schedule 1 seeks to make a number of amendments to the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Tax Laws Amendment (Research and Development) Act 2015* in order to reform the Research and Development Tax Incentive (the Incentive). Item 17 of Schedule 1 seeks to apply these amendments to assessments for income years commencing on or after 1 July 2018.

1.164 Schedule 2 seeks to amend the *Income Tax Assessment Act 1936* (ITAA 1936) and the ITAA 1997 in order to ensure research and development entities cannot obtain inappropriate tax benefits under the Incentive and to recoup benefits gained under the Incentive to the extent an entity has received another benefit in relation to

167 Schedule 1, item 17 and Schedule 2, item 56. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

a research and development activity. Item 56 provides that the proposed amendments under Part 1 of Schedule 2 apply to research and development tax benefits derived on or after 1 July 2018, and the proposed amendments under Part 2 of Schedule 2 apply in relation to assessments for income years commencing on or after 1 July 2018.

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

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

1.167 In this instance, the explanatory memorandum provides no explanation as to why it is necessary or appropriate to apply the proposed amendments in schedules 1 and 2 to income years commencing on or after 1 July 2018, or to tax benefits derived on or after 1 July 2018, nor sets out whether any persons are likely to be adversely affected.[168]

1.168 The committee requests the Treasurer's advice as to why it is necessary to retrospectively apply proposed amendments under Schedules 1 and 2 to income years commencing on or after 1 July 2018, or to tax benefits derived on or after 1 July 2018, and whether any persons would be detrimentally affected by the retrospective application.

Broad delegation of administrative powers[169]

1.169 Paragraph 21(1)(e) and subsection 22A(1) of the *Industry Research and Development Act 1986* currently provide that the Innovation and Science Australia Board (the Board), or a committee appointed to provide advice to the Board, may delegate any or all of its functions or powers to Board members, a committee of the Board or a member of staff assisting the Board or committee who is an SES employee or acting SES employee.[170] Items 18 and 19 of Schedule 3 seek to remove the existing requirement that powers or functions only be delegated to SES or acting SES

168 Explanatory memorandum, pp. 20, 41.

169 Schedule 3, items 18 and 19. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

170 A member of the Senior Executive Service of the Australian Public Service.

employees so as to allow the Board or committee to delegate functions or powers to a member of staff at any level.

1.170 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.171 In this instance, the explanatory memorandum states that the current limit on the delegation power has proved to be impractical and a significant barrier to the Board carrying out functions necessary to the operation of the Research and Development Tax Incentive, given that these functions include processing around 14,000 registration applications each year and hundreds of compliance activities.[171] The explanatory memorandum also states that, prior to the current limitation of delegations to SES staff, a broader delegation power was used effectively and efficiently on a long-standing basis.[172]

1.172 The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level. If it is considered necessary to expand the range of staff to whom delegations may be made beyond the SES level, as suggested by the explanatory memorandum, the committee considers it would be appropriate for the bill to be amended so as to limit the delegation of powers or functions to persons with appropriate expertise.

1.173 The committee considers it may be appropriate to amend the bill to require that the Innovation and Science Australia Board, or a committee appointed to advise the board, be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated, and requests the Treasurer's advice in relation to this matter.

171 Explanatory memorandum, p. 50.

172 Explanatory memorandum, p. 50.

Veterans' Affairs Legislation Amendment (Omnibus) Bill 2018

Purpose	This bill seeks to amend various Acts relating to veterans' affairs and military rehabilitation to: • enable the Chief of the Defence Force to make a claim for liability for current serving Australian Defence Force members where they have given consent; • enable the Military Rehabilitation and Compensation Commission to obtain information from Commonwealth, State or Territory departments and authorities, and other third parties when determining a claim; and • ensure that exempt lump sum determinations will apply as exempt lump sums from income tests that applies to Department of Veterans' Affairs income support clients
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 20 September 2018

Coercive powers
Strict liability
Reversal of evidential burden of proof[173]

1.174 Proposed subsection 151(1) seeks to allow the Military Rehabilitation and Compensation Commission (MRCC) to give a written notice to any person, for the purposes of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRC Act). The notice could require the recipient to provide the MRCC with such information or documents as the MRCC requires, or to appear before a staff member assisting the MRCC to answer questions.

1.175 Proposed subsections 151(9) and (10) seek to make it an offence of strict liability to fail to comply with a notice under subsection 151(1), punishable by a penalty of 10 penalty units. Proposed subsection 151(11) seeks to create an offence-specific defence, which provides that the offence does not apply to the extent that the person is not capable of complying with a notice. This defence reverses the evidential burden of proof.

1.176 The committee notes that proposed section 151 seeks to replace existing section 151 of the DRC Act. Existing section 151 enables the MRCC to issue notices

173 Schedule 2, item 1, proposed section 151. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

requiring the production of documents and information. However, notice recipients under that provision are limited to the secretary of the Department of Defence, the secretary of the Department of Veterans' Affairs and the Chief of the Defence Force. In contrast, proposed section 151 would extend the MRCC's powers by enabling the MRCC to give a notice to 'any person', as well as by enabling the MRCC to require a person to appear before a staff member assisting the MRCC to answer questions.

1.177 Where a bill seeks to confer coercive powers on persons or bodies, the committee would expect the explanatory materials to provide a sound justification for the conferral of such powers, by reference to principles set out in the *Guide to Framing Commonwealth Offences*.[174] In this instance, the explanatory memorandum states the that the proposed amendments would:

> enable the MRCC to require information from any Commonwealth, State or Territory Departments and authorities, and other persons such as current or former treatment providers and other third parties in addition to the Secretary of the Department of Defence, the Secretary of the Department of Veterans' Affairs or the CDF.[175]

1.178 The statement of compatibility further provides that:

> The requirement to obtain information from third parties is in connection to a claim made by a person (or a dependent of a person or their estate) for liability and/or a claim for compensation under the Act…
>
> In some cases, a dependent or the estate of a person may experience difficulty in sourcing the information required to establish a claim. Where this occurs, the MRCC may require information directly from the source which will overcome this limitation.[176]

1.179 However, the explanatory materials do not explain why it is necessary to enable the MRCC to issue a notice to 'any person', and there is nothing on the face of the bill that would limit the persons to whom a notice may be issued (in contrast to the existing provisions, which are limited to the heads of the particular agencies).

1.180 In relation to the application of strict liability in proposed subsection 151(10), and the reversal of the evidential burden of proof in proposed subsection 151(11), the committee emphasises that criminal law principles generally require that:

- fault is proved before a person can be found guilty of a criminal offence (ensuring criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have); and
- the prosecution prove all elements of an offence.

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174 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Chapters 7-10.

