

The Senate

---

Standing  
Committee for the  
Scrutiny of Bills

---

Scrutiny Digest 1 of 2019

13 February 2019

© Commonwealth of Australia 2019

ISSN 2207-2004 (print)

ISSN 2207-2012 (online)

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

# Membership of the Committee

## Current members

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

## Secretariat

Ms Anita Coles, Secretary  
Ms Alexandra Logan, Principal Research Officer  
Mr Andrew McIntyre, Senior Research Officer  
Ms Ingrid Zappe, Legislative Research Officer

## Committee legal adviser

Associate Professor Leighton McDonald

## Committee contacts

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Phone: 02 6277 3050  
Email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny)



# TABLE OF CONTENTS

<b>Membership of the committee</b> .....	iii
<b>Introduction</b> .....	vii
<b>Chapter 1 – Initial scrutiny</b>	
<b>Commentary on bills</b>	
Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018.....	1
Defence Legislation Amendment Bill 2018.....	8
International Human Rights and Corruption (Magnitsky Sanctions) Bill 2018 .....	10
National Integrity (Parliamentary Standards) Bill 2018.....	11
Sex Discrimination and Marriage Legislation Amendment (Protecting Supporters of Traditional Marriage) Bill 2018 .....	17
Social Security Commission Bill 2018 (No. 2).....	19
Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018.....	20
<b>No comment on bills</b> .....	22
Aboriginal Land Rights (Northern Territory) Amendment (Land Scheduling) Bill 2018	
Coal-Fired Power Funding Prohibition Bill 2018	
Environment Protection and Biodiversity Conservation Amendment (Heritage Listing for the Bight) Bill 2018	
Galilee Basin (Coal Prohibition) Bill 2018	
Live Animal Export Prohibition (Ending Cruelty) Bill 2018	
Live Sheep Long Haul Export Prohibition Bill 2018 [No. 2]	
Major Sporting Events (Indicia and Images) Protection Amendment Bill 2018	
Migration Amendment (Urgent Medical Treatment) Bill 2018	
Offshore Petroleum and Greenhouse Gas Storage Amendment (Regulation References) Bill 2018	
Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Regulations References) Bill 2018	
Parliamentary Service Amendment (Post-election Report) Bill 2018	
Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 [No. 2]	
Tertiary Education Quality and Standards Agency Amendment Bill 2018	

---

<b>Commentary on amendments and explanatory materials</b>	
Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018.....	23
<b>Chapter 2 – Commentary on ministerial responses</b>	
Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 .....	25
Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018.....	32
Future Drought Fund Bill 2018.....	36
Intelligence Services Amendment Bill 2018 .....	51
Migration Amendment (Streamlining Visa Processing) Bill 2018.....	57
Social Services and Other Legislation Amendment (Supporting Retirement Incomes) Bill 2018.....	62
Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2018.....	65
<b>Chapter 3 – Scrutiny of standing appropriations .....</b>	<b>67</b>

# 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 (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018**

<b>Purpose</b>	<p>This bill seeks to amend the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (the Act) to:</p> <ul style="list-style-type: none"> <li>• amend the classification structure for Aboriginal and Torres Strait Islander (ATSI) corporations;</li> <li>• make a number of changes in relation to corporations recognised under the Act regarding: <ul style="list-style-type: none"> <li>- making of constitutions;</li> <li>- review of financial reports;</li> <li>- subsidiaries and other entities;</li> <li>- meeting and reporting obligations;</li> <li>- members and membership;</li> <li>- voluntary deregistration;</li> <li>- investigation and enforcement;</li> <li>- publication of notices;</li> <li>- independent directors;</li> <li>- qualified privilege for auditors;</li> <li>- resolutions;</li> <li>- unanimous requests for special administration;</li> <li>- conflicting duties under state or territory legislation; and</li> </ul> </li> <li>• make technical amendments</li> </ul>
<b>Portfolio</b>	Indigenous Affairs
<b>Introduced</b>	Senate on 5 December 2018

## Significant matters in delegated legislation<sup>1</sup>

1.2 Item 1 of Schedule 1 seeks to repeal and replace section 37-10 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) to provide that:

- an Aboriginal and Torres Strait Islander (ATSI) corporation is a small corporation for a financial year if its consolidated revenue is less than the amount prescribed by the regulations;
- an ATSI corporation is a medium corporation for a financial year if it is not a small corporation, and its consolidated revenue is less than the amount prescribed by the regulations; and
- an ATSI corporation is a large corporation for a financial year if it is neither a small corporation nor a medium corporation.

1.3 The size of an ATSI corporation appears to determine a number of matters under the CATSI Act, such as reporting obligations and governance requirements. In this respect, it appears that the size of an ATSI corporation is a significant element of the regulatory regime administered under the CATSI Act.

1.4 The committee's view is that significant matters, such as revenue thresholds for an ATSI corporation to be designated a corporation of a particular size, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states that:

The thresholds for the revenue test will be prescribed in the regulations so that classifications, and the related annual reporting obligations, can be adjusted appropriately to reflect changes in the broader economic and regulatory environment.<sup>2</sup>

1.5 While noting this explanation, the committee emphasises that it does not generally consider operational flexibility to be sufficient justification for leaving significant elements of a regulatory scheme to delegated legislation. In this regard, the committee notes that the bill provides no guidance at all on what will constitute a small or medium corporation.

1.6 In addition, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that no such consultation requirements are currently set out in the bill. The explanatory

---

1 Item 1, Schedule 1, proposed section 37-10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Explanatory memorandum, p. 7.



materials also do not appear to provide any information regarding the nature of any consultation that would be undertaken before making an instrument the revenue thresholds that would determine if an ATSI corporation is small, medium or large.

**1.7 The committee requests the minister's advice as to:**

- **why it is considered appropriate to leave to delegated legislation the revenue thresholds that would determine whether an Aboriginal and Torres Strait Islander corporation is of a particular size; and**
- **the nature of any consultation that it is envisaged would be undertaken prior to making regulations of that nature.**

**1.8 The committee also requests the minister's advice as to the appropriateness of amending the bill to include specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*), with compliance with those obligations a condition of the validity of regulations which specify revenue thresholds for Aboriginal and Torres Strait Islander corporations.**

---

**Power for delegated legislation to amend primary legislation (Henry VIII clause)<sup>3</sup>**

1.9 Proposed section 66-5 provides for the circumstances in which a provision of an ATSI corporation's constitution may modify or replace a replaceable rule.<sup>4</sup> Proposed subsections 66-5(3) and (4) seek to allow regulations to modify proposed section 66-5, including to provide for further situations in which the internal governance rules of an ATSI corporation may modify or replace a replaceable rule. Proposed subsections 66-5(3) and (4) would therefore appear to allow delegated legislation to modify the operation of primary legislation.

1.10 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 parent statute). The committee has significant concerns with Henry VIII-type clauses, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive. Consequently, the committee expects a sound justification in the explanatory materials for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

---

3 Schedule 1, item 33, proposed subsections 66-5(3) and (4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

4 Section 60-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* provides that 'replaceable rules' are provisions of that Act whose heading contains the words 'replaceable rule—see section 61'. Section 60-5 provides that a replaceable rule that applies to an ATSI corporation may be modified or replaced by the corporation's constitution.

1.11 In this instance, the explanatory memorandum states that:

Subsections 66-5(3) and (4) provide that regulations may be made that prescribe further matters to be covered in the replaceable rules, which reflects the current subsections 66-5(4) and (5). This will allow greater flexibility and responsiveness in meeting the needs of CATSI corporations by ensuring that the replaceable rules and their application remain relevant and effective in the future, taking into account that CATSI corporations can modify or replace replaceable rules.<sup>5</sup>

1.12 The committee acknowledges that it may be intended to use proposed subsections 66-5(3) and (4) to expand the matters to be covered by the replaceable rules. However, the committee is concerned that proposed subsection 66-5(3) does not appear to be limited in this manner, rather it simply states that the regulations may modify the section in the Act.

1.13 In this respect, the committee notes that the explanatory memorandum does not provide any specific justification for the inclusion of a Henry VIII-type clause in proposed subsection 66-5(3). The committee also emphasises that it does not generally consider operational flexibility, or consistency with existing provisions, to be sufficient justification for the conferral of broad powers for delegated legislation to modify the operation of primary legislation.

**1.14 As the explanatory materials do not sufficiently address this issue, the committee requests the minister's advice as to why it is considered necessary and appropriate to allow regulations to modify proposed section 66-5.**

---

### **Privilege against self-incrimination<sup>6</sup>**

1.15 Proposed sections 453-2, 453-3 and 453-4 would allow the Registrar, by written notice, to:

- require an ATSI corporation, a person representing an ATSI corporation, or a person in possession of relevant books, to produce specified books relating to the corporation's affairs;
- require a person who fails to produce such books to state where the books may be found, to identify the person who was last in possession, custody or control of the books, and to state where that person may be found; and
- require a person to identify property belonging to an ATSI corporation, and explain how the corporation has kept account of that property.

---

5 Explanatory memorandum, p. 13.

6 Schedule 1, item 214, proposed sections 453-2, 453-3 and 453-4. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.16 Existing section 461-15 of the CATSI Act provides that it is not an excuse for a person to give information or to produce a book, in accordance with a requirement made of a person, on the grounds that to do so might tend to incriminate the person or make the person liable to a penalty. This provision overrides the common-law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material that may tend to incriminate himself or herself.<sup>7</sup> The amendments proposed by the bill (outlined above) would expand the information and documents to which the abrogation of the privilege against self-incrimination would apply.

1.17 The committee recognises that there may be circumstances in which the privilege against self-incrimination may be overridden. However, abrogating this privilege represents a serious loss of personal liberty. Consequently, in considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs any loss of personal liberty.

1.18 In this instance, the explanatory memorandum states that a justification for abrogating the privilege against self-incrimination is set out in the revised explanatory memorandum to the Corporations (Aboriginal and Torres Strait Islander Bill) 2006 (2006 EM). An extract from the 2006 EM is reproduced in the statement of compatibility to the present bill.<sup>8</sup> This extract provides some explanation of why it was not considered necessary to provide for certain immunities (discussed further below). However, it does appear to explain why it was considered necessary or appropriate to abrogate the privilege against self-incrimination.

1.19 The committee notes that a 'use' immunity appears in subsection 461-15(3) of the CATSI Act. That subsection provides that oral statements given in accordance with a requirement under Part 10-3 or 10-4 (which would include proposed sections 453-2, 453-3 and 453-4) are not admissible in evidence against the person making the statement in criminal proceedings or proceedings for the imposition of a penalty. However, this immunity would only apply in circumstances where a person claims that the statement might tend to incriminate them. Further, the 'use' immunity would not apply to the production of documents.

1.20 The committee also notes neither the CATSI Act nor the bill contain a 'derivative use' immunity in relation to a statement or a document given in accordance with proposed sections 453-2, 453-3 or 453-4. This means that further information obtained as an indirect consequence of giving the statement or document may still be admissible in evidence.

---

7 See *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

8 Statement of compatibility, p. 56.

1.21 In relation to the limited immunities in the CATSI Act, the 2006 EM states:

Proposed section 461-15 is based on section 68 of the ASIC Act, which also restricts the provision of derivative use immunity and provides use immunity for answers to questions, not for documents produced. The enactment of more limited immunities for ASIC and APRA followed extensive inquiries and empirical research into the particular difficulties of corporate regulation...It was accepted that a full 'use' and 'derivative use' immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences. In light of the Registrar's similar role as a corporate regulator, a limited immunity is also justified here.<sup>9</sup>

1.22 The committee notes the view that providing full 'use' and 'derivative' use immunities would fetter the investigation and prosecution of corporate misconduct offences relating to ATSI corporations. However, the committee remains concerned that the bill would expand the types of information and documents that may be affected by the abrogation of the privilege against self-incrimination, including in circumstances where 'use' and 'derivative use' immunities are not available. The committee also notes that it does not generally consider consistency with existing legislation to be sufficient justification for abrogating the privilege against self-incrimination.

**1.23 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of expanding the requirement to produce information and documents in a context where the privilege against self-incrimination is abrogated.**

---

### Immunity from liability<sup>10</sup>

1.24 Proposed section 610-1 seeks to confer a 'qualified privilege' on an auditor of an ATSI corporation, in respect of a statement made, a report prepared, or a notification given in the course of the auditor's duties. This privilege would also extend to persons representing an auditor at the AGM of an ATSI corporation, and to persons who publish an auditor's statement or report.

1.25 Proposed section 694-120 defines 'qualified privilege'. The section provides that, where a person has qualified privilege in respect of an act, matter or thing, the person, as the case requires:

- has qualified privilege in proceedings for defamation; or

---

9 Statement of compatibility, p. 56.

10 Schedule 1, items 246 and 247, proposed sections 610-1 and 694-120. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

- is not, in the absence of malice on the person's part, liable to an action for defamation at the suit of another person.