175 Explanatory memorandum, p. i.

176 Statement of compatibility, p. v.

1.181 Offences of strict liability remove the requirement for the prosecution to prove the defendant's fault, while provisions that reverse the burden of proof require the defendant, rather than the prosecution, to disprove, or raise evidence to disprove, one or more elements of an offence. Both the imposition of strict liability and the reversal of the burden of proof interfere with fundamental criminal law principles, and consequently the committee would expect a sound justification for such provisions to be included in the explanatory memorandum. In relation to the application of strict liability, the explanatory memorandum states that:

> The intention behind imposing strict liability for an offence under subsection 151(9) is to recognise the seriousness of the MRCC's need to obtain sufficient information to determine a person's claim and the potential significant financial consequences for that person.[177]

1.182 However, the committee considers that this may not be sufficient to justify the application of strict liability. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability may be justified where there are legitimate grounds for penalising a person lacking fault, such as placing persons on notice to guard against the possibility of contravention or ensuring the integrity of a regulatory regime.[178]

1.183 In addition, the explanatory memorandum provides no justification for the reversal of the evidential burden of proof. It merely restates the operation and effect of the relevant provisions.

1.184 As the explanatory memorandum does not address, or does not adequately address, these issues, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to:

- **confer on the Military Rehabilitation and Compensation Commission broad powers to require information and documents from 'any person', and to require 'any person' to appear before the Commission to give evidence;**
- **apply strict liability to the offence in proposed subsection 151(9); and**
- **include an offence-specific defence (which reverses the evidential burden of proof) in proposed subsection 151(11).**

1.185 The committee's consideration of these matters would be assisted if the minister's response expressly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[179]

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177 Explanatory memorandum, p. 7.

178 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 23-24.

179 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22-25 (strict liability), pp. 50-52 (reverse burdens) and Chapters 7-10 (coercive powers).

Bills with no committee comment

1.186 The committee has no comment in relation to the following bills which were introduced into the Parliament between 17 – 20 September 2018:

- Aviation Transport Security Amendment Bill 2018;
- Customs Amendment (Collecting Tobacco Duties at the Border) Bill 2018
- Customs Amendment (Peru-Australia Free Trade Agreement Implementation) Bill 2018;
- Customs Amendment (Product Specific Rule Modernisation) Bill 2018;
- Customs Tariff Amendment (Peru-Australia Free Trade Agreement Implementation) Bill 2018;
- Excise Tariff Amendment (Collecting Tobacco Duties at Manufacture) Bill 2018
- Income Tax (Managed Investment Trust Withholdings Tax) Amendment Bill 2018;
- Income Tax Rates Amendment (Sovereign Entities) Bill 2018;
- Maritime Legislation Amendment Bill 2018;
- Treasury Laws Amendment (2018 Measures No. 5) Bill 2018;
- Treasury Laws Amendment (Black Economy Taskforce Measures No. 2) Bill 2018; and
- Treasury Laws Amendment (Gift Cards) Bill 2018.

Commentary on amendments and explanatory materials

Bankruptcy Amendment (Debt Agreement Reform) Bill 2018
[Digests 3, 5 & 7/18]

1.187 On 18 September 2018 the Assistant Minister for Agriculture and Water Resources (Senator Colbeck) tabled a supplementary explanatory memorandum. On 19 September 2018 the Senate agreed to 36 Government amendments and the bill was read a third time. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

1.188 In *Scrutiny Digest 3 of 2018*, the committee raised concerns that proposed subsections 185EC(6), 185MC(6) and 185PC(6) sought to impose penalties of three months' imprisonment for offences relating to misconduct by debt agreement administrators. The committee noted that this appeared to be inconsistent with the *Guide to Framing Commonwealth Offences* which provides that imprisonment should be reserved for serious offences, and if a term of six months or more is not justified a pecuniary penalty, rather than a period of imprisonment, should be used. In *Scrutiny Digest 5 of 2018*, the committee raised further concerns with respect to the minister's proposal to raise the penalty in those provisions from three to six months' imprisonment, noting that the proposed increase was not justified by reference to comparable offences in other Commonwealth legislation.

1.189 In this regard, the committee is concerned that amendments 17, 27 and 32 increase the penalties in proposed subsections 186EC(6), 185MC(6) and 185PC(6) from three to six months' imprisonment, while item 36 similarly increases the penalty for an offence against section 60-21 of the *Bankruptcy Act 1966* (Bankruptcy Act) from three to six months' imprisonment. However, the committee notes that amendments 16, 26, 31 and 36 also change the fault element in each of those offences from 'with a view to' to 'with the intention of' (thereby raising the threshold for imposing liability). Additionally, amendment 36 removes the application of strict liability from the offence in section 60-21 of the Bankruptcy Act. Further, the supplementary explanatory memorandum appears to justify the penalty increases by reference to a similar offence in the *Competition and Consumer Act 2010* relating to cartel conduct.[180]

1.190 In *Scrutiny Digest 3 of 2018*, the committee also raised concerns that the bill would allow the minister to determine, by delegated legislation, the percentage by which the total of payments under a debt agreements could exceed a debtor's yearly income ('payment to income ratio'), noting that this appeared to be a significant

180 Supplementary explanatory memorandum, p. 8.

element of the debt agreements framework in the Bankruptcy Act. The committee also raised concerns that the minister could set the payment to income ratio at a level that would enable lower income debtors to enter into a debt agreements with an unreasonable repayment schedule. In *Scrutiny Digest 5 of 2018*, the committee noted the minister's advice that allowing the minister to set the payment income ratio by delegated legislation would ensure the flexibility necessary to respond quickly to fluctuations in financial markets in order to protect vulnerable debtors from excessive repayment schedules. In light of this information, the committee made no further comment on this matter.

1.191 The committee notes that amendments 3, 5-8, 10, 11, 13, 18, 21 and 34 would, in consideration of the committee's concerns, alter the payment to income ratio to apply stricter standards for low income debtors, while still allowing such debtors to exceed the ratio in appropriate circumstances (for example, where the debtor receives assistance from family or returns to ongoing employment). The committee notes that the amendments would also introduce safeguards to ensure low income debtors are not able to rely on inappropriate or speculative sources of income to meet their repayment schedules, and to ensure that debtors are not subject to unreasonable financial hardship. These amendments would appear to address the committee's scrutiny concerns.

1.192 In light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment on these matters.

Civil Law and Justice Legislation Amendment Bill 2018
[Digests 4 &5/17]

1.193 On 12 September 2018 the Senate agreed to 17 Government amendments, the Minister for Regional Services, Sport, Local Government and Decentralisation (Senator McKenzie) tabled three supplementary memoranda and the bill was read a third time.

1.194 In *Scrutiny Digest 4 of 2017* and *Scrutiny Digest 5 of 2017*, the committee raised concerns that the bill sought to confer powers of arrest, search and entry on Australian Public Service employees in the (then) Department of Immigration and Border Protection, who may lack the appropriate training to exercise those powers. Amendments 4 and 5 appear to address the committee's concerns in relation to this matter.

1.195 The committee also notes that amendments 6-14 seek to remake a number of offences in the *Family Law Act 1975*, and to introduce new offence-specific defences relating to fleeing family violence. The proposed defences would reverse the evidential burden of proof. However, the committee notes that no justification for reversing the evidential burden of proof in those defences is included in the supplementary explanatory memoranda.