1.26 In some cases, these provisions would remove the common law right to bring an action in defamation in respect of the conduct of an auditor or an associated person, unless it can be shown that the relevant person acted with malice. In this respect, the committee notes that, in the context of judicial review, the courts have taken the view that bad faith can only be shown in very limited circumstances. The committee considers that malice on the part of an auditor or associated person may be similarly difficult to establish.

1.27 The committee expects that, if a bill seeks to confer immunity from liability, particularly where such immunity could affect individual rights, this should be soundly justified in the explanatory materials. In this instance, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.<sup>11</sup>

**1.28 The committee requests the minister's advice as to why it is considered necessary and appropriate to confer immunity from liability (that is, a qualified privilege) on auditors and associated persons, in respect of things done in the course of their duties.**

---

11 Explanatory memorandum, p. 44.

## Defence Legislation Amendment Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend the <i>Defence Force Discipline Act 1982</i> (the DFDA Act) and the <i>Defence Reserve Service (Protection) Act 2001</i> (the DRS(P) Act) to:</p> <ul style="list-style-type: none"> <li>• make changes to the DFDA Act in relation to the selection, remuneration and termination of members of the Judge Advocates' Panel;</li> <li>• move the complaint, investigation and mediation scheme from regulations into the DRS(P) Act; and</li> <li>• make a number of minor and technical amendments to the DFDA Act</li> </ul>
<b>Portfolio</b>	Defence
<b>Introduced</b>	House of Representatives on 5 December 2018

### Inclusion of complaints scheme in primary legislation

1.29 Schedule 2 of the bill seeks to move the complaints and mediation scheme that is currently established under the Defence Reserve Service (Protection) Regulations 2001 to the *Defence Reserve Service (Protection) Act 2001*. In [Scrutiny Digest 5 of 2017](#),<sup>12</sup> the committee raised concerns that as the complaints and mediation scheme was a significant matter, it was inappropriate to provide for in delegated legislation. In response the minister undertook to review moving the scheme into the principal legislation prior to the sunset of the regulations. Schedule 2 completes the minister's undertaking.

**1.30 The committee welcomes the amendments in Schedule 2 of this bill, which move the complaints and mediation scheme which is currently in regulations, into primary legislation.**

### Broad delegation of administrative powers<sup>13</sup>

1.31 As noted above, Schedule 2 seeks to introduce a complaints and mediation scheme. The scheme would allow the Chief of the Defence Force to deal with

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, pp. 21-22.

13 Schedule 2, item 35, proposed subsection 79(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

complaints as they see fit, including through investigations and dispute resolution processes. Item 35 of Schedule 2 seeks to insert proposed subsection 79(2), which provides that the Chief of the Defence Force may delegate all or any of their powers and functions under proposed Part 10, or proposed Divisions 1B, 1C or 3 of Part 11 to:

- an SES employee, or acting SES employee, in the department; or
- an APS employee who holds or performs the duties of an Executive Level 2 position, or an equivalent, in the department; or
- a person who holds a rank not lower than the naval rank of captain, or the rank of colonel or group captain.<sup>14</sup>

1.32 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, or equivalent. Where broad delegations are provided for, the committee considers that an explanation of why these are necessary should be included in the explanatory memorandum.

1.33 In this case the explanatory memorandum states:

These are appropriate minimum levels for the powers and functions in question, noting the experience and skills of people at these levels, the history of how similar powers have been administered under the regulations, and the need for flexibility to allow the CDF to appropriately delegate the powers in the event of restructuring within Defence.<sup>15</sup>

1.34 While noting this explanation, the committee does not consider administrative flexibility to be sufficient justification for enabling the delegation of the Chief of the Defence Force's powers beyond Senior Executive Service employees, particularly noting that the powers and functions that can be delegated include the power to investigate complaints, disclose information and require information to be provided.

**1.35 The committee considers it may be appropriate to amend the bill to require that the Chief of the Defence Force be satisfied that persons performing delegated functions or exercising delegated powers have the expertise appropriate to the function or power delegated, and requests the minister's advice in relation to this matter.**

---

14 These ranks are the equivalent of an Executive Level 2 position in the APS.

15 Explanatory memorandum, p. 25.

## International Human Rights and Corruption (Magnitsky Sanctions) Bill 2018

<b>Purpose</b>	This bill seeks to enable sanctions to be imposed at the discretion of the minister in relation to violations of international human rights
<b>Sponsor</b>	Mr Michael Danby MP
<b>Introduced</b>	House of Representatives on 3 December 2018

### Significant matters in delegated legislation<sup>16</sup>

1.36 Clause 7 of the bill provides that the Governor-General may make regulations that impose immigration sanctions, or financial or trade sanctions, on a prescribed foreign person or class of foreign persons. In addition, clause 9 provides that the regulations may prescribe penalties, including imprisonment for up to 12 months, for offences against the regulations.

1.37 The committee's view is that significant matters, such as the power to impose sanctions or prescribe penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no justification for empowering the minister to impose sanctions or prescribe penalties by delegated legislation, merely restating the operation of the relevant provisions.<sup>17</sup>

**1.38 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing sanctions and penalties to be imposed by delegated legislation.**

16 Clauses 7 and 9. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

17 Explanatory memorandum, p 2.



## National Integrity (Parliamentary Standards) Bill 2018<sup>18</sup>

<b>Purpose</b>	<p>This bill seeks to create:</p> <ul style="list-style-type: none"> <li>• statutory codes of conduct for members of each House of Parliament and their staff;</li> <li>• a statutory basis for a parliamentarians' register of interests;</li> <li>• a Parliamentary Integrity Adviser, to provide independent advice and guidance to members and staff; and</li> <li>• a Parliamentary Standards Commissioner, to assist presiding officers, the Ethics and Privileges Committees, the Prime Minister and the National Integrity Commission with assessment, investigation and resolution of breaches of applicable codes of conduct</li> </ul>
<b>Sponsor</b>	Ms Cathy McGowan MP
<b>Introduced</b>	House of Representatives on 3 December 2018

### Reversal of evidential burden of proof<sup>19</sup>

1.39 Clauses 35 and 67 of the bill seek to make it an offence for a person who is or was the Parliamentary Integrity Adviser (Integrity Adviser) or the Parliamentary Standards Commissioner (Commissioner) to use or disclose certain kinds of protected information,<sup>20</sup> in circumstances where the use or disclosure is not authorised or required by the bill. Subclauses 35(2) and 67(2) seek to create exemptions (offence-specific defences) to the offences in clauses 35 and 67, which provide that the offences do not apply to the extent that the relevant person uses or discloses the information in good faith and in purported compliance with provisions of the bill.

18 This bill is part of a package of bills including the National Integrity Commission Bill 2018 and the National Integrity Commission Bill 2018 (No. 2). The committee previously commented on the two National Integrity Commission bills in [Scrutiny Digest 15 of 2018](#), pp. 29-43.

19 Subclauses 35(2), 37(2), 67(2) and 69(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

20 Clause 35 applies to 'protected Adviser information', defined in clause 31 as information about a person, matter or issue obtained by the Parliamentary Integrity Adviser in the course of exercising powers, performing duties or functions, under or in accordance with Division 2 of Part 4 of the bill. Clause 67 applies to 'protected Commissioner information', defined in clause 63 as information about a person, matter, issue or allegation obtained by the Parliamentary Standards Commissioner in the course of exercising powers, or performing functions or duties, under or in accordance with Division 2 or 3 of Part 5 of the bill.

1.40 Clauses 37 and 69 of the bill seek to make it an offence for any other person involved in the administration of the Act to record, use or disclose information relating to an ethics or integrity issue or to an alleged or suspected contravention of a code of conduct. Subclauses 37(2) and 69(2) seek to create exemptions (offence-specific defences) to these offences, which provide that the offences do not apply if the recording, use or disclosure of the relevant information is in the person's performance of functions under the Act, or authorised by the Act or another Act.

1.41 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 the evidential burden in relation to that matter.

1.42 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 evidential 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.

1.43 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 nevertheless expects any reversal of the evidential burden of proof to be justified. In this instance, the explanatory materials provide no justification for the reversals of the evidential burden of proof in the provisions identified at paragraphs [1.39] and [1.40] above, merely restating the operation and effect of those provisions.<sup>21</sup>

**1.44 In the event that the bill progresses further through the Parliament, the committee may request further information from the legislation proponent.**

**1.45 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of including offence-specific defences, which reverse the evidential burden of proof, in subclauses 35(2), 37(2), 67(2) and 69(2).**

---

### **Fair hearing**<sup>22</sup>

1.46 The bill provides that the Commissioner may conduct an inquiry into alleged or suspected contraventions of parliamentary and ministerial codes of conduct. Clauses 46 and 57 provide that, after completing an inquiry, the Commissioner must prepare a report. The report must set out the Commissioner's findings, the evidence

---

21 Explanatory memorandum, pp. 8 and 12.

22 Subclauses 47(2) and 58(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

and other material on which those findings are based, and any recommendations that the Commissioner thinks fit to make.<sup>23</sup>

1.47 Clauses 47 and 58 provide that the Commissioner must not include in a report in relation to an investigation of a corruption issue, an opinion or finding that is critical of a person (either expressly or impliedly), unless the Commissioner has first given the person a statement setting out the opinion or finding, and given the person a reasonable opportunity to appear before the Commissioner to make submissions in relation to the opinion or finding. However, subclauses 47(2) and 58(2) provide that a hearing is not required if the Commissioner is satisfied that:

- a person may have committed a criminal offence, contravened a civil penalty provision, or engaged in conduct that could be subject to disciplinary proceedings or provide grounds for the termination of employment; and
- affording the person the opportunity to be heard may compromise the effectiveness of the inquiry into the relevant contravention, or any action taken as the result of such an inquiry.

1.48 In effect, subclauses 47(2) and 58(2) attempt to exclude an obligation to give a person the right to be heard prior to the completion of a report. This is despite the fact that subclauses 46(3) and 57(3) expressly provide that a report may recommend taking disciplinary action against a person, or taking action with a view to having a person charged with a criminal offence. The committee notes that the explanatory memorandum provides no justification for limiting the right to a fair hearing. It merely sets out the operation and effect of the relevant provisions.<sup>24</sup> Additionally, while subclauses 46(4) and 57(4) would allow the Commissioner to exclude sensitive information from a report, they would not require the Commissioner to do so.

1.49 Given the capacity of findings and opinions in an inquiry report to affect a person's reputation,<sup>25</sup> and the characterisation of the right to be heard as a fundamental common law right, the bill may, without further clarification, give rise to considerable interpretive difficulties in the courts. For example, a court may infer a right to be heard before the Commissioner gives the report to a Privileges Committee or the Prime Minister, or before the report is tabled in Parliament.<sup>26</sup>

---

23 Subclauses 46(2) and 57(2).

24 Explanatory memorandum, pp. 10-11.

25 See *Ainsworth v Criminal Justice Commission (Qld)* (1992) 175 CLR 564.

26 Clause 48 would require the Commissioner to give a report of any inquiry into a contravention of a parliamentary code of conduct to the Privileges Committee of the House to which the report relates. Under clause 51, the Privileges Committee may be required to table the report in both Houses of Parliament. Clause 59 would require the Commissioner to give the Prime Minister the report of any inquiry into a contravention of a ministerial code of conduct. Clause 62 may require the Prime Minister to table the report in both Houses of Parliament.

1.50 The committee also notes that, under paragraphs 47(5)(b) and 58(5)(b), a person appearing before the Commissioner to make submissions in relation to an adverse finding or opinion may be represented by another person, but only with the Commissioner's permission. This would appear to give the Commissioner the power to refuse to allow a person to be represented—including by their lawyer. Given the nature of the rights and interests at stake and the potential complexity of the issues that may be raised, the committee considers that there may be circumstances in which a person's right to a fair hearing may be compromised if the Commissioner refuses to allow that person to be represented.

**1.51 In the event that the bill progresses further through the Parliament, the committee may request further information from the legislation proponent.**

**1.52 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of:**

- **effectively excluding the right to a fair hearing for persons who, in the view of the Parliamentary Standards Commissioner, may have engaged in unlawful conduct or conduct that may give rise to disciplinary proceedings;**
- **giving the Parliamentary Standards Commissioner the power to approve whether a person appearing before the Commissioner to make a submission in relation to an adverse finding or opinion may be represented (rather than giving the person a right to be represented).**

---

### **Immunity from liability<sup>27</sup>**

1.53 Clause 94 seeks to confer immunity from liability on certain persons for actions taken in the course of exercising powers, or performing functions or duties, in good faith and in accordance with the Act. These persons include the Integrity Adviser, the Commissioner, persons assisting those authorities, and an Assistant Parliamentary Standards Commissioner. Clause 94(3) extends this immunity to the giving of information and evidence, and to the production of documents.

1.54 These immunities would remove any common-law right to bring an action to enforce legal rights (for example, a claim of defamation), 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.

---

27 Clause 94. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.55 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 for this provision, merely restating the terms of the provision.<sup>28</sup>

**1.56 In the event that the bill progresses further through the Parliament, the committee may request further information from the legislation proponent.**

**1.57 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring an immunity from liability on a broad range of persons.**

---

### Significant matters in delegated legislation<sup>29</sup>

1.58 Clause 101 seeks to empower the Governor-General to make regulations for the purposes of the bill. Subclause 101(2) seeks to provide that the regulations may require that information or reports that are required to be given under prescribed provisions are also to be given to prescribed persons in specified circumstances. The committee notes that certain reports prepared in accordance with the bill may contain personal information, or contain opinions or findings that may have an adverse effect on a person's reputation.<sup>30</sup>

1.59 The committee's view is that significant matters, such as the persons to whom reports may be given, 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 legislative instruments, made by the executive, are not subject to the level of parliamentary scrutiny inherent in bringing about proposed changes in the form of an amending bill.

1.60 In this instance, the explanatory memorandum provides no justification for leaving the persons to whom reports may be provided to delegated legislation, nor does it provide any examples of the persons to whom it may be necessary to provide a report. It merely restates the operation and effect of the relevant provisions.<sup>31</sup>

---

28 Explanatory memorandum, p. 16.

29 Subclause 101(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

30 For example, an inquiry report prepared in accordance with clause 46 or 57 may include sensitive information, and may recommend taking action to initiate disciplinary proceedings or to have a person charged with a criminal offence. Pursuant to clause 7, 'sensitive information' would be defined by the National Integrity Commission Bill 2018, and would include information that could endanger a person's safety, identify a confidential source of information (e.g. an informant), or unreasonably disclose a person's personal affairs.

31 Explanatory memorandum, p. 17.

**1.61** In the event that the bill progresses further through the Parliament, the committee may request further information from the legislation proponent.

**1.62** The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving to delegated legislation the persons to whom reports prepared in accordance with the bill may be given.

## Sex Discrimination and Marriage Legislation Amendment (Protecting Supporters of Traditional Marriage) Bill 2018

<p><b>Purpose</b></p> <p><b>Sponsor</b></p> <p><b>Introduced</b></p>	<p>This bill seeks to amend the <i>Marriage Act 1961</i> and the <i>Sex Discrimination Act 1984</i>, to provide that:</p> <ul style="list-style-type: none"> <li>• celebrants may refuse to solemnise marriages based on conscience or religious belief; and</li> <li>• it is not unlawful to discriminate against a person on the basis of sexual orientation, gender identity, intersex status or marital or relationship status, in the course of providing or offering to provide goods, services or facilities in connection with the solemnisation of a marriage</li> </ul> <p>Senator Fraser Anning</p> <p>Senate on 4 December 2018</p>
--	---

### Power for delegated legislation to amend primary legislation (Henry VIII clause)<sup>32</sup>

1.63 Item 15 of the bill seeks to provide that the Governor-General may, for a period of 12 months following the commencement of the item, make regulations amending other Acts (including the *Marriage Act 1961* and the *Sex Discrimination Act 1984*). The amendments must be transitional in nature, and may include saving or application provisions.

1.64 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with Henry VIII clauses, as enabling delegated legislation to override the operation of legislation which has been passed by Parliament impacts on levels of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. The committee therefore expects a sound justification for the use of any Henry VIII clauses to be included in the explanatory materials.

1.65 In this instance, the explanatory memorandum provides no justification for the inclusion of a Henry VIII clause in item 15 of the bill. It merely restates the operation and effect of the relevant provisions.<sup>33</sup>

32 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

33 Explanatory memorandum, p. 3.

**1.66** The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of empowering delegated legislation to be made that could amend primary legislation.



## Social Security Commission Bill 2018 (No. 2)<sup>34</sup>

<b>Purpose</b>	This bill seeks to establish a Social Security Commission to provide the Parliament with independent advice on the minimum levels for social security payments
<b>Sponsor</b>	Senator Tim Storer
<b>Introduced</b>	Senate on 26 November 2018

### Broad delegation of administrative powers<sup>35</sup>

1.67 Clause 43 of the bill seeks to provide that the general manager of the proposed Social Security Commission (the Commission) may delegate all or any of his or her functions or powers to SES employees or acting SES employees of the Commission, or to a member of the staff of the Commission who is in a class of employees prescribed by the regulations.

1.68 The committee has consistently drawn attention to legislation that would allow 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.

1.69 In this instance, the explanatory memorandum does not explain why it is necessary to allow the general manager to delegate his or her functions or powers to a member of the staff of the Commission who is in a class of employees prescribed by regulations.

**1.70 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the general manager to delegate all or any of his or her functions or powers to a staff member of the Commission in a class of employees prescribed by regulation.**

---

34 This bill is identical to a bill that was introduced in the House of Representatives on 20 August 2018 which the committee commented on: see Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2018*, p. 5.

35 Subclause 43(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

## Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Competition and Consumer Act 2010</i> to: <ul style="list-style-type: none"> <li>• implement a legislative framework consisting of new prohibitions and remedies in relation to electricity retail, contract and wholesale markets; and</li> <li>• allow the Australian Energy Regulator to gather and use information concerning energy businesses</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 5 December 2018

### Reversal of evidential and legal burden of proof<sup>36</sup>

1.71 Schedule 2 of the bill seeks to amend the *Competition and Consumer Act 2010* to provide the Australian Energy Regulator with new compulsory information gathering powers. Proposed subsection 44AAFB(1) makes it an offence for a person to fail to comply with a notice to produce documents or information given under proposed section 44AAFA. The offence carries a maximum penalty of imprisonment for two years or 100 penalty units. Proposed subsection 44AAFB(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if a person is not capable of complying with the notice. As such, this reverses the evidential burden of proof.<sup>37</sup>

1.72 Proposed subsection 44AAFB(3) provides a further exception if the person can prove that, after a reasonable search, they are not aware of the documents specified in the notice and the person provides a written response to the notice, including a description of the scope and limitations of the search. As such this imposes a legal burden of proof on the defendant to prove that after a reasonable search, they are not aware of the documents.<sup>38</sup>

36 Schedule 2, item 5, proposed section 44AAFB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

37 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.

38 Section 13.4 of the *Criminal Code Act 1995* provides that a burden of proof is a legal burden if the law expressly specifies it is, or requires the defendant to prove the matter or creates a presumption that the matter exists unless the contrary is proved.

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

1.74 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time either the evidential or legal burden is reversed, with the rights of people affected being the paramount consideration. The explanatory memorandum does not address why either the evidential or legal burden has been reversed.

**1.75 As the explanatory materials do not address this issue, the committee requests the Treasurer's advice as to why it is proposed to use offence-specific defences (which reverse both the evidential and legal burden of proof). 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.<sup>39</sup>**

---

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

## Bills with no committee comment

1.76 The committee has no comment in relation to the following bills which were introduced into the Parliament between 3 – 6 December 2018:

- Aboriginal Land Rights (Northern Territory) Amendment (Land Scheduling) Bill 2018;
- Coal-Fired Power Funding Prohibition Bill 2018;
- Environment Protection and Biodiversity Conservation Amendment (Heritage Listing for the Bight) Bill 2018;
- Galilee Basin (Coal Prohibition) Bill 2018;
- Live Animal Export Prohibition (Ending Cruelty) Bill 2018;
- Live Sheep Long Haul Export Prohibition Bill 2018 [No. 2];
- Major Sporting Events (Indicia and Images) Protection Amendment Bill 2018;
- Migration Amendment (Urgent Medical Treatment) Bill 2018;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Regulation References) Bill 2018;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Regulations References) Bill 2018;
- Parliamentary Service Amendment (Post-election Report) Bill 2018;
- Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 [No. 2]; and
- Tertiary Education Quality and Standards Agency Amendment Bill 2018.

## Commentary on amendments and explanatory materials

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

*[Digests 13 & 14/18]*

1.77 On 6 December 2018 the House of Representatives agreed to 173 Government amendments, the Attorney-General (Mr Porter) presented a supplementary explanatory memorandum and on the same day the bill passed both Houses.

1.78 In *Scrutiny Digest 13 of 2018* and *Scrutiny Digest 14 of 2018* the committee raised a number of concerns about the bill. Some of these amendments appear to address some, but not all, of the committee's scrutiny concerns.

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

---

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

- Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018;<sup>40</sup>
- Migration Amendment (Family Violence and Other Measures) Bill 2016;<sup>41</sup>
- Modern Slavery Bill 2018;<sup>42</sup>
- Telecommunications Legislation Amendment Bill 2018;<sup>43</sup>
- Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Bill 2017;<sup>44</sup>

---

40 On the 6 December 2018 the Senate agreed to two Independent (Senator Storer)/Australian Greens amendments and the bill was read a third time.

41 On 27 and 28 November 2018 the Senate agreed to two Government amendments on each respect day. On the 28 November 2018 the House of Representatives agreed to the Senate amendments and the bill was passed.

42 On 28 November 2018 the Senate agreed to eight Government amendments and the bill was read a third time. On 29 November 2018 the House of Representatives agreed to the Senate amendments and the bill was passed.

43 On 3 December 2018 the Senate agreed to one Opposition amendment and the bill was read a third time.

- 
- Treasury Laws Amendment (2018 Measures No. 4) Bill 2018;<sup>45</sup> and
  - Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017.<sup>46</sup>

---

44 On 5 December 2018 the Senate agreed to one Government amendment, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time.

45 On 5 December 2018 the Senate agreed to three Government amendments, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time.

46 On 6 December 2018 the Senate agreed to 58 Government amendments, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time.

## Chapter 2

### Commentary on ministerial responses

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

### Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Australian Citizenship Act 2007</i> to: <ul style="list-style-type: none"> <li>• remove the requirement that a person be sentenced to six or more years of imprisonment, if convicted of a terrorism offence; and</li> <li>• adjust the threshold for determining dual citizenship by replacing it with a requirement that the Minister is satisfied the person will not become stateless</li> </ul>
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of Representatives on 28 November 2018
<b>Bill status</b>	Before the House of Representatives

#### Broad discretionary power Trespass on personal rights and liberties<sup>1</sup>

2.2 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's more detailed justification as to the necessity and appropriateness of expanding the minister's discretionary power to determine that a person ceases to be an Australian citizen.<sup>2</sup>

#### *Minister's response*<sup>3</sup>

2.3 The minister advised:

---

1 Schedule 1, item 1, proposed subsection (1A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 2-5.

3 The minister responded to the committee's comments in a letter dated 22 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2019* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

The purpose of the Bill is twofold: firstly, to ensure the power of the Minister to cease Australian citizenship remains an adaptable tool to protect the Australian community in the evolving threat environment; and secondly, to maintain the integrity of Australian citizenship and the privileges that attach to it.

One of the key amendments in the Bill is the removal of the requirement for an individual to be sentenced to a minimum of six years' imprisonment for one or more relevant terrorism offences. By replacing this with a requirement for an individual to be convicted of a relevant terrorism offence, the Bill broadens the cohort of offenders who may be eligible to have their Australian citizenship ceased. It also aligns the provisions in section 35A more closely with those of section 34, which provide the Minister may cancel citizenship on the basis of serious offences.

Sentences imposed for terrorism offences in Australia have ranged from 44 days to 44 years' imprisonment. This is reflective of the wide variety of matters that the court must take into account during sentencing, such as the degree to which the person has shown contrition for the offence, whether or not they pleaded guilty, and prospects for rehabilitation.

This amendment recognises that there are a number of offenders who have served, or will serve, sentences of less than 6 years' imprisonment (or less than 10 years' imprisonment, for those convicted prior to 12 December 2015) for relevant terrorism offences.

While these offenders may be subject to intervention and rehabilitation initiatives while in custody, there is no guarantee that this will result in their complete disengagement from a violent extremist ideology. Recidivism remains a risk where offenders re-adopt or re-engage in violent extremist ideologies following their release into the community. Some of these offenders will continue to pose a threat to the community at the end of their sentence.

As such, it is important to ensure there are a range of flexible and proportionate measures available to manage the risks posed by these offenders. Cessation of Australian citizenship is one such measure, which may be considered during or after a convicted terrorist offender's prison sentence.

The Bill does not make any changes to the existing requirements for the Minister, before determining an individual ceases to be an Australian citizen, to consider whether the person's conduct demonstrates a repudiation of their allegiance to Australia, and broader public interest matters such as the severity of their offending conduct, and degree of threat they pose to the Australian community. This means the Minister retains an appropriate level of discretion when making a determination under section 35A.

I note the Committee's observation that the Bill does not require the Minister to consider the person's family or other connections to Australia,



or their length of stay in Australia. The factors the Minister must consider when making a determination to cease an individual's Australian citizenship are necessarily focused on whether it is in the public interest for the individual to remain an Australian citizen, and encompass issues such as the degree of threat posed to the community, as well as the severity of their offending conduct. This does not prevent the Minister from taking other matters of public interest into account, and the Minister is also required to consider the person's connection to the other country of which the person is a national or citizen.

The Bill's application to dual citizens (regardless of how they obtained Australian citizenship) is consistent with the existing provisions in the *Australian Citizenship Act 2007*. This reflects the fact that Australian citizenship is founded on common values and carries with it a duty of allegiance to Australia. This duty applies to all Australian citizens, irrespective of how they acquired citizenship, and includes responsibilities to obey the law and uphold Australia's democratic values.