1.196 The committee welcomes amendments 4 and 5, made in response to concerns raised by the committee, which would restrict the persons on whom powers of arrest, search and entry are conferred to members of the Australian Border Force.

1.197 In relation to amendments 6-14, the committee considers that it would be appropriate for information regarding why it is considered necessary and appropriate to reverse the evidential burden of proof to be included in the explanatory memorandum.

Government Procurement (Judicial Review) Bill 2017
[Digests 6 & 8/17]

1.198 On 19 September 2018 the Assistant Minister for Regional Development and Territories presented an addendum to the explanatory memorandum and the bill was read a third time.

1.199 The committee thanks the assistant minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[181]

Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018
[Digests 5 & 6/18]

1.200 On 20 September 2018 the Senate agreed to two Opposition amendments. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

1.201 In *Scrutiny Digest 5 of 2018* and *Scrutiny Digest 6 of 2018*, the committee raised concerns around the retrospective application of amendments relating to Capital Gains Tax small business concessions. Amendment 1 partially addresses the committee's concerns.

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

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181 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, pp. 69-72

Unexplained Wealth Legislation Amendment Bill 2018
[Digests 7 & 8/18]

1.203 On 19 September 2018 the Assistant Minister for Home Affairs (Senator Reynolds) tabled an addendum to the explanatory memorandum relating to the bill.

1.204 The committee thanks the assistant minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[182]

Veterans' Entitlements Amendment Bill 2018
[Digests 10 & 11/18]

1.205 On 17 September 2018 the Assistant Minister for Defence (Senator Fawcett) tabled an addendum to the explanatory memorandum relating to the bill.

1.206 The committee thanks the assistant minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[183]

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

- Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018.[184]

182 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, pp. 61-73.

183 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2018*, pp. 8-9; *Scrutiny Digest 11 of 2018*, pp. 19-20.

184 On 17 September 2018 the Senate agreed to one Opposition amendment and the bill was read a third time. On 18 September 2018 the House of Representatives agreed to the Senate amendment and the bill was passed.

Chapter 2

Commentary on ministerial responses

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

Aged Care Quality and Safety Commission Bill 2018

Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018

Purpose	The Aged Care Quality and Safety Commission Bill 2018 seeks to establish a new Aged Care Quality and Safety Commission to replace the existing Australian Aged Care Quality Agency and Aged Care Complaints Commissioner from 1 January 2019 The Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018 seeks to address consequential and transitional matters that arise from the enactment of the *Aged Care Quality and Safety Commission Act 2018*
Portfolio	Health
Introduced	House of Representatives on 12 September 2018
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Review rights[1]

2.2 In *Scrutiny Digest 11 of 2018*[2] the committee requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to leave the Commissioner's complaints and regulatory functions, including review rights in relation to decisions made under these functions, to be set out entirely in the rules; and

1 Aged Care Quality and Safety Commission Bill 2018, clause 21. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2018*, at pp. 1-4.

- the type of consultation that it is envisaged will be conducted prior to the making of the rules 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).

Minister's response[3]

2.3 The minister advised:

Executive rule making powers

The Bill provides that matters relating to the performance of the complaints and regulatory functions (among others), will be prescribed in the Rules (clause 22(2)).

All significant matters relating to the rights and responsibilities of persons involved in the complaints and regulatory functions will be established in primary legislation, including both the Bill and the *Aged Care Act 1997,* as amended by the Consequential and Transitional Bill. These Bills elevate certain matters of significance currently in delegated legislation into the primary legislation, and leave matters largely of an operational nature, that set out how the Commissioner may exercise their functions, to be prescribed in rules.

By way of explanation, the Bill provides the scope and nature of the Commissioner's complaints and regulatory functions (clauses 18 and 19) and monitoring powers and purposes for which they may be exercised in carrying out these functions (Part 8). For example, this includes the search and entry powers of regulatory officials as they relate to the Quality Agency's accreditation, quality review and monitoring functions which are currently conferred under Parts 2 and 3 of the *Accountability Principles 2014.* The Bill moves these powers from delegated legislation to primary legislation, consistent with the arrangements for the powers of authorised complaints officers. Such changes will ensure matters which directly affect the rights, and liberties of persons are also expressly provided for in primary legislation.

In addition, to support these functions, it is relevant to take into account that the *Aged Care Act 1997* sets out the enforceable responsibilities of approved providers, in relation to which the Commissioner may resolve or deal with complaints (for example, in Parts 4.1, 4.2, 4.3), and accredit, review or monitor the provision of quality of care (for example, in sections 42-1; 42-4, and Part 4.3).

3 The minister responded to the committee's comments in a letter 4 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

> The *Aged Care Act 1997* also provides the functions and powers through which these responsibilities will be enforced (Part 4.4) by the Secretary of the Department. In light of this, the Bill and Rules will not generally confer the Commissioner with any powers to ultimately determine or give effect to these rights or responsibilities, they would be expected to only set out a means for reviewing decisions of the Commissioner, as is currently provided for in the *Quality Agency Principles 2013.*
>
> Consultation on rule making powers
>
> Additional consultation requirements, beyond those provided for under section 17 of the *Legislation Act 2003* have not been included in the Bill, since the rules will largely deal with operational matters, as noted above. The Department of Health has been working with the aged care sector on aged care reforms, including the co-design of the new Aged Care Quality Standards, and the Government is committed to continuing this manner of consultation.
>
> In relation to the initial Rules which will be made to commence on 1 January 2019, it is also relevant to note that the main content of these rules will broadly reflect the current *Quality Agency Principles 2013* and the *Complaints Principles 2015* and the *Quality Agency Reporting Principles 2013,* which will be replaced by the Rules. As noted in the explanatory statements for these Principles, relevant stakeholders were consulted on these Principles prior to their enactment.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the bills elevate certain matters of significance currently in delegated legislation into primary legislation, leaving operational matters related to the exercise of the Commissioner's functions to be prescribed by the rules.

2.5 The committee further notes the minister's advice that the *Aged Care Act 1997* (Aged Care Act) sets out the responsibilities of approved providers in relation to which the Commissioner may deal with complaints and accredit, review or monitor the provision of care, as well as the functions and powers through which these responsibilities may be enforced by the secretary. The committee further notes the minister's advice that the rules would not generally confer on the Commissioner any power to ultimately determine or give effect to rights or responsibilities; rather, the rules would be expected only to set out a means of reviewing decisions of the Commissioner.

2.6 The committee welcomes the inclusion in the bill of a number of significant matters from delegated to primary legislation. Nevertheless, the committee remains concerned that the bill would still leave a number of significant matters regarding the Commissioner's complaints and regulatory functions, to be prescribed by the rules, with no further guidance on the face of the bill as to how the rule making power is to be exercised. Further, and as outlined in its initial comments, the committee

considers that review rights in relation to the exercise of complaints and regulatory functions are significant matters that should also be included in primary legislation. The committee therefore remains concerned that it is left to the rules to set out the means by which decisions of the Commissioner may be reviewed.