I note the Committee's concern that adjusting the threshold for determining dual nationality may result in an individual's Australian citizenship being ceased while possessing no other citizenship. The adjustment to the threshold for determining dual nationality is consistent with Australia's international obligations not to render an individual stateless. The Bill will still require the Minister to be satisfied that the person would not become stateless, should their Australian citizenship be ceased. For example, this could capture situations where an individual would automatically acquire (or re-acquire) another country's citizenship upon cessation of their Australian citizenship.

The Committee has also raised concerns that non-citizens who do not possess a valid visa ('unlawful non-citizens') may be detained indefinitely in immigration detention. Cessation of a dual national's Australian citizenship will result in the automatic issuing (by operation of law), of an ex-citizen visa. Depending on whether the individual is currently incarcerated, and the length of their sentence, this may be subject to mandatory cancellation under section 501 of the *Migration Act 1958*. Should no other visa be sought or granted to regularise the person's immigration status, they would become an unlawful non-citizen, and therefore subject to removal from Australia. The Bill does not affect or amend the existing policies and processes that support Australia's immigration and visa framework, which will continue to apply as per the current provisions of the *Migration Act*.

The minister's discretionary power to determine that a person ceases to be an Australian citizen remains subject to judicial review. As the Committee has noted, determinations made by the Minister may be reviewed on the basis of whether the Minister's satisfaction of the fact of an individual's dual citizenship was formed reasonably. This retains an important safeguard for the legislation, while providing greater flexibility

to the Minister in achieving the requisite level of satisfaction that an individual would not be left stateless if their Australian citizenship was to cease.

***Committee comment***

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that replacing the requirement for an individual to have been sentenced to a minimum of six years imprisonment for terrorist offences, with a requirement for an individual to be convicted of a relevant terrorism offence, broadens the cohort of offenders who may be eligible to have their citizenship ceased. The committee notes the minister's advice that sentences imposed for terrorism offences in Australia have ranged from 44 days to 44 years imprisonment and that it is important that there are a range of flexible and proportionate measures available to manage the risks posed by offenders, including loss of citizenship.

2.5 The committee also notes the minister's advice that the bill does not make any changes to the existing requirements for the minister to consider before ceasing an individual's citizenship, which are necessarily focused on whether it is in the public interest for the individual to remain an Australian citizen. In addition the committee notes the minister's advice that this does not prevent the minister from taking into account other matters of public interest.

2.6 However, the committee reiterates that the loss of citizenship is a severe consequence, which may ultimately lead to a person being physically excluded from the Australian community. The committee does not consider that the need for flexibility nor the existence of similar provisions provides adequate justifications for the removal of the requirement for a minimum sentence to have been imposed before determining the cessation of citizenship.

2.7 The committee also reiterates that when the Parliamentary Joint Committee on Intelligence and Security reported on the bill that originally introduced section 35A, it recommended that citizenship may only be revoked following conviction for offences with a sentence of at least six years imprisonment (or multiple sentences totalling at least six years imprisonment). It explained its reasoning on the following basis:

While limiting the provision to more serious offences is an appropriate measure to better define the scope of conduct leading to revocation, the Committee notes that even following a conviction there will still be degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia. Therefore, the Committee recommends that loss of citizenship under this provision not be triggered unless the person has been given sentences of imprisonment that together total a minimum of six years for offences listed in the Bill. Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed

section 35A to more serious conduct. It was noted that three years is the minimum sentence for which a person is no longer entitled to vote in Australian elections.<sup>4</sup> Loss of citizenship should be attached to more serious conduct and a greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.<sup>5</sup>

2.8 The committee reiterates that removing the length of sentences imposed on a person gives greater discretion to the minister to remove citizenship, and the committee remains concerned that these amendments may inappropriately expand administrative power and may unduly trespass on personal rights and liberties.

2.9 The committee also notes the minister's advice that the adjustment to the threshold for determining dual nationality is consistent with Australia's international obligations not to render an individual stateless, as the minister would still need to be satisfied that the person would not become stateless should Australian citizenship be ceased. The committee notes the minister's advice that the cessation of a dual national's Australian citizenship will result in the automatic issuing (by operation of law) of an ex-citizen visa, which may be subject to automatic cancellation under the *Migration Act 1958*. The committee further notes the minister's advice that, in the event an ex-citizen visa is automatically cancelled and no other visa is sought or granted, the person would become an unlawful non-citizen, and therefore subject to removal from Australia. The committee reiterates its concerns that a situation could arise where a person could have their citizenship removed while possessing no other citizenship (and perhaps not ever being able to obtain such citizenship in practice). If such a person's ex-citizenship visa was revoked (and the *Migration Act 1958* requires the minister to cancel a visa if a person has a substantial criminal record)<sup>6</sup> the person would be subject to immigration detention, which, if they are stateless, would appear to be indefinite. The minister's response does not appear to address the committee's concerns that these amendments could result in a person being detained indefinitely in immigration detention, other than to note that the bill does not affect or amend the existing immigration and visa policies and processes.

2.10 The committee notes the minister's advice that amendments allowing the minister to determine that a person ceases to be an Australian citizen on the basis that they are satisfied that the person would not become a person who is not a national or citizen of any country provides 'greater flexibility' to the minister in achieving the requisite level of satisfaction that an individual would not be left stateless. The committee does not consider the need for administrative flexibility provides an adequate justification for enabling the minister to cease an individual's

---

4 Subsection 93(8AA) of the Commonwealth Electoral Act 1918.

5 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, pp. 115-116.

6 See section 501 of the *Migration Act 1958*.

citizenship in circumstances where the minister 'is satisfied' that the person would not become stateless (and not that the person is actually a citizen of another country). The committee reiterates its concerns that this reduces the scope and availability of judicial review.<sup>7</sup>

**2.11 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the minister's discretionary power to determine that a person ceases to be an Australian citizen.**

---

### **Retrospective application**

2.12 In [Scrutiny Digest 15 of 2018](#) the committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of retrospectively applying the power to remove citizenship based on convictions made up to 13 years ago.<sup>8</sup>

#### ***Minister's response***

2.13 The minister advised:

I note the Committee's comments regarding the retrospective application of the Bill, including concern that the amendments will apply to convictions made up to 13 years ago. Broadening the retrospective application of section 35A (which already applies to convictions made up to 13 years ago, in certain circumstances) will bolster the Minister's ability to cease an individual's Australian citizenship where they have been convicted of a relevant terrorism offence, regardless of length of sentence. This reflects the fluid nature of the risk posed by convicted terrorist offenders, who may either continue to prescribe to a violent extremist ideology or subsequently re-adopt such an ideology, and are thus of concern to authorities.

#### ***Committee comment***

2.14 The committee thanks the minister for this advice and notes the advice that broadening the retrospective application of section 35A will bolster the minister's ability to cease an individual's citizenship which reflects the 'fluid nature' of the risk posed by convicted terrorist offenders. However, the committee reiterates that it is a fundamental principle of the rule of law that the existence of an offence and penalty be established prospectively. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying

---

7 Under the current provision, the question of whether a person is a national or citizen of another country is a jurisdictional fact that could be reviewed by the court for correctness, rather than merely on the basis of whether the minister's opinion on the question was formed reasonably.

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 5-6.

values of the rule of law. The committee does not consider that either the minister's response or the explanatory memorandum provide an adequate justification for the retrospective application of a provision of this nature. The committee reiterates that it will consistently raise scrutiny concerns in circumstance where the law is applied retrospectively, particularly when the consequences for affected individuals are significant (as in this case).

**2.15 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively applying the power to remove citizenship based on convictions made up to 13 years ago.**

## Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> and the <i>Referendum (Machinery Provisions) Act 1984</i> to: <ul style="list-style-type: none"> <li>include an obligation for persons wishing to nominate as candidates in federal elections to provide information to demonstrate their eligibility to be elected to Parliament under section 44 of the Constitution; and</li> <li>facilitate electronic lodgement of candidate nominations</li> </ul>
<b>Portfolio</b>	Special Minister of State
<b>Introduced</b>	House of Representatives on 29 November 2018
<b>Bill status</b>	Before the House of Representatives

### Privacy<sup>9</sup>

2.16 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's detailed justification as to why it is necessary to publish on the internet the personal details of people who have, or have had, a connection to a nominee for election, noting that it would be possible to require the information be provided to the Electoral Commissioner without the corresponding requirement that all such information be published.

2.17 The committee also sought the minister's advice as to, at a minimum, the appropriateness of amending the bill to provide that publication is not mandatory and to require the Electoral Commissioner to consider the impact on the privacy of third parties when deciding whether to publish a document.<sup>10</sup>

### Minister's response<sup>11</sup>

2.18 The minister advised:

#### 1. Publication of third party information

*AEC does not determine eligibility under the Constitution*

9 Schedule 1, item 54, proposed sections 181A and 181C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 7-10.

11 The minister responded to the committee's comments in a letter 21 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2019* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

The Australian Electoral Commission (AEC) administers the *Commonwealth Electoral Act 1918* (Electoral Act) and is responsible for running federal elections. The AEC (and the Electoral Commissioner) has no role in assessing candidate eligibility under the Constitution. Eligibility under the Constitution is a matter for the High Court sitting as the Court of Disputed Returns. The High Court has original jurisdiction to review candidate nominations.

It is vital to our democracy that the body responsible for running elections is not involved in vetting or assessing candidates. That could result in the perception that the AEC decides who nominates for an election. The Constitution requires that the Parliament be directly chosen by the people. If the AEC had a role in assessing eligibility, limiting the choices available to electors, we may risk infringing this requirement.

*Third Party Details are relevant to eligibility under section 44 of the Constitution*

The requirement to complete and publish the Qualification Checklist aims to reduce the risk of a recurrence of the eligibility issues we have seen in recent years. The majority of recent High Court cases have considered subsection 44(i) of the Constitution, which deals with disqualification based on citizenship grounds - a person who holds or is eligible for dual citizenship is not eligible to nominate as a candidate and serve in Parliament.

Whether a person holds or is eligible for citizenship of another country is determined by foreign laws and often depends on their individual circumstances and family background - for example, where and when their parents or grandparents were born, what the relevant law was at the time; where and when their current or former spouse was born, when they were married, divorced etc. This necessarily involves third party information.

## **2. Not appropriate to remove mandatory publication requirement**

Amending the Modernisation Bill to remove mandatory publication would prevent the Qualification Checklist from achieving its key intent—increasing transparency of information relevant to the status of candidates under section 44 of the Constitution. This is important for maintaining public confidence in Commonwealth democratic processes, as well reassuring voters that their elected representatives are qualified to sit in Parliament.

The Qualification Checklist and any supporting documents provided with the nomination will be published on the AEC website as soon as practicable from the declaration of nominations, until 40 days after the return of the writs. That is, until a petition disputing the election can no longer be filed under Part XXII of the Electoral Act. Publishing this information allows claims disputing a person's eligibility under section 44 of the Constitution to be lodged with the relevant court, based on the information disclosed (or not disclosed) in the Qualification Checklist and any supporting documents.

### **3. Requiring Electoral Commissioner consider privacy before publishing**

Demonstrating eligibility under section 44 of the Constitution may necessarily involve disclosing a level of third party information, particularly for questions related to citizenship. The Qualification Checklist is not intended to be a barrier to participation in elections. It is designed to shine light on information relevant to a candidate's eligibility status, including those elements that may involve a level of third party information.

I appreciate the Committee's concerns with respect to privacy of third parties. Nevertheless, I am satisfied that the Bill contains sufficient mitigation measures, such as allowing candidates to redact, omit, or delete any information from a document they do not wish published. This allows candidates to demonstrate their eligibility without unduly impacting on their own and others personal information. Accordingly, I am satisfied that the mandatory Qualification Checklist balances individual and third party rights to privacy, with the need to increase transparency for voters surrounding the eligibility status of candidates and those elected to parliament.

#### ***Committee comment***

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that it would not be appropriate for the Australian Electoral Commission (AEC) or the Electoral Commissioner to confirm a candidate's eligibility, noting that eligibility under the Constitution is a matter for the High Court sitting as the Court of Disputed Returns.<sup>12</sup> The committee also notes the minister's advice that a candidate's eligibility under section 44 of the Constitution will depend on whether they hold or are eligible for foreign citizenship, which will necessarily involve considering third party information.

2.20 The committee also notes the minister's advice that removing the mandatory publication requirements would prevent the qualification checklist from achieving its key intent, which is to increase transparency as to candidates' eligibility for election under section 44 of the Constitution. The committee further notes the advice that publishing the qualification checklist and supporting documents allows claims disputing a person's eligibility to be lodged with the relevant court.

2.21 The committee finally notes the minister's view that the bill contains sufficient mitigation measures, such as allowing candidates to redact, omit or delete any information from a document that they do not wish to be published.

2.22 The committee reiterates that a completed Qualification Checklist and supporting documents could contain a great deal of personal information relating not only to the applicant seeking nomination, but also to the citizenship and birth places of the applicant's parents, grandparents (including biological or adoptive

---

12 See also section 353 of the *Commonwealth Electoral Act 1918*.



parents or grandparents) and former or current spouses or similar partners, which could be included on a public website without those parties' consent.

2.23 While the committee acknowledges that it is not the role of the Commissioner to confirm a candidate's eligibility, and that third party information may be relevant to a candidate's eligibility under the Constitution, the committee remains concerned that publishing the personal information of third parties on a public website without their consent has the potential to unduly trespass on personal rights and liberties, in particular the right to privacy. It remains unclear to the committee that there are no other mechanisms by which third party privacy could be protected while still achieving the aim of the bill (for example, requiring candidates to include their relatives' birth and citizenship details without including their name, or allowing the information to be disclosed on request rather than automatically uploaded to the internet).

2.24 The committee reiterates that the safeguards specified by the minister, such as allowing candidates to redact, omit or delete any information, would rely entirely on the discretion of the relevant candidate. The committee notes that there is no requirement for a candidate or the Commissioner to consider the privacy of third parties when completing a qualification checklist, nor any limitation on including personal or sensitive information in a qualification checklist or supporting documents. The committee also reiterates that the Electoral Commissioner's ability to redact information from the qualification checklist and supporting documents similarly relies on the Commissioner's discretion. Moreover, and as noted in the committee's initial comments, the statement of compatibility indicates that the AEC may be unable to vet qualification checklists and supporting documents for third party personal information due to the pressures imposed on the AEC during an election period.<sup>13</sup> This raises additional concerns that the Commissioner's discretion to redact information would not operate as an effective safeguard in practice.

**2.25 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of requiring the publication on a public website of potentially a substantial amount of third-party personal information without their consent.**

---

13 Statement of compatibility, pp. 12-13.

## Future Drought Fund Bill 2018

<b>Purpose</b>	This bill seeks to establish the Future Drought Fund to fund initiatives relating to future drought resilience, preparedness and response, and provides an initial credit of \$3.9 billion
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives on 28 November 2018
<b>Bill status</b>	Before the House of Representatives

### Broad discretionary powers<sup>14</sup>

2.1 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's advice as to why it is considered necessary and appropriate to confer on the Agriculture Minister a broad power to make grants of financial assistance, in the absence of any guidance on the face of the bill as to how this power is to be exercised.

2.2 The committee also requested the minister's advice as to the appropriateness of amending the bill to include (at least high-level) guidance as to the terms and conditions on which financial assistance may be granted.<sup>15</sup>

### Minister's response<sup>16</sup>

2.3 The minister advised:

The Future Drought Fund Bill 2018 (Bill) ensures any financial assistance provided under the Future Drought Fund (FDF) will be subject to appropriately robust and transparent decision-making processes. This includes the overarching obligation in the Bill that spending from the FDF must enhance the public good by building drought resilience.

The Bill requires a Drought Resilience Funding Plan (the Plan), a legislative instrument, to be in force and for the Agriculture Minister to have regard to it in decision-making. The Plan will set out a coherent and consistent approach for making arrangements or grants in relation to drought resilience or entering agreements in relation to such grants. The Plan will be developed with a long-term focus for drought resilience funding and will be informed by the Intergovernmental Agreement on National

14 Clause 21 and clause 22. The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(iv) and (v).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 12-13.

16 The minister responded to the committee's comments in a letter dated 16 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2019* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

Drought Program Reform, as agreed by all jurisdictions on 12 December 2018, and by any successive agreements, as well as by Australian Government drought policies and strategies. Extensive public consultation, including with key stakeholders, will be undertaken in accordance with the requirements of the Bill before the Plan can be finalised and tabled. Activities to be supported under the Plan will be considered through the Budget process, providing a further robust step in decision-making about spending.

In addition to the Plan, the Bill also requires the Agriculture Minister to have regard to the independent expert technical advice from the Regional Investment Corporation (RIC) Board in making decisions. The RIC Board is established and operates under the *Regional Investment Corporation Act 2018* and is required when performing its functions to act in a proper, efficient and effective manner. The RIC Board must comply with the Plan when preparing its advice to the Agriculture Minister.

These governance measures are similar to the governance structure in place under the *Medical Research Future Fund Act 2015* (the MRFF Act), which requires the Minister to seek advice from an independent advisory body. The MRFF Act also requires both the Minister and the Advisory body to have regard to public strategic guidance (the Medical Research and Innovation Strategy and Medical Research and Innovation Priorities). Similar arrangements also apply under the *Nation-building Funds Act 2008*, in respect of the Building Australia Fund (BAF) and the Education Investment Fund.

In addition, where appropriate, FDF programs identified in the Plan will have published guidelines to ensure that applicants are treated equitably, and that funding recipients are selected based on merit addressing the program's objectives. Grant programs under the FDF will be developed in accordance with the Commonwealth Grant Rules and Guidelines 2017 (CGRG) and the requirements of the *Public Governance, Performance and Accountability Act 2013*. Grant guidelines will be developed for all new grant opportunities and approved grants will be reported on the GrantConnect website no later than 21 days after the grant agreement takes effect. FDF grant administration will be conducted in a manner consistent with the CGRG's principles of:

- robust planning and design;
- collaboration and partnership;
- proportionality;
- an outcomes orientation;
- achieving value with relevant money;
- governance and accountability; and
- probity and transparency.

Procurements under the FDF will be undertaken in accordance with the Commonwealth Procurement Rules 2018 and the procurement policy framework. FDF procurements will be accountable and transparent, while meeting the core procurement principle of achieving value for money.

The terms and conditions of grants or arrangements would be set out in a written agreement between the Commonwealth and the relevant funding recipient. This approach is consistent with the CGRGs, which state that grant agreements should provide for:

- a clear understanding between the parties on required outcomes, prior to commencing payment of the grant;
- appropriate accountability for relevant money, which is informed by risk analysis;
- agreed terms and conditions in regards to the use of the grant, including any access requirements; and
- the performance information and other data that the grantee may be required to collect as well as the criteria that will be used to evaluate the grant, the grantee's compliance and performance.

I do not consider an amendment is necessary or that it would add to the effective administration of the FDF. The detailed criteria to define the activities to be funded will be developed when preparing the Plan; it will be subject to public consultations and will be revised after each four year period. As such, it would be appropriate to detail criteria in delegated legislation or guidelines rather than placing them within the primary legislation.

I consider the Bill includes sufficient high-level guidance on the terms and conditions for financial assistance to be granted. As outlined above, financial assistance will be granted through robust, well-informed decision-making processes. The process includes: independent technical expert advice from a legislated board, consideration through the Government's Budget process and alignment with the Plan, which will be a coherent and consistent approach for making arrangements or grants in relation to drought resilience or entering agreements in relation to such grants. These processes, as outlined in sections 28 and 29 of the Bill, prevent obscure decision-making or financial assistance being granted to projects without merit. The Commonwealth Grant Guidelines and the Procurement Rules provide further assurance.

The detailed terms and conditions will be developed after the Plan is agreed (to be revised after each four year period). Where appropriate, terms and conditions would be included in guidelines and funding agreements for each activity, rather than placing it within the primary legislation.

I do not consider that an amendment is necessary or would add to the effective administration of the FDF.

**Committee comment**

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the bill ensures that financial assistance provided under the Future Drought Fund (the Fund) will be subject to robust and transparent decision-making processes, including an overarching obligation to enhance the public good by building drought resilience.

2.5 In this regard, the committee notes the minister's advice that, in making funding decisions, the Agriculture Minister would be required to have regard to the Drought Resilience Funding Plan (DRF Plan), which will be a legislative instrument and subject to extensive public consultation. The committee also notes the advice that activities to be supported under the DRF Plan would be considered through the Budget process, and that in addition to the DRF Plan the Agriculture Minister would be required to have regard to the expert advice of the Regional Investment Corporation.

2.6 The committee also notes the minister's advice that programs identified in the DRF Plan will have published guidelines to ensure that grant applicants are treated equitably, and funding recipients will be selected on merit according to a program's objectives. The committee also notes the advice that guidelines will be developed in accordance with the Commonwealth's Grant Rules and Guidelines 2017 and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and the advice that all procurements under the Fund will be undertaken in accordance with the Commonwealth Procurement Rules 2018.

2.7 Finally, the committee notes the minister's advice that the terms and conditions applicable to grants and funding arrangements would be set out in a written agreement between the Commonwealth and the relevant funding recipient.

2.8 While funding provided in accordance with the bill appears to be subject to a number of controls designed to prevent arbitrary decision-making, the committee remains concerned that the bill would permit the expenditure of a substantial amount of Commonwealth money, with no clear guidance on the face of the bill as to the terms and conditions on which funds may be granted. In relation to the grant of funding to a State or Territory, the committee also reiterates that the Constitution confers on the *Parliament* the power to make such grants and to determine associated terms and conditions. Where the Parliament delegates this power, the committee considers that its exercise should be subject to at least some level of parliamentary scrutiny.

2.9 The committee also acknowledges that a number of matters relating to the grant of funding (including, potentially, relevant terms and conditions) would be set out in the DRF Plan, which would be a legislative instrument and would therefore be tabled in Parliament. However, the committee remains concerned that the DRF Plan would not be a *disallowable* legislative instrument, and would therefore not be subject to appropriate parliamentary scrutiny.

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

**2.11** The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of conferring on the Agriculture Minister a broad power to make grants of financial assistance, including to the States and Territories, in the absence of any specific guidance on the face of the bill as to how the power is to be exercised.

---

### Merits review<sup>17</sup>

**2.12** In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's advice as to:

- the processes by which grants would be provided, and arrangements would be entered into, in accordance with clause 21 of the bill;
- whether decisions in relation to the provision of grants and entering into arrangements would be subject to independent merits review; and
- if not, the characteristics of those decisions that would justify excluding merits review.<sup>18</sup>

### Minister's response

**2.13** The minister advised:

As outlined above, financial assistance will be granted through robust and well-informed decision-making processes. The process includes:

- the Plan (a legislated instrument developed following public consultation) which will outline a coherent and consistent approach for making arrangements or grants in relation to drought resilience or entering agreements; and
- independent technical expert advice from a legislated board.

The processes in the Bill provide transparent and merit based decision-making for financial assistance being granted to projects that enhance the public good.

Priorities may be delivered by activities supported by, but not exclusive to, a competitive merit-based grants program, discretionary grants or a

---

17 Clause 21. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 13-14.

procurement process, consistent with the rules relating to the Commonwealth in the *Public Governance, Performance and Accountability Act 2013*.

Guidelines will be developed for FDF granting activities and will include detailed criteria and merit review processes where appropriate. Scope also exists to provide funding to state and territory governments to support drought resilience initiatives under arrangements consistent with both the Intergovernmental Agreement on Federal Financial Relations and the new Intergovernmental Agreement on National Drought Program Reform.

The details of financial assistance provided from the FDF will be announced on the Department of Agriculture and Water Resources' website and provided in the department's annual report, providing transparency of the outcomes.

The general exclusion of an independent merit review process in the legislation can be justified on the basis of decisions relating to the allocation of a finite resource where not all claims can be met. Allocating resources to a merit process would be disproportionate to the significance of the decisions under review - for example, small grants programs. However, where appropriate, merit review processes will be included in grant guidelines. If funding is provided to States and Territories to distribute, any independent merit review would be subject to the conditions and processes they impose on recipients. There is appropriate transparency for decisions on grants and other arrangements.

I do not consider that an amendment is necessary or would contribute to the effective administration of the FDF.

### **Committee comment**

2.14 The committee thanks the minister for this response. The committee notes the minister's advice regarding the processes through which financial assistance will be granted and that guidelines will be developed for granting activities, which will include detailed criteria and merit review processes where appropriate.

2.15 The committee also notes the minister's advice that the general exclusion of independent merit review in relation to grant decisions can be justified on the basis that such decisions allocate a finite resource between competing applicants. The committee also notes the advice that allocating resources to a merit process would be disproportionate to the significance of the decisions under review. These committee notes that these matters appear to reflect established grounds for excluding merits review.<sup>19</sup>

---

19 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.11]-[4.19], [4.56]-[4.57].

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

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

---

### **Significant matters in non-disallowable legislative instruments<sup>20</sup>**

**2.18** In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's advice as to:

- why it is considered appropriate to leave significant elements of the drought resilience funding scheme proposed by the bill to delegated legislation; and
- why the relevant instruments (that is, the DRF Plan and directions making up the Future Drought Fund Investment Mandate would not be subject to disallowance.

**2.19** In relation to directions making up the Investment Mandate, the committee also requested the minister's advice as to the appropriateness of amending the bill to provide that the directions are subject to disallowance but only come into force once the disallowance period has expired, unless the minister certifies that there is an urgent need to make changes and it is in the national interest that a specified direction not be subject to disallowance.<sup>21</sup>

### ***Minister's response***

**2.20** The minister advised:

As outlined above, the Bill provides a robust and transparent framework for the elements of the FDF and prevents funding activities without merit or that are inconsistent with building drought resilience.