2.7 The committee further notes the minister's advice that additional consultation requirements have not been included in the bill as the rules will largely deal with operational matters and the government is committed to continuing consultation. However, as the bill appears to leave a number of significant matters to delegated legislation, the committee reiterates its general view that, where the Parliament delegates its legislative power in relation to significant regulatory schemes, it is appropriate that specific consultation obligations (beyond those in section 17 of the Legislation Act) are included in the bill and that compliance with those obligations is a condition of the validity of the relevant legislative instrument.

2.8 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*).

2.9 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of leaving significant matters, such as complaints and regulatory functions, and review rights relating to those functions, to delegated legislation.

2.10 The committee also draws these matters to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Broad discretionary powers
Significant matters in delegated legislation
Privacy[4]

2.11 In *Scrutiny Digest 11 of 2018,*[5] in relation to subclause 56(1), the committee requested the minister's advice as to why it is necessary to allow additional circumstances in which the Commissioner must give information to the secretary to be specified in the rules.

2.12 In relation to paragraph 61(1)(a), the committee requested the minister's advice as to:

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4 Aged Care Quality and Safety Commission Bill 2018, clause 56, and proposed paragraphs 61(1)(a) and (j). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i), (ii), (iv) and (v).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2018*, at pp. 4-6.

- why it is necessary to grant the Commissioner a broad discretion to disclose protected information to any person and for any purpose, so long as the Commissioner considers it necessary in the public interest to do so; and
- why (at least high-level) rules or guidance about the exercise of this disclosure power cannot be included in the primary legislation.

2.13 In relation to paragraph 61(1)(j), the committee requested the minister's advice as to why it is considered necessary and appropriate to allow the rules to specify additional kinds of persons to whom protected information may be disclosed and the purposes for which such a disclosure may be made.

Minister's response[6]

2.14 The minister advised:

> Rules specifying disclosures to Secretary
>
> Rules specifying disclosures by the Commissioner to the Secretary are necessary given the Secretary will routinely require information acquired in the course of performing the Commissioner's functions, in order to carry out the Secretary's functions.
>
> This information is expected to include information relating to the Commissioner's accreditation and monitoring functions as contemplated under s 65-1A of the *Aged Care Act 1997* and in the current *Quality Agency Reporting Principles 2013* (which will be replaced by the Rules). The Commissioner would disclose this information to the Secretary, for the purposes of deciding whether an approved provider has complied, or is complying, with one or more of its responsibilities under Part 4.1, 4.2 or 4.3. The Secretary may impose sanctions under Part 4.4 if a provider fails to comply with its responsibilities. The need for this provision will be reviewed during the second stage of reform, when compliance functions of the Department are transferred to the Commission.
>
> Permitted disclosure on public interests grounds
>
> Clause 61(1)(a) of the Bill is intended to be based on provisions contained in Division 86 *Aged Care Act 1997* and Part 7 of the *Australian Aged Care Quality Agency Act 2013.* These provisions enable disclosures of protected information on similar terms to support the complementary functions of the CEO of the Quality Agency and the Secretary of the Department under the *Aged Care Act 1997.* Clause 61(1)(a) is therefore included in the Bill to maintain consistency with the *Aged Care Act 1997.*
>
> In addition, this broad discretion is appropriate as it will give the Commissioner the ability to disclose information in circumstances: where

6 The minister responded to the committee's comments in a letter 4 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

it will address particular risks to aged care consumers; or where it will benefit aged care providers and consumers as a whole; or which arise in relation to broader issues also affecting other areas outside the health portfolio, such as corporate governance or workplace relations. This is likely to become increasingly relevant with the insights of a single agency that has more comprehensive oversight of regulated activities.

It should be noted that any protected information that is disclosed under this provision may only include personal information (or any other protected information), where it is necessary for the public interest purpose, and will remain subject to these restrictions to prevent unrelated disclosures or disclosures for secondary purposes.

Rules to specify additional grounds for disclosure kinds of disclosures

The Bill provides for the Rules to specify additional circumstances in which disclosures of protected information may be authorised. This has been necessary to accommodate new legislation that is introduced which interacts with the *Aged Care Act 1997.* Principles made under corresponding provisions of the *Aged Care Act 1997* have been amended from time to time for this purpose. For example, the current *Information Principles 2014* enable the Secretary of the Department of Health to disclose information to the Repatriation Commission and to State and Territory authority responsible to fire safety, where the information relates to the functions of that organisation. Disclosures of this type ensure the seamless operation of related legislation related to safety, the payment of aged care subsidies, pensions and other Government payments.

The need for these provisions will also be reviewed in the second stage of reform, which will consider the information needs of the Commissioner in the context of the functions of the Commissioner as a whole from 1 January 2020, taking into account the level of executive scrutiny that is appropriate for such provisions and the views of the Committee.

Committee comment

2.15 The committee thanks the minister for this response. In relation to subclause 56(1), the committee notes the minister's advice that allowing the rules to specify the circumstances in which the Commissioner must give information (which is expected to include information relating to the Commissioner's accreditation and monitoring functions) to the secretary is necessary, as the secretary will routinely require such information in order to carry out the secretary's functions, including imposing sanctions if a provider fails to comply with its responsibilities.

2.16 In relation to paragraph 61(1)(a), the committee notes the minister's advice that the provision was included to maintain consistency with the Aged Care Act, and that the broad discretion is appropriate as it will allow the Commissioner to disclose information in order to manage risks and deliver benefits to aged care providers and consumers, as well as in circumstances related to areas outside the health portfolio.

The committee further notes the minister's advice that protected information disclosed under paragraph 61(1)(a) may only include personal information where it is necessary in the public interest, and that the information will remain subject to restrictions to prevent unrelated disclosures or disclosures for secondary purposes.

2.17 While noting this advice, the committee remains concerned that paragraph 61(1)(a) confers an extremely broad discretion to disclose protected information (which may include personal information) to *any* person, and for *any* purpose, so long as the Commissioner considers it in the public interest to do so. In this regard, the committee reiterates that the bill contains no requirement for the Commissioner to notify a person about whom information is to be disclosed, give the person an opportunity to make representations about the proposed disclosure, or to consider the impact that the disclosure may have on the person. The committee acknowledges the importance of addressing risks to aged care consumers. However, as noted in the committee's initial comments, paragraphs 61(1)(e) and 61(1)(h)(i), respectively, already allow the disclosure of information to prevent or lessen risks to aged care consumers and for the enforcement of the criminal law. The committee notes the minister's advice that disclosure may also be to 'benefit aged care providers and consumers as a whole' or in relation to broader issues which arise 'such as corporate governance or workplace relations'. However, it is unclear why, in such instances, identifiable personal information should be able to be disclosed, rather than de-identified information.

2.18 Finally, in relation to paragraph 61(1)(j), the committee notes the minister's advice that allowing rules to specify additional circumstances in which protected information may be disclosed has been necessary to accommodate new legislation which interacts with the Aged Care Act. In this regard, the committee notes the advice that disclosures of this type ensure the seamless operation of related legislation associated with safety, as well as the payment of aged care subsidies, pensions and other government payments. The committee further notes the minister's advice that the need for this provision will be reviewed in the second stage of reform, which will take into account the level of executive scrutiny that is appropriate for such provisions, as well as the views of the committee.

2.19 The committee appreciates the importance of responding effectively to legislative changes that affect the operation of the aged care regime. However, the committee notes that there is no limit on the persons to whom, or the purposes for which, personal information could be shared as set out in rules made under paragraph 61(1)(j). It remains unclear to the committee that other persons to whom information may be disclosed, and the permitted purposes for that disclosure, could not similarly be set out in primary legislation, with amendments made as necessary to take account of changes in legislation that interacts with the Aged Care Act (noting that any new legislation could be the vehicle to make the necessary amendments).

2.20 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*).

2.21 In relation to subclause 56(1) of the Aged Care Quality and Safety Commission Bill 2018, in light of the information provided the committee makes no further comment.

2.22 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of granting a broad discretionary power to disclose protected information, and to allow the rules to specify additional categories of persons and purposes for the disclosure of protected information, in paragraphs 61(1)(a) and (j) of the Aged Care Quality and Safety Commission Bill 2018.

2.23 The committee also draws these matters to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Reversal of evidential burden of proof[7]

2.24 In *Scrutiny Digest 11 of 2018*[8] the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclauses 60(3), (4) and 74(6).

Minister's response[9]

2.25 The minister advised:

> Consistent with Australian Government Policy - *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* - the primary reason a defendant bears an evidential burden in relation to the matters covered under subclauses 60(3) and 60(4) is because they are matters peculiarly within the knowledge of the defendant.
>
> Conduct which qualifies for exception under these subclauses, such as disclosures to specified persons, or disclosures made on the authority provided by the person or body to whom it relates, concern matters directly connected to the defendant's conduct. In particular, in circumstances where the excluded conduct is carried out in the course of

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7 Aged Care Quality and Safety Commission Bill 2018, subclauses 60(3) and (4), and 74(6). 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 11 of 2018*, at pp. 6-7.

9 The minister responded to the committee's comments in a letter 4 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

> performing functions or exercising powers under the new Act or Rules as per subclause 60(1), the defendant would, as a matter of course, be expected to maintain the appropriate records relating to the purpose of the record, use or disclosure of protected information, or authority which may have been obtained to record, use of disclose this information.
>
> Further, the matters dealt with under subclauses 60(3) and 60(4) are not central to the question of culpability for the offence under subclause 60(1), which also carries a relatively low penalty.
>
> In relation to the strict liability offences created for failing to return an identity card (subclauses 74(3) and (4)), the evidential burden is reversed given that the exceptions provided for (i.e. the loss or destruction of a card) are also matters peculiarly in the knowledge of the defendant. If the defendant is unable to return the card because it has been destroyed, that knowledge would be held by the defendant, or alternatively, if the card has been lost by the defendant, this is also a matter specifically within the defendant's knowledge, as per the other exception to the offence.
>
> In addition, these offences are also publishable [sic] by a relatively low penalty of one penalty unity and are not subject to a term of imprisonment.

Committee comment

2.26 The committee thanks the minister for this response. The committee notes the minister's advice that the matters in subclauses 60(3) and (4) would be peculiarly within the knowledge of the defendant. In this regard, the committee notes the advice that the relevant matters (for example, disclosures made to or on the authority of particular persons) are directly connected to the defendant's conduct, and the advice that the defendant would be expected to maintain appropriate records relating to the purpose of, and the authorisations given, in relation to the use, disclosure or recording of protected information. The committee further notes the minister's advice that the matters dealt with under subclauses 60(3) and (4) are not central to the question of culpability for the offence in subclause 60(1), which carries a relatively low penalty.

2.27 However, it is not apparent to the committee that each of the matters in subclauses 60(3) and (4) would be peculiarly within the knowledge of the defendant. For example, in relation to subclause 60(3), whether the recording, disclosure or use of protected information is authorised under particular legislation appears to be a largely factual matter. In relation to subclause 60(4), whether the disclosure of information is to the person or body to which the information relates, or to the minister or the secretary, appears to be a matter of which those persons would be particularly apprised.

2.28 The committee also notes that the *Guide to Framing Commonwealth Offences* states that creating an offence-specific defence may be more readily justified if relevant matters are not central to the question of culpability for the

offence, or if the relevant offence carries a relatively low penalty.[10] However, it appears that the matters in subclauses 60(3) and (4) would be central to culpability for the offence in subclause 60(1), noting that the substance of that offence relates to unauthorised disclosure. Moreover, the committee does not consider a custodial penalty of two years' imprisonment to be a 'low penalty'.

2.29 In relation to the reversal of the burden of proof in subclause 74(6), the committee notes the minister's advice that the matters in that provision (that is, whether an identity card has been lost or destroyed) are matters that are peculiarly within the defendant's knowledge. The committee also notes the minister's advice that the offences in subclauses 74(3) and (4), to which the defence in subclause 74(6) relates, are punishable by a relatively low penalty of one penalty unit, and are not subject to a term of imprisonment.

2.30 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*).

2.31 The committee draws its scrutiny concerns relating to the reversal of the evidential burden of proof in subclauses 60(3) and (4) of the Aged Care Quality and Safety Commission Bill 2018 to the attention of senators, and leaves to the Senate as a whole the appropriateness of reversing the burden of proof in relation to matters that do not appear to be peculiarly within the defendant's knowledge.

2.32 In light of the information provided by the minister, the committee makes no further comment on the reversal of the evidential burden of proof in subclause 74(6) of the Aged Care Quality and Safety Commission Bill 2018.

Broad delegation of administrative powers[11]

In *Scrutiny Digest 11 of 2018*[12] the committee considered it may be appropriate to:

- amend clause 76 of the Aged Care Quality and Safety Commission Bill 2018 to require that the Commissioner be satisfied that persons performing

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

11 Aged Care Quality and Safety Commission Bill 2018, subclause 76(1), and Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018, Schedule 1, item 19. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

12 Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2018*, at pp. 8-9.

delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated; and

- amend item 19 of Schedule 1 of the Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018 to require that the Commissioner be satisfied that persons performing sub-delegated functions and exercising sub-delegated powers have the expertise appropriate to the function or power sub-delegated.