High level detail regarding the Drought Resilience Funding Plan and the Investment Mandate is contained in the Bill in sections 31 and 41. However, it would not be possible to specify the full detail of these documents in the Bill. Both the Plan and the investment mandate documents are to be informed through public consultation and will need to be subject to change over time, in response to emergent issues, intergovernmental priorities and extrinsic factors such as financial market volatility.

---

20 Clause 31 and clause 41. The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(iv) and (v).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 14-16.



### *Drought Resilience Funding Plan*

The FDF's funding priorities will be developed in the Plan following a public consultation process. The Explanatory Memorandum states that, in developing the Plan, the Agriculture Minister will have regard to the Intergovernmental Agreement on National Drought Program Reform, as agreed by all jurisdictions on 12 December 2018 and any successive agreements, as well as any related Australian Government drought policies and strategies.

These dependencies and interconnections with other (intergovernmental) programs, as well as the variability of the effect of drought events, mean that the Drought Resilience Funding Plan is best operationalised in delegated legislation. The Drought Resilience Funding Plan is intended to endure, being in place for four years, to provide a stable and longer-term focus for drought resilience funding, while providing a review opportunity to ensure that drought resilience funding priorities remain current.

The independent expert technical advice from the RIC Board, an independent Commonwealth entity established by the Parliament under statute, and the Agriculture Minister's decision-making process must comply with the Plan.

The Plan is not subject to disallowance and I do not consider an amendment is necessary, because of governance and transparency measures already in the Bill, when these are weighed against the potential risk of certainty of operation required to inform investment and grant decisions and the need to ensure current drought resilience priorities are appropriately captured.

### *Future Drought Fund Investment Mandate*

The Future Drought Fund investment mandate is a direction by the Treasurer and the Minister for Finance and the Public Service, as the responsible Ministers under the Bill, to a body (in this case the Future Fund Board of Guardians (FFBG)) and is, therefore, exempt from disallowance under sub-item 9(2) of the *Legislation (Exemption and other Matters) Regulation 2015*.

This is consistent with the long-standing and established operational arrangements for other funds currently managed by the Future Fund Board of Guardians (Future Fund Board), such as the Future Fund, the Medical Research Future Fund, the *DisabilityCare* Australia Fund, the Building Australia Fund and the Education Investment Fund.

The approach is also consistent with the approach, contemporaneously legislated (in 2018), for the Aboriginal and Torres Strait Islander Land and Sea Future Fund.

The investment mandate provides direction to the Future Fund Board in relation to the performance of its investment functions, and will include

the setting of a benchmark rate of return and an acceptable level of risk that is aligned with the purpose of the FDF.

In setting the investment mandates for the different funds, responsible Ministers need to ensure:

- targeted returns are consistent with the policy intent (including consideration of the intended cashflows from the fund and growth of the underlying capital);
- that resultant risks are aligned with the targeted returns, are reasonable and within tolerances; and
- the mandate is informed by appropriate and expert advice and set with regard to current and expected economic and financial market conditions.

The Government is committed to maintaining the independence of the Future Fund Board's investment activities and to not interfere in investment decisions. Successive Governments have stated that they do not wish to influence the FFBG's investment decisions.

The Bill provides appropriate parliamentary and public scrutiny of the investment mandate. The Bill requires that; prior to issuing the investment mandate, the responsible Ministers must consult the Future Fund Board (section 44(1) refers).

If the Future Fund Board chooses to make a submission regarding the draft investment mandate, this submission must be tabled in both houses of Parliament (s 44(2) refers). This requirement ensures that Parliament is informed of any matters raised by the Future Fund Board.

Additionally, the Future Fund Management Agency provides annual and quarterly performance reports, including comparisons against the benchmark rates specified in the Fund investment mandates.

### ***Committee comment***

2.21 The committee thanks the minister for this response, and notes the advice that it would not be possible to include the matters covered by the DRF Plan and the Investment Mandate in the bill. In this respect, the committee notes the advice that these instruments are to be informed by public consultation, and will need to be subject to change over time in response to emergent issues, intergovernmental priorities and extrinsic factors such as financial market volatility.

2.22 The committee also notes the minister's advice that the DRF Plan is best operationalised in delegated legislation. The committee notes the advice that this is because the DRF Plan will be designed to respond to changes in drought events, and because, in developing the plan, the minister will have regard to intergovernmental agreements and related government drought policies and strategies. The committee further notes the minister's advice that it is appropriate for the DRF Plan to be non-disallowable in light of the governance and transparency measures in the bill, the

need to ensure certainty in grant and investment decision-making, and the need to ensure that drought resilience priorities are appropriately captured.

2.23 The committee also notes the minister's advice that the bill provides appropriate parliamentary and public scrutiny of the Investment Mandate. In this respect, the committee notes the advice that the responsible ministers would be required to consult the FFB when making the Investment Mandate, and that any submission by the FFB on the draft mandate would be required to be tabled in Parliament. The committee also notes the advice that the Future Fund Management Agency provides annual and quarterly performance reports, which include comparisons against benchmark rates specified in the Investment Mandate and these reports will also be tabled in Parliament.

2.24 The committee notes the importance of ensuring independence, transparency and certainty in investment activities, and ensuring that drought resilience priorities are appropriately captured. The committee also acknowledges that the DRF Plan and the directions making up the Investment Mandate would be subject to some parliamentary oversight. However, in light of the significant matters to be included in those instruments, and that such instruments will not be subject to disallowance, the committee considers that the proposed level of parliamentary oversight may not be sufficient.

2.25 In this respect, the committee reiterates that there may be methods available to deliver transparency and certainty in relation to investment decisions, and maintain the independence of the FRB, while still delivering an appropriate level of parliamentary oversight. For example, the committee considers that certainty may be delivered by providing that the relevant instruments do not come into force until after the applicable disallowance period has expired. Moreover, and as outlined in the committee's initial comments, it may be possible to provide that the instruments are generally disallowable, with an exception provided for emergency circumstances.

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

**2.27 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of exempting the Drought Resilience Funding Plan, and directions making up the Future Fund Board's investment mandate, from disallowance.**

---

## Broad delegation of administrative powers<sup>22</sup>

2.28 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's more detailed advice as to why it is considered necessary and appropriate to permit the Agriculture Minister to delegate their powers to any official of a Commonwealth entity.

2.29 The committee also requested the minister's advice as to the appropriateness of amending the bill to; at a minimum, require that persons exercising delegated powers possess the expertise appropriate to the relevant delegation.<sup>23</sup>

### Minister's response

2.30 The minister advised:

The Bill needs to be read in conjunction with the primary legislation governing the operation of all Commonwealth entities: the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

The PGPA Act imposes general duties on all accountable authorities of Commonwealth entities (at sections 15 to 19) including, inter alia, a duty to govern their entity in a way that promotes the proper use (efficient, effective, economical and ethical use) of public resources. Integral to that is the duty to establish and maintain systems relating to risk and control (section 16), including measures directed at ensuring that the officials of the entity comply with the finance law.

To give effect to their duties, accountable authorities would be generally expected to implement:

- delegation and decision-making processes for the proper use of public resources including, robust decision-making and control processes for the expenditure of relevant money. For example:
  - decision-making processes could be supported by requirements on the type of information that officials need to consider before making a spending decision;
  - delegation processes could be limited to particular persons or positions with particular skills and roles (financial transaction limits could be part of those system of delegation).
- appropriate oversight and reporting arrangements for activities and projects, and to address the inappropriate use of resources by officials, or the failure by officials to comply with applicable laws or Commonwealth policies.

---

22 Proposed paragraph 63(1)(c). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 17-18.

These processes can be designed to provide an appropriate level of assurance in accordance with the accountable authorities duty to establish and maintain systems in relation to risk and control in section 16 of the PGPA Act.

The PGPA Act provides an express power of delegation to accountable authorities for reasons of practical necessity, administrative efficiency and operational efficacy. The PGPA Act requirement that the delegation is in writing ensures clarity and accountability for decision-making. Management of delegated power by delegators is crucial to the legitimacy and appropriateness of the exercise of delegated power. The accountable authority of an entity may also, by written instrument, give instructions to officials of other entities where these officials are approving the commitment of relevant money or dealing with public resources for which the accountable authority is responsible (section 22 of the PGPA Act).

When delegating PGPA Act powers accountable authorities must bear in mind their duties under the PGPA Act at sections 15 to 19, including their duty to govern their entity in a way that promotes the proper use of public resources. To give effect to this, an accountable authority may accompany their delegations of power with directions to delegates. Directions enable the accountable authority to instruct the delegate to exercise the delegated power within specified parameters. This not only allows the accountable authority to control how the delegated power is exercised consistent with the statutory requirement to promote the proper use of resources, but also allows the accountable authority to set limits on the power the delegate may exercise.

Delegates, who are officials under the PGPA Act, should understand the nature and scope of the power they have been delegated. This is reinforced through the application of the duties of officials at sections 25 to 29 of the PGPA Act, which, inter alia, requires them to exercise powers with care and diligence, honestly, in good faith and for a proper purpose.

The Department of Agriculture and Water Resources will utilise the Community Grants Hub, through a contract arrangement that it has in place with the Department of Social Services, to make payments to grant recipients. Grants Hub staff will also be officials under the PGPA Act and subject to the responsibilities outlined above.

The provisions of the PGPA Act endure and there is no need or intention to introduce duplicative statutory requirements. The governance outcomes sought by the Committee are already factors implemented under the PGPA Act - see response above.

### ***Committee comment***

2.31 The committee thanks the minister for this response. The committee notes the minister's advice that the Department of Agriculture and Water Resources will use the Community Grants Hub (CGH) to make payments to grant recipients. This indicates that the Agriculture Minister may delegate powers and functions to staff

administering the CGH. The committee notes the minister's advice that CGH staff would be 'officials' under the PGPA Act, and subject to the duties set out therein. In this respect, the committee notes that the PGPA Act requires delegates to exercise their powers with care, diligence, honesty, in good faith and for a proper purpose.

2.32 The committee also notes the minister's advice that accountable authorities under the PGPA Act are expected to implement appropriate decision-making, delegation and oversight processes, including ensuring that delegates possess expertise appropriate to the delegated functions and powers.

2.33 While the committee acknowledges that delegates, as 'officials' under the PGPA Act, would be subject to a number of relevant duties, it remains concerned that the bill does not appear to limit the delegation of the Agriculture Minister's powers to staff at a particular level, or require the minister to be satisfied that delegates possess expertise appropriate to the relevant delegation.

2.34 It is also unclear to the committee that such requirements would be duplicative of the PGPA Act, or inconsistent with the other powers of delegation set out in the bill. In this respect, the committee notes that the Agriculture Minister does not appear to be captured by the definition of 'accountable authority' in the PGPA Act<sup>24</sup> (and may not be subject to the corresponding duties). In contrast, the bill would restrict any delegations made by the Treasurer and the Finance Minister to heads of departments and members of the Senior Executive Service.

**2.35 The committee considers that it may be appropriate for the bill to be amended to, at a minimum, require that persons exercising delegated powers possess the expertise appropriate to the relevant delegation.**

**2.36 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 Agriculture Minister to delegate functions and powers to *any* official of a Commonwealth entity.**

---

### **No requirement to table or publish review report<sup>25</sup>**

2.37 In [Scrutiny Digest 15 of 2018](#), noting that there may be impacts on parliamentary scrutiny where documents associated with a significant review are not available to the Parliament, the committee requested the minister's advice as to why

---

24 Section 12 of the PGPA Act provides that 'accountable authority' refers to the secretary of a government department, a person prescribed as an accountable authority by Commonwealth legislation, or the governing body of a Commonwealth corporate entity.

25 Clause 65. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

it is not proposed to require documents associated with the operational review of the Act to be tabled in Parliament and made available online.<sup>26</sup>

### **Minister's response**

2.38 The minister advised:

The review is envisaged to be operational in nature and, as outlined in the explanatory memorandum, is intended to provide the opportunity to consider whether the Bill is providing the outcomes envisaged. In view of the expectation that the balance of the Fund could grow to \$5 billion over 10 years, the review would consider whether higher annual disbursements could be sustained. Legislative amendment would be necessary in these circumstances and the resultant proposals would be subject to parliamentary oversight, inquiry and appropriate processes.

The Bill structurally follows the drafting adopted in the *Disability Care Australia Fund Act 2013* and the *Medical Research Future Fund Act 2015*. Both contain a requirement for a review of the operation of the Acts to be undertaken, but do not require the results of the review to be tabled in the Parliament.

The Future Drought Fund Bill 2018 also contains a requirement for a review of the operation of the Act but does not require the results of the review to be tabled in the Parliament. However, should the legislation be enacted, I note that there is nothing preventing the Treasurer and I, as the responsible Ministers, from tabling the report of the review in the Parliament.

### **Committee comment**

2.39 The committee thanks the minister for this response. The committee notes the minister's advice that any legislative proposals arising out of a review conducted in accordance with clause 65 would be subject to parliamentary oversight. In this regard, the committee notes the advice that although the bill does not require the results of the review to be tabled in Parliament, there is nothing preventing the responsible ministers from doing so.