Minister's response[13]

2.33 The minister advised:

> This provision is consistent with the powers of the current Aged Care Complaints Commissioner, and this flexibility has been retained to ensure operational efficiency is maintained for the Commissioner. It is also relevant to note, that the matters dealt with in the Rules will to a large extent include routine matters of operation, as mentioned above.
>
> Additionally, consistent with their general duties, I would expect the Commissioner to take into account not only the expertise of staff but also other appropriate factors, in delegating his or her functions under the Bill or *Aged Care Act 1997.*
>
> For example, the Commissioner should also consider the broader governance structure which will best serve the Commission's purpose of establishing a single agency that consolidates functions and makes best use of information and resources to identify and respond to regulatory risks.
>
> I thank the Committee for its consideration of this matter and note the recommendation put forward for the Senate's consideration. However, for the reasons outlined above, the Government's view is that the provisions of the Bill are appropriate and further refinements can be considered as part of the second stage of reforms to the powers and functions of the Commissioner.

Committee comment

2.34 The committee thanks the minister for this response. The committee notes the minister's advice that the powers of delegation under the bills are consistent with the powers of the current Aged Care Complaints Commissioner, and that these powers have been retained in order to maintain operational flexibility. The committee also notes the minister's advice that the Commissioner would be expected to take into account the expertise of staff, as well as other appropriate factors, in delegating his or her functions under the bill or the Aged Care Act.

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13 The minister responded to the committee's comments in a letter 4 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

2.35 The committee further notes the minister's advice that, for the reasons outlined above, the government's view is that the relevant provisions of the bills (that is, the powers of delegation) are appropriate, and the advice that further refinements can be considered as part of the second stage of reforms to the powers and functions of the Commissioner.

2.36 While noting this advice, the committee reiterates that it has not generally considered administrative or operational flexibility, or consistency with existing legislation, to be sufficient justification for allowing a broad delegation of administrative powers to officials at any level. Noting that it is intended for the Commissioner to take into account the expertise of staff, and other appropriate matters, when delegating powers and functions, it remains unclear to the committee why the bill could not include a requirement that the Commissioner be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.

2.37 As outlined its initial comments, the committee considers it may be appropriate to:

- **amend clause 76 of the Aged Care Quality and Safety Commission Bill 2018 to require that the Commissioner be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated; and**
- **amend item 19 of Schedule 1 of the Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018 to require that the Commissioner be satisfied that persons performing sub-delegated functions and exercising sub-delegated powers have the expertise appropriate to the function or power sub-delegated.**

2.38 The committee otherwise reiterates its initial scrutiny concerns, and leaves to the Senate as a whole the appropriateness of allowing the delegation and sub-delegation of administrative powers to a broad range of staff members of the Commission.

Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

Purpose	This bill seeks to amend the *Crimes Act 1914* to allow constables and protective service officers to: • direct a person to produce evidence of their identity; • direct a person to leave airport premises and/or not take a specified flight or any flight, for up to 24 hours; and • direct a person to stop or do anything else necessary to facilitate an identity check or move-on direction
Portfolio	Home Affairs
Introduced	House of Representatives on 12 September 2018
Bill status	Before the House of Representatives

Trespass on personal rights and liberties[14]

2.39 In *Scrutiny Digest 11 of 2018*[15] the committee requested the minister's advice as to:

- the circumstances in which it is envisaged the powers in proposed sections 3UN, 3UO and 3UQ (identification, stop and move-on directions powers) would be exercised to ensure the 'good order' of an airport, its premises, and flights, and the need for such powers; and
- whether these circumstances would extend beyond ensuring safety or disrupting or preventing criminal activity; in particular, whether the powers may be exercised to disrupt or quell a peaceful protest.

Minister's response[16]

2.40 The minister advised:

> Circumstances where proposed powers may be exercised
>
> Airports, and the aviation network more broadly, are known targets for terrorists and for serious and organised crime groups seeking to expand

14 Schedule 1, items 2 and 5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2018*, at pp. 13-15.

16 The minister responded to the committee's comments in a letter 8 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

their operations in activities such as illicit drug trafficking, both within Australia and abroad. The Crimes Legislation Amendment (Police Powers at Airports) Bill 2018 (the Bill) will address these risks by giving police broader powers to assess and disrupt potential criminal activity and threats to aviation security, and identify the individuals involved. The powers proposed in the Bill provide a consistent approach across Australia's major airports, with the agility to address circumstances which current police powers within airports do not.

For example, police intelligence or observations may indicate that a person is behaving suspiciously in the airport - such as a person taking photos or videos of security screening points. The proposed powers under 3UN, 3UO and 3UQ will allow police to direct a person to stop, request the identification of individuals involved and, where appropriate, direct the individual to move on from the airport environment, immediately disrupting their activities, and allowing time for further investigations to occur. Under the current framework, police are unable to request the identification of persons engaging in suspicious conduct at airports without a reasonable suspicion that an offence has been, is being, or will be committed.

These powers will ensure police can respond to serious threats that arise in the aviation environment in a more tailored and proportionate way. For example, police may issue a move-on direction to exclude known members of an Outlaw Motorcycle Gang (OMCG) from the arrivals hall of an airport for a period of two hours, in circumstances where police have intelligence about an incoming flight carrying rival gang members. In such a situation, police are unlikely to meet the threshold of reasonable suspicion that a crime will be committed, but there is a strong possibility that there may be a disruption to the good order of the airport, which can be prevented by directing the OMCG members to move on from the airport premises.

Police will not be able to use the proposed powers to disrupt or quell a peaceful protest, as a peaceful protest would not pose a threat to aviation security, including the good order and safe operation of the airport, or involve the commission of a serious criminal offence.

Further explanation of the definition of aviation security

Section 3UL of the Bill inserts a definition for the term *aviation security.* For the purposes of Division 38, *aviation security* includes the good order and safe operation of a major airport and its premises, and flights to and from a major airport.

The definition of *aviation security,* and the inclusion of the term 'good order', is designed to ensure that *aviation security* is interpreted in accordance with its ordinary meaning, and captures a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct). Threats to *aviation security,* in this context will extend to a range of conduct, such as

acts of terrorism, drug trafficking, violent behaviour, extortion, or any other activity that is disruptive to, or risks the safety of, the public and the airport. As outlined above, the Bill does not give police the ability to use the new powers to disrupt or quell a peaceful protest.

Safeguards against misuse of powers

It is also important to note that there are various safeguards on the use of the proposed powers, including those prescribed in the Bill, and those arising from other Commonwealth, State and Territory legislation, as well as the policies, procedures and specialist training of the Australian Federal Police (AFP).

For example, the Bill includes a requirement for a senior police officer to authorise a move-on direction that excludes a person for more than twelve hours or a subsequent direction within seven days, and a restriction on more than two move-on directions in relation to the same person within a seven day period. Further, as prescribed by the Bill, police will be required to issue a written move-on direction which details a person's exclusion from any or specified flights and/or airports.

The most important safeguard built into the Bill is that, to issue a direction, police must consider that there are reasonable grounds for doing so which are linked to criminal activity or aviation security. This 'reasonable grounds' requirement ensures that directions are based on actionable observations or intelligence relevant to aviation security or criminal conduct.