2.40 However, the committee considers that where a bill requires or permits an operational review to be conducted, the bill should require (rather than simply permit) documents associated with the review to be tabled in Parliament and published online. The committee reiterates that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians of the existence of the documents and provides opportunities for debate that are not available where documents are not made public. Publishing review documents online also promotes transparency and accountability.

---

26 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 18-19.

**2.41** The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of not requiring documents associated with an operational review conducted in accordance with clause 65 (including, for example, the review report) to be tabled in Parliament or published online.



## Intelligence Services Amendment Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Intelligence Services Act 2001</i> to: <ul style="list-style-type: none"> <li>• enable the minister to specify additional persons outside Australia who may be protected by an ASIS staff member or agent; and</li> <li>• provide that an ASIS staff member or agent performing specified activities outside Australia will be able to use reasonable and necessary force in the performance of an ASIS function</li> </ul>
<b>Portfolio</b>	Foreign Affairs
<b>Introduced</b>	House of Representatives on 29 November 2018
<b>Bill status</b>	Received Royal Assent on 10 December 2018

### Use of force<sup>27</sup>

2.42 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's advice as to:

- the circumstances in which it is envisaged that force, or the threat of force, might be used against a person to protect the 'operational security' of the Australian Secret Intelligence Service (ASIS) from interference by a foreign person or entity;
- the circumstances in which it is envisaged that pre-emptive force would be used to prevent, mitigate or remove risks; and
- the appropriateness of amending the bill to specify that pre-emptive force may only be used to address *immediate* risks or threats.<sup>28</sup>

### Minister's response<sup>29</sup>

2.43 The minister advised:

The Committee has requested advice in relation to circumstances in which it is envisaged that force, or the threat of force, might be used against a person to protect the 'operational security' of the Australian Secret

27 Item 1, proposed section 6(5A); item 13, clause 2 of proposed Schedule 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 21-22.

29 The minister responded to the committee's comments in a letter dated 21 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2019* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

Intelligence Service from interference by a foreign person or entity, and in particular, the use of 'pre-emptive' force to address immediate risks or threats.

As the Committee would appreciate, ASIS operations are necessarily highly classified. The location, nature and substance of those operations varies and is not able to be disclosed publicly. The Australian Government has put as extensive an account as possible into the public domain as part of the material associated with the Bill. 'Operational security' in this context relates to the secrecy of the purpose of the ASIS activity, and indeed, the fact of ASIS involvement. Importantly, force or the threat of force may only be used where there is a significant risk to the integrity of ASIS operations from interference by a foreign person or entity. In practice, this means that such use of force will need to be reasonable and necessary in order to protect the liberty of ASIS staff members or agents undertaking an operation overseas. It could also apply where the sensitivity and the value of the operation to Australia's national interests, as determined by the Minister having consulted with the Prime Minister, Attorney-General, Minister for Defence and other responsible Ministers, is such that the use of force to restrain, control or compel a person in order to protect the integrity of that operation would be reasonable and proportionate. While it is not possible to be proscriptive about the particular operations, which would be of such significance, it is the case that this ability to use force will not apply to routine ASIS intelligence activities. Reasonable and necessary force in this context might involve, for example, temporarily restraining a person who is uncooperative and/or who poses a threat of compromise to the intelligence operation. Such force might also be used to search a person including to seize a potential weapon or communications device, for example, where the device is likely to be used to alert others to the ASIS operation.

The Act does not permit an ASIS staff member or agent to use force in self-defence beyond the concept as it applies under common law. At common law, whether pre-emptive acts are appropriate or not does not necessarily depend on whether an attack was imminent or a person immediately threatened, but whether the accused person's perception of danger led him or her to believe that the use of defensive force was necessary, and the reasonableness of the grounds for that belief. That may be affected by the lack of immediacy of the threat, although Courts have recognised that this will not necessarily always be the case.

Circumstances involving 'pre-emptive' activities involving the use of limited force by ASIS staff members or agents under Schedule 3 of the Act to prevent, mitigate or remove risks might include temporary stopping, detention and searching of foreign persons who are in the immediate vicinity of, or purporting to cooperate in, an ASIS activity - but in a context in which a prudent intelligence agency would take reasonable steps to ensure continued safety of its personnel and integrity of the operation such as undertaking a search for physical threats (e.g. hidden weapons) or

technical threats (e.g. electronic communications devices) that would seriously jeopardise the safety and security of an operation. The 'immediacy' of the risks and threats and when they crystallise may not always be apparent, although such matters, if undetected, have a real prospect of increasing attention from persons who may wish to do harm to the ASIS officers and also potentially causing long-term harm to Australia's national interests. The inclusion of additional words of limitation, such as "immediate risks or threats" may not be helpful in such instances. This is because such a requirement risks leaving a problem to escalate to a point where greater force would be required to address what due to the delay in responding would now be an immediate threat of harm to the staff member or agent or a colleague or other protected person.

ASIS activities are intentionally clandestine in nature and/ or very 'low key' and, in the case of activities undertaken pursuant to Schedule 3 of the Act only take place after rigorous internal operational approvals and as approved by the Minister following consultation with the Prime Minister, Attorney-General, Defence Minister and other relevant Ministers.

I note the Parliamentary Joint Committee on Intelligence and Security (PJCIS) exists to examine legislation that relates to the performance by ASIS of its functions in a context where classified information may be disclosed to it. The PJCIS did not recommend the inclusion of provisions as the Committee contemplates in the digest.

As such, I do not believe that the Act requires further amendment to specify that pre-emptive force may only be used to address 'immediate' risks or threats.

However, as the Minister responsible for ASIS, I share and respect the Committee's perspective in ensuring appropriate rigour and oversight of the activities of ASIS and I will, as the Minister responsible for ASIS continue to ensure that its legislative framework remains balanced and that all its activities are proportionate, necessary and that the nature and consequences of ASIS operations remain reasonable. In particular, I have asked ASIS to have regard to the committee's comments in the development of the new guidelines for the use of force.

### ***Committee comment***

2.44 The committee thanks the minister for this response, and notes the minister's advice that 'operational security', in the context of the bill, relates to the secrecy of the purpose of ASIS activities and the fact of ASIS involvement. The committee also notes the minister's advice that the use or threat of force will only be permitted where there is a significant risk to the integrity of ASIS operations, would need to be reasonable and necessary in order to protect ASIS officers or to protect the integrity of an operation of significance to Australia's national interests, and would not be permitted in routine ASIS activities.

2.45 The committee also notes the minister's advice that 'reasonable and necessary' force may be used to restrain, control or compel a person. For example, force may be used to temporarily restrain a person who is uncooperative, or to seize a communications device which is likely to be used to alert others to an operation. The committee also notes the advice that the *Intelligence Services Act 2001* (Intelligence Act) does not permit ASIS staff or agents to use force beyond what is permitted under the common law, and that the use of force would be subject to a rigorous approvals process.

2.46 The committee further notes the minister's advice that pre-emptive force might be used to temporarily stop, detain or search a foreign person who is in the immediate vicinity of, or purporting to cooperate with, an ASIS activity, in a context where a prudent intelligence agency would take reasonable steps to ensure the safety of its personnel and the integrity of its operation. The committee notes the minister's advice that the 'immediacy' of risks and threats and when they manifest might not always be apparent, and so including additional words of limitation to the power to use force may risk allowing a problem to escalate to a point at which greater force may be required.

2.47 The committee appreciates that it may not be possible to proscribe the specific circumstances in which force may be used to safeguard operational security, and acknowledges that the use of force would be subject to internal controls. Nevertheless, without further information, the circumstances in which force may be used to safeguard operational security remain unclear. The committee therefore reiterates its concerns regarding the breadth of the relevant powers.

2.48 The committee also notes that the bill passed both Houses of Parliament within four sitting days of its introduction.<sup>30</sup> In this respect, and noting the significance of the matters to which the bill relates, the committee is concerned that the bill may not have been subject to sufficient parliamentary oversight.

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

---

### Significant matters in non-statutory guidelines<sup>31</sup>

2.50 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's advice as to:

---

30 The bill was introduced in the House of Representatives on 29 November 2018. It passed both Houses of Parliament on 5 December 2018.

31 Item 13, clause 2 of proposed Schedule 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- why it is considered necessary and appropriate to leave significant matters relating to the use of force to non-statutory guidelines; and
- the type of consultation that it is envisaged would be conducted prior to making the guidelines.

2.51 The committee also requested the minister's advice as to the appropriateness of amending the bill to:

- require that the guidelines made under clause 2 of proposed Schedule 3 be made by disallowable legislative instrument; and
- include specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003* (Legislation Act)), with compliance with those obligations a condition of the validity of the guidelines.<sup>32</sup>

### **Minister's response**

2.52 The minister advised:

The ASIS Guidelines on the Use of Force and Self Defence Techniques have been in place since 2004 when the Act was amended to permit ASIS to engage in training in and the provision of weapons and equipment for the purposes of protection for ASIS staff members and agents.

They were originally drafted in close consultation with the Australian Government Solicitor and originally based on similar rules of engagement by the Australian Federal Police (Commissioner's Orders). They were initially approved by the National Security Committee of Cabinet.

The existing use of force Guidelines issued by the Director-General under Schedule 2 and the new guidelines to be issued under Schedule 3 of the Act necessarily contain a significant amount of sensitive and classified detail concerning ASIS's internal structure and positions as well as contextual details concerning methods of carriage of different types of weapons, locations and types of operations. These are not matters that can be disclosed publicly as part of disallowable instrument processes without jeopardising Australia's national security. I do not consider it appropriate that they be made by disallowable legislative instrument.

The type of consultation envisaged for amendments to the guidelines includes consultation with the Australian Government Solicitor and the policy divisions of the Attorney-General's Department (taking into account domestic and international law considerations) as well as the Office of the Inspector-General of Intelligence and Security. I note that under the Act, the IGIS must brief the PJCIS on the content and effect of the Guidelines if the Committee requests it or if the guidelines change. As part of the amendments this briefing of the PJCIS will extend for the first time to include the ASIS Guidelines on the Use of Force and Self Defence

---

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 23-24.

Techniques which have been in place since 2004. The Department of Foreign Affairs and Trade will also have visibility through the normal Ministerial submission process.

I consider these bodies to be the most appropriate and reasonably practicable entities for the purpose of consultation consistent with section 17 of the Legislation Act 2003. In assessing that the guidelines would not be characterised as legislative instruments ASIS relied upon advice from the Administrative Law Section in the Attorney-General's Department. This advice was reflected in the Explanatory Memorandum.

### ***Committee comment***

2.53 The committee thanks the minister for this response. The committee notes the minister's advice that the use of force guidelines necessarily contain a significant amount of classified detail and these matters cannot be disclosed publicly as part of disallowable instrument processes without jeopardising Australia's national security.

2.54 The committee also notes the minister's advice that, before making the guidelines, consultation will take place with the Australian Government Solicitor, the Attorney-General's Department and the Office of the Inspector-General of Intelligence and Security (IGIS). The committee further notes the advice that, under the Intelligence Act, the IGIS must brief the Parliamentary Joint Committee on Intelligence and Security on the use of force guidelines on request or if the guidelines change, and the advice that the Department of Foreign Affairs and Trade would be involved in the guidelines' development.

2.55 While noting this advice, the committee remains concerned that the guidelines may not be subject to an appropriate level of parliamentary oversight. For example, as the guidelines would not be a legislative instrument, they would not be subject to technical scrutiny by the Senate Standing Committee on Regulations and Ordinances or assessed for compatibility with human rights law by the Parliamentary Joint Committee on Human Rights. Moreover, while the consultation envisaged by paragraph [2.54] above may be sufficient for the purposes of the Legislation Act, there is no *requirement* that consultation be undertaken before guidelines are made.

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

## Migration Amendment (Streamlining Visa Processing) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Migration Act 1958</i> to enable the minister, in a legislative instrument, to specify groups of visa applicants who are required to provide one or more personal identifiers to make a valid visa application
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of Representatives on 29 November 2018
<b>Bill status</b>	Before the House of Representatives

### Significant matters in non-disallowable legislative instruments<sup>33</sup>

#### Privacy<sup>34</sup>

2.57 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to leave significant elements of the visa processing framework—including matters that may have significant impacts on individuals' privacy—to non-disallowable legislative instruments; and
- the nature of any consultation that it is envisaged would be undertaken prior to making an instrument under proposed subsection 46(2B).

2.58 The committee also requested the minister's advice as to the appropriateness of amending the bill to:

- at a minimum, require that determinations made under proposed subsection 46(2B) be disallowable; and
- include specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003* (Legislation Act)), including a requirement to consult with and consider the views of the Privacy Commissioner, with compliance with those obligations a condition of the validity of a determination made under proposed subsection 46(2B).<sup>35</sup>

33 Item 1, proposed subsection 46(2B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

34 Item 1, proposed subsection 46(2B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

35 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 25-28.

**Minister's response**<sup>36</sup>

## 2.59 The minister advised:

The Bill enables the Department of Home Affairs to require personal identifiers from applicants, as an application validity requirement. The amendments will allow the Department to conduct identity, security, law enforcement and immigration checks immediately following lodgement of a visa application, which will improve the integrity of our visa application process, while reducing the time taken to process visa applications.

In response to your first query, the purpose of the Bill is not to expand or impact the nature or type of personal identifiers that can be required, or amend the purposes for which they can be collected. The Department already has broad powers under section 257A of the *Migration Act 1958* (the Migration Act), to require any visa applicant to provide personal identifiers *after* they have lodged a valid visa application. This process is well established and operates onshore within Australia and in 46 countries overseas.

Section 5A of the Migration Act defines 'personal identifiers' and lists the purposes for which they can be collected.

- Subsection 5A(1) defines a personal identifier to include: fingerprints or handprints, measurement of a person's height and weight, photograph or other image of a person's face and shoulders, an audio or a video recording of a person, an iris scan, a person's signature and any other personal identifier prescribed by the *Migration Regulations 1994* (the Migration Regulations).
- Subsection 5A(3) provides the purposes of collecting personal identifiers includes: assisting in the identification of, and authenticating the identity of, any person who can be required under the Act to provide a personal identifier; improving procedures for determining visa applications and combating document and identity fraud in immigration matters.

Both of these subsections in 5A of the Migration Act have been subject to Parliamentary scrutiny. The Bill *will* not expand or amend the types of personal identifiers authorised to be collected, the purpose for which they are collected, or impose any additional privacy concerns.

Further, as the provisions relate to how a person is to make a visa application, and more broadly to the 'arrival, presence and departure of persons' and 'the application for visas', it is appropriately located in Part 2 of the Migration Act. By virtue of its location in Part 2 of the Act, and in accordance with Item 20 of the table in s 10 of the *Legislation (Exemptions*

---

36 The minister responded to the committee's comments in a letter dated 30 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)



and Other Matters) Regulation 2015, any instrument made under new subsection (2B) will be non-disallowable.

Therefore there is no need for Parliament to reconsider these same matters in relation to this Bill. On this basis it is appropriate that the instruments made under proposed subsection 46(2B) are to be non-disallowable.

Continuing to exempt instruments made under Part 2 of the Act from disallowance ensures certainty in visa operational matters for the Department, as well as certainty to visa applicants in terms of knowing what they need to do in order to make a valid visa application. If these instruments were subject to disallowance, the Australian Government would be less agile in addressing emerging issues relating to trends in identity fraud. On the basis of the above mentioned, instruments made under proposed subsection 46(2B) will be non-disallowable.

With regard to your second query, I do not intend that any specific consultations would be undertaken prior to making the instrument under subsection 46(2B). Decisions on which cohorts will be included in the instrument will be determined in line with operational priorities, intelligence, identifiable fraud risks and other factors. While these decisions may be made with the input of relevant stakeholders, it would not be appropriate to mandate such consultations as it would reduce the Department's flexibility in responding quickly to emerging trends and threats.

Similarly, with regard to your third query, I do not consider it appropriate to amend the Bill to include specific consultation obligations with the Privacy Commissioner. The Privacy Commissioner was consulted when section 5A was inserted into the Migration Act.

### **Committee comment**

2.60 The committee thanks the minister for this response, and notes the minister's advice that the bill does not expand the types of personal identifiers that may be collected from visa applicants under the *Migration Act 1958* (Migration Act).

2.61 The committee also notes the minister's advice that it is considered appropriate to exempt instruments made under proposed subsection 46(2B) from disallowance, as this ensures certainty in visa operational matters for the department, as well as certainty for visa applicants. The committee also notes the advice that, if the relevant instruments were disallowable, the government would be less agile in responding to issues related to identity fraud.

2.62 The committee further notes the minister's advice that it is not intended for any specific consultation to be undertaken prior to making an instrument under proposed subsection 46(2B). In this respect, the committee notes the advice that decisions on cohorts of persons to be included in an instrument will be made in accordance with operational priorities, current intelligence, identifiable fraud risks

and other factors. The committee also notes the advice that, while such decisions may be made with stakeholder input, it would not be appropriate to include mandatory consultation obligations (for example, a requirement to consult the Privacy Commissioner) in the bill, as this would reduce the department's flexibility in responding quickly to emerging trends and threats.

2.63 The committee acknowledges that the bill would not expand the *types* of personal identifiers that may be collected from visa applicants. Nevertheless, the bill would leave a number of significant matters to delegated legislation, such as the classes of visa applicants who must provide personal identifiers to make a valid application, the identifiers that must be provided by specified classes of persons and the manner in which those identifiers are to be provided.

2.64 In this regard, the committee reiterates its concern that the relevant instruments would not be disallowable, and would not, therefore, be subject to parliamentary oversight. The committee also reiterates that it does not consider flexibility, operational certainty or broad statements regarding potential threats, to be sufficient justification for leaving significant matters to non-disallowable legislative instruments. The committee notes that it may be possible to deliver certainty for the department and for visa applicants while still maintaining an appropriate level of parliamentary oversight. For example, the bill could provide that the relevant instruments only come into effect after the disallowance period has expired or until both Houses of Parliament have positively approved the making of the instrument.

2.65 Finally, the committee is concerned that the bill would not require that any consultation be undertaken prior to making an instrument under proposed subsection 46(2B). These concerns are heightened by the fact that it is not envisaged that any consultation would occur, and consequently there appears to be a significant risk that the views of relevant stakeholders, including persons who may be affected by the relevant instrument, would not be taken into account. Moreover, while an instrument made under subsection 46(2B) would be subject to the requirements of the Legislation Act, this is unlikely to ensure that proper consultation is undertaken. This is because the Legislation Act 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 does not affect the validity of an instrument.<sup>37</sup>

**2.66 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of leaving a significant element of the visa processing framework to legislative instruments that would not be subject to disallowance by the Parliament.**

---

37 See section 19 of the *Legislation Act 2003*.

---

**2.67** In this respect, the committee notes that the bill does not impose any specific consultation requirements in relation to the making of such instruments, and that it is not envisaged that any consultation would be undertaken.

## Social Services and Other Legislation Amendment (Supporting Retirement Incomes) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Social Security Act 1991</i> and the <i>Veterans' Entitlements Act 1986</i> to: <ul style="list-style-type: none"> <li>• provide new means test rules to encourage the take-up of lifetime retirement income products;</li> <li>• amend the Pension Loans Scheme; and</li> <li>• amend the pension work bonus</li> </ul>
<b>Portfolio</b>	Families and Social Services
<b>Introduced</b>	House of Representatives on 29 November 2018
<b>Bill status</b>	Before the House of Representatives

### Delegated legislation not subject to disallowance<sup>38</sup>

2.68 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's advice as to why it is appropriate to make a number of instruments under the bill notifiable instruments rather than legislative instruments, which are not subject to disallowance or sunseting.<sup>39</sup>

### Minister's response<sup>40</sup>

2.69 The minister advised:

There are two notifiable instrument making powers in the first schedule of the Bill, which are mirrored in the amendments to the *Social Security Act 1991* (SSA) and the *Veterans' Entitlements Act 1986* (VEA).

In both cases, an instrument made under these provisions would not be a legislative instrument, as it does not purport to determine or alter the content of the law, or have the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

38 Schedule 1, item 36, proposed subsections 1120AB(8) and (11); Schedule 1, item 77, proposed subsections 52BAB(9) and (12). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 44 to 45.

40 The minister responded to the committee's comments in a letter dated 9 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2019* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

Notifiable instruments are instruments that are not appropriate to be registered as legislative instruments, but for which public accessibility and centralised management is desirable. I understand that the main criterion, when considering whether an instrument that is not legislative in character should be a notifiable instrument, is whether the public in general, or a member of the public, would benefit from access to an authoritative form of the instrument from a centrally managed source.

The Bill uses notifiable instruments to allow the new means test rules to refer to specific pieces of external information integral to the rules. The Office of Parliamentary Counsel consulted with the Attorney-General's Department when drafting the Bill and obtained approval for the use of notifiable instrument making powers for this purpose.

A notifiable instrument has been used in proposed subsections 1120AB(8) of the SSA and 52BAB(9) of the VEA to define the relevant considerations for the making of an administrative decision and is therefore not legislative in character. This instrument simply allows the new means test rules to refer to a piece of external information, the public accessibility and centralised management of which is desirable for the purposes of the SSA and VEA.

The Bill states the condition of release identified by the Secretary (or Commission) must also be conditions of release in the *Superannuation Industry (Supervision) Regulations 1994*. The explanatory memorandum to the Bill clarifies that this notifiable instrument should mirror the specific conditions of release currently outlined in sub-regulation 16A(3)(a) of the *Superannuation Industry (Supervision) Regulations 1994*.

A notifiable instrument has been used in proposed subsections 1120AB(11) of the SSA and 52BAB(12) of the VEA to specify the number that should be used when referring to the expected age of death of a 65-year-old male, which is relevant when calculating a person's 'threshold day'. This is in order to refer directly to the information in a centrally managed source, to ensure consistency if the location of the information changes in the future (e.g. if the Australian Government Actuary publishes their life tables in different format). These Australian Government Actuary's life tables are also large and complex, therefore from a clearer law perspective, it is desirable to replicate the relevant information in a notifiable instrument.

For this instrument, the Bill states the Secretary (or Commission) must have regard to the most recent life tables published by the Australian Government Actuary and the expected age at death of a 65-year-old male detailed therein.

Given the constraints above, and that the both these instruments are designed to only point to available external information to allow for the proper application of policy, the use of notifiable instruments was considered appropriate.

***Committee comment***

2.70 The committee thanks the minister for this response. The committee notes the minister's advice that the notifiable instruments used in the bill do not purport to determine or alter the content of the law and are therefore not legislative in character.

2.71 The committee also notes the minister's advice that the notifiable instruments in the bill are designed to provide an easily accessible reference to other available external information to allow for the proper application of policy.

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

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

## Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2018

<b>Purpose</b>	This bill seeks to amend Commonwealth legislation to partially implement the <i>Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Boundaries in the Timor Sea</i> (New York, 6 March 2018)[2018] ATNIF 4 (the Treaty)
<b>Portfolio</b>	Resources and Northern Australia
<b>Introduced</b>	House of Representatives on 28 November 2018

### Power for delegated legislation to amend primary legislation (Henry VIII clause)<sup>41</sup>

2.74 In [Scrutiny Digest 15 of 2018](#) the committee requested the minister's more detailed justification as to why it is proposed to allow rules to modify the application of an Act, noting the committee's scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament.<sup>42</sup>

### **Minister's response**<sup>43</sup>

2.75 The minister advised:

The Committee has sought justification for the delegation of legislative power under proposed new subsection 11(3) of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act). That proposed new subsection is to be inserted by item 3 of Schedule 1 of the Bill. It would allow for rules under the BCIIP Act to modify the application of the BCIIP Act in the Greater Sunrise special regime area (special regime area).

As noted in the explanatory memorandum to the Bill, the inclusion of proposed subsection 11(3) is to allow rules to be made to ensure the BCIIP Act applies in a manner consistent with Australia's obligations under the *Treaty Between Australia and the Democratic Republic of Timor-Leste*

41 Schedule 1, item 3, proposed subsection 11(3) of the *Building and Construction Industry (Improving Productivity) Act 2016*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, pp. 46-47.

43 The minister responded to the committee's comments in a letter dated 21 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2019* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

*Establishing Their Boundaries in the Timor Sea* (Treaty) and to facilitate the cooperative exercise of jurisdiction in the special regime area.

Consultations on the cooperative exercise of jurisdiction are ongoing, and as such it is not known at this stage whether, and to what extent, the application of the BCIIIP Act will need to be modified, insofar as it relates to the special regime area, to facilitate the cooperative exercise of jurisdiction in the special regime area. This may be particularly relevant in terms of ensuring there is no conflict between the local content requirements referred to in the Treaty and the provisions of the *Code for the Tendering and Performance of Building Work 2016* (if applicable to particular building work carried out in the special regime area).

In light of the above, I consider it both necessary and appropriate to include the rule making power in the Bill to ensure the Australian Government can flexibly and expeditiously alter the application of the BCIIIP Act in the special regime area to reflect its international obligations.

The rule making power is limited to the special regime area and does not allow for the modification of the BCIIIP Act in other areas in waters above the continental shelf or in the exclusive economic zone. Further, any rules made for the purposes of proposed subsection 11(3) will be disallowable and therefore subject to parliamentary scrutiny, including by the Senate Standing Committee on Regulations and Ordinances.

### **Committee comment**

2.76 The committee thanks the minister for this response. The committee notes the minister's advice that consultations regarding the cooperative exercise of jurisdiction are ongoing and it is not yet known to what extent the application of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIIP Act) will need to be modified.

2.77 The committee also notes the minister's advice that the rule making power is limited to the special regime area and does not allow for the modification of the BCIIIP Act in other areas and that rules made to modify the operation of the Act will be disallowable.

**2.78 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*).**

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



## Chapter 3

### Scrutiny of standing appropriations

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

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

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

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

**Senator Helen Polley**  
**Chair**

---

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](#).