Commonwealth officers exercising these powers are also bound by Commonwealth anti-discrimination legislation, such as the *Privacy Act 1998,* the *Racial Discrimination Act 1975,* the *Sex Discrimination Act 1984,* the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004.* State and Territory police officers are also bound by similar legislation within their own jurisdictions.

Finally, the policies, procedures and specialist training of the AFP will ensure that the proposed identity checking, stop and move-on directions are properly exercised, and that each use of the powers is recorded appropriately. Members of the AFP are appropriately trained in Behavioural Assessment and Security Questioning to identify known behavioural traits displayed by people who are about to commit a criminal act, and to ask targeted questions of persons of interest, without prejudice or discrimination.

Police officers are also bound by professional standards that preclude them from using their powers in a discriminatory fashion. The AFP Code of Conduct, for example, requires all AFP appointees to act without discrimination or harassment in the course of AFP duties. A breach of this Code may lead to disciplinary action, including termination.

Committee comment

2.41 The committee thanks the minister for this response. The committee notes the minister's advice that under the current framework, police are unable to request the identification of persons engaging in suspicious conduct at airports without a reasonable suspicion that an offence has been, is being, or will be, committed, and that the proposed powers will ensure that police can respond to serious threats that arise in the aviation environment in a more tailored and proportionate way.

2.42 The committee further notes the minister's advice that the inclusion of the term 'good order' in the definition of 'aviation security' is designed to ensure that 'aviation security' is interpreted in accordance with its ordinary meaning, and captures a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct). The committee welcomes the advice that a peaceful protest would not be considered a threat to aviation security, and consequently the AFP would not be able to use the new powers to disrupt or quell a peaceful protest.

2.43 Finally, the committee notes the minister's advice that there are various safeguards in place in relation to the proposed powers, including statutory safeguards under the bill and other legislation, and the policies, procedures and specialist training of the AFP. The committee notes the advice that the powers to issue directions would be subject to a requirement that the relevant officer consider that there are 'reasonable grounds' for doing so which are linked to criminal activity or aviation security, which will ensure that directions are based on actionable observations or intelligence related to aviation security or criminal conduct.

2.44 While noting this advice, the committee remains concerned that the bill would confer on the AFP broad powers to direct persons to produce identity documents, vacate airports and related premises, and abstain from taking flights, in circumstances where there is no suspicion of criminal activity and no identified threat to safety. In this regard, the committee notes that while the minister's response indicates that 'aviation security' is intended to capture behaviours that pose a risk to others in the aviation environment, there is nothing on the face of the bill that would limit the exercise of the powers in proposed sections 3UN, 3UO and 3UQ to situations where criminal activity or a threat to safety is identified, particularly given that 'aviation security' includes the 'good order' of the airport and flights.

2.45 The committee welcomes the advice that the bill does not give police the ability to use the new powers to disrupt or quell a peaceful protest. However, noting that the powers in proposed sections 3UN, 3UO and 3UQ would allow the AFP to give directions to safeguard the 'good order' of an airport, the committee considers, for the sake of certainty, it would be appropriate to make it clear on the face of the bill that such powers may not be used to disrupt or quell a peaceful protest.

2.46 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*).

2.47 The committee considers, in line with the minister's advice that the bill does not give police the ability to use the new powers to disrupt or quell a peaceful protest, that it would be appropriate for the bill to be amended to provide that proposed Division 3B does not give a constable or protective service officer the power to disrupt or quell a peaceful protest at a major airport or its premises or on flights to and from a major airport.

2.48 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of conferring on the Australian Federal Police broad powers to direct persons to produce identity documents, vacate airports and related premises, and abstain from taking particular flights, to ensure the 'good order' of an airport.

Federal Circuit and Family Court of Australia Bill 2018

Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018

Purpose	The Federal Circuit and Family Court of Australia Bill 2018 seeks to bring the Family Court of Australia and the Federal Circuit Court of Australia together into an overarching, unified administrative structure to be known as the Federal Circuit and Family Court of Australia[17] The Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 seeks to make the necessary amendments to other Commonwealth Acts and Regulations affected by the passage of the Federal Circuit and Family Court of Australia Bill 2018
Portfolio	Attorney-General
Introduced	House of Representatives on 23 August 2018
Bill status	Before the House of Representatives

Broad delegation of administrative powers[18]

2.49 In *Scrutiny Digest 10 of 2018*[19] the committee requested the Attorney-General's advice as to :

- the persons or bodies it is envisaged the Chief Justice and Chief Judge may authorise to handle complaints under subclauses 32(2) and 113(2) of the Federal Circuit and Family Court of Australia Bill 2018 (Principal bill), and
- the appropriateness of amending the Principal bill to require that, when authorising a person or body to handle complaints, the Chief Justice or Chief Judge be satisfied the person or body has the expertise appropriate to this role.

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17 This bill also contains a standing appropriation under clause 96. The significance of standing appropriations from a scrutiny perspective, and the committee's approach to such provisions, are explained in chapter 3.

18 Subclauses 32(2) and 113(2) of the Federal Circuit and Family Court of Australia Bill 2018. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2018*, at pp. 1-4.

Attorney-General's response[20]

2.50 The Attorney-General advised:

> The Committee has queried the persons or bodies that the Chief Justice and the Chief Judge may authorise to handle complaints under clauses 32 and 113 of the main Bill, and asked whether it is appropriate that the legislation provide that the Chief Justice or Chief Judge be satisfied the person or body has the expertise appropriate to the role. These clauses and the relevant subclauses reflect existing provisions in the FLA (sections 21B (1B) and (3A)), the FCCA Act (sections 12(3AA) and (3AB)) as well as in the FCA Act (sections 15(1AAA) and (1AAB)).
>
> The Federal Court, the Family Court and the Federal Circuit Court all employ a consistent practice in relation to the authorisation of persons or bodies to handle complaints. In each Court, the respective Chief Justice or Chief Judge has authorised the Deputy Principal Registrar of that Court to assist with the handling of complaints against judges of that Court. In the Family Court, the Chief Justice has also authorised the Deputy Chief Justice to assist with the handling of complaints. The Deputy Principal Registrars are legally qualified, experienced and occupy Senior Executive positions. Each Court has complaint handling strategies, which include the escalation of complaints to the Chief Justice or Deputy Chief Justice, as appropriate.
>
> In the FCFC, I anticipate that the persons authorised to handle complaints would continue to be limited to the Deputy Principal Registrars and the Deputy Chief Justice of the FCFC (Division 1), and would also likely include the Deputy Chief Judge of the FCFC (Division 2). However, and as outlined in the Explanatory Memorandum to the main Bill, having a broad delegation power will allow flexibility in the complaint handling process, which may involve a wide variety of circumstances.
>
> Given that no substantive issues have been raised by the Committee in relation to the current operation of the existing provisions, I am of the view that it is not necessary to make amendments to the main Bill. If it would assist in explaining the operation of clauses 32 and 113 of the main Bill, the Explanatory Memorandum to the main Bill could be amended to provide further clarity about the types of persons who may be authorised to handle complaints.

Committee comment

2.51 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that he anticipates that persons authorised to handle complaints would be limited to Deputy Principal Registrars and the Deputy Chief Justice of the Federal Circuit and Family Court (FCFC) (Division 1),

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20 The Attorney-General responded to the committee's comments in a letter 4 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

and the Deputy Chief Judge of the FCFC (Division 2), and the advice that Deputy Principal Registrars are legally qualified, experienced, and occupy senior executive positions. The committee also notes the Attorney-General's advice that having a broad power of delegation will allow flexibility in the complaints-handling process, which may involve a wide variety of circumstances.

2.52 The committee further notes the Attorney-General's view that it is not necessary to amend the Principal bill, and his offer to amend the explanatory memorandum to provide further clarity about the types of persons who may be authorised to handle complaints.

2.53 While noting this advice, the committee reiterates that it has generally not accepted administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers, with no specificity as to the qualifications or attributes that delegates must possess. In this regard, the committee remains concerned that while it may be intended only to authorise appropriately qualified senior executive and judicial officers to handle complaints, there does not appear to be anything on the face of the Principal bill requiring that only such persons be authorised. There also does not appear to be anything in the bill that would require that persons authorised to handle complaints possess appropriate expertise.

2.54 The committee considers that it would be appropriate for the Federal Circuit and Family Court of Australia Bill 2018 to be amended to require the Chief Justice (Division 1) and the Chief Judge (Division 2) of the Federal Circuit and Family Court to be satisfied that persons authorised to handle complaints possess appropriate expertise.

2.55 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum to the Federal Circuit and Family Court of Australia Bill 2018, 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*).

2.56 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the Chief Justice (Division 1) and the Chief Judge (Division 2) of the Federal Circuit and Family Court to authorise 'a person or body' to handle complaints, with no requirements as to the person's or body's expertise.

Broad delegation of administrative powers[21]

2.57 In *Scrutiny Digest 10 of 2018*[22] the committee requested the Attorney-General's advice as to :

- why it is necessary to allow the Sheriff or a Deputy Sheriff, and the Marshal or a Deputy Marshal, of both the Federal Circuit and Family Court and the Federal Court to authorise 'any person' to assist in the exercise of powers and performance of functions; and
- whether it would be appropriate to amend the bills to require that any person assisting have the expertise appropriate to the function or power being carried out.

Attorney-General's response[23]

2.58 The Attorney-General advised:

> The Committee has queried the rationale underpinning clauses 72, 234 and 235 of the main Bill and proposed sections 18PB and 18PE of the FCA Act, and the appropriateness of confining the powers in those provisions to persons with expertise appropriate to the function or power being carried out.
>
> These provisions would allow the Sheriff, the Deputy Sheriff, the Marshal and the Deputy Marshal of the FCFC (Division 1), the FCFC (Division 2) and the Federal Court to authorise any person to assist in exercising powers or performing functions. These provisions are modelled on existing provisions in the FLA (section 38P(4)), the FCCA Act (sections 108 and 111) and the FCA Act (section 18P(4)).
>
> Those persons currently authorised to provide such assistance within the Family Court, the Federal Circuit Court and the Federal Court are State and Territory Sheriff's officers. These officers execute the Courts' orders in relation to civil enforcement matters. As such, they execute civil enforcement warrants to seize and sell property or take vacant possession of property in strict accordance with the order issued by the respective Court. State and Territory Sheriff's officers perform the same duties in relation to enforcement orders issued by State and Territory Courts, are

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21 Clauses 72, 234 and 235 of the Federal Circuit and Family Court of Australia Bill 2018, and Schedule 1, item 208, proposed sections 18PB and 18PE of the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2018*, at pp. 1-4.

23 The Attorney-General responded to the committee's comments in a letter 4 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

> trained in accordance with State and Territory requirements and are generally uniformed and carry photo identity cards. Where violence is anticipated, authorised officers seek assistance of local police and do not arrest people in connection with this type of process.
>
> It is essential that there is provision for such authorisation. State and Territory Sheriff's officers assist the federal courts, which do not have personnel with the necessary training and powers to undertake such duties. In the FCFC and the Federal Court, the persons authorised under the provisions would continue to be limited to State and Territory Sheriff's officers.
>
> Given that no substantive issues have been raised by the Committee in relation to the current operation of the existing provisions, I am of the view that it is not necessary to make amendments to the proposed clauses and provisions of the main Bill and consequential Bill. However, if it would assist in explaining the operation of the proposed clauses and provisions, the Explanatory Memorandums accompanying the Bills could be amended to provide further clarity on the types of persons who may be authorised under the relevant provisions.

Committee comment

2.59 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the persons authorised to assist the Sheriff, Deputy Sheriff, Marshall or Deputy Marshall of the FCFC or the Federal Court would be limited to State and Territory Sheriff's officers. The committee notes the advice that these officers are trained in accordance with State and Territory requirements, are generally uniformed and carry identity cards. The committee also notes the Attorney-General's advice that it is essential that there is provision to authorise State and Territory Sheriff's officers to assist officers of the federal courts, as these courts do not have personnel with the necessary training and powers to perform the relevant functions.

2.60 The committee further notes the Attorney-General's view that it is not necessary to amend either the Principal bill or the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018, and his offer to amend the explanatory memoranda accompanying the bills to provide further clarity about the types of persons who may be authorised to assist officers of the federal courts in performing their functions.

2.61 The committee appreciates that it may be necessary to authorise State and Territory Sheriff's officers to assist officers of the federal courts. However, the committee notes that the Attorney-General's response does not address why it is necessary or appropriate to authorise 'any person' to provide assistance. In this regard, the committee is also concerned that while it may be intended only to authorise State and Territory Sheriff's officers to assist officers of the federal courts in the performance of their functions, there does not appear to be anything on the face of the bills requiring that only such persons be authorised. There also does not

appear to be anything in the bills that would require that persons authorised to assist federal court officers possess appropriate expertise.

2.62 As outlined in its initial comments on the bills, the committee's concerns in this regard are heightened by the fact that persons authorised to assist officers of the federal courts may participate in the exercise of relatively significant coercive powers, including powers of arrest, search and entry.

2.63 The committee considers that it would be appropriate for the bills to be amended to require that the Sheriff, Deputy Sheriff, Marshall or Deputy Marshall of the Federal Circuit and Family Court and the Federal Court to be satisfied that persons authorised to assist those officers in the performance of their functions possess appropriate expertise.

2.64 The committee requests that the key information provided by the Attorney-General be included in the explanatory memoranda, noting the importance of these documents 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 otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the Sheriff, Deputy Sheriff, Marshall or Deputy Marshall of both the Federal Circuit and Family Court and the Federal Court to authorise 'any person' to assist in the performance of those officers' functions, with no requirements as to the person's expertise.

Chapter 3

Scrutiny of standing appropriations

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

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.[1] It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

> (iv) inappropriately delegate legislative powers; or
>
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[2]

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

Senator John Williams
Acting Chair

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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*.