The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 12 of 2020

18 September 2020

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

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

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Contents

Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Comment bills

1.1 The committee comments on the following bills and, in some instances, seeks a response or further information from the relevant minister.

National Commissioner for Defence and Veteran Suicide Prevention Bill 2020

Purpose	This bill seeks to establish the National Commissioner for Defence and Veteran Suicide Prevention as an independent statutory office holder within the Attorney-General's portfolio
Portfolio	Attorney-General
Introduced	House of Representatives on 27 August 2020

Significant criminal penalties[1]

1.2 Part 3 of the bill establishes the powers of the Commissioner to gather information, compel the production of documents and hold hearings. Part 4 of the bill sets out a number of offences for persons who fail to comply with requests by the Commissioner to produce documents or attend hearings, as well as other related offences. These offences provide for penalties ranging between one and three years imprisonment. For example, clause 45 provides that a person will commit an offence subject to a maximum penalty of two years imprisonment if they fail to attend a hearing.

1.3 The committee's expectation is that a detailed justification for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in other Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a

1 Clauses 45, 46, 47, 49, 51, 52, 54 and 55. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

similar kind or of a similar seriousness. This should include a consideration of other comparable offences in Commonwealth legislation'.[2]

1.4 In this instance, the explanatory memorandum states:

> Part 3 of the Bill sets out the broad information gathering and inquiry powers available to the Commissioner. The Commissioner's information gathering powers include compelling the production of documents and written statements, convening public and private hearings, and summoning persons to attend a hearing to give evidence under oath or affirmation. These powers are closely modelled on the equivalent powers of a Royal Commission under the *Royal Commissions Act 1902* (Cth), and are supported by similar criminal penalties.[3]

1.5 While the committee acknowledges this explanation, the Commission established under this bill is not a royal commission and it is not clear that the Commission requires such significant powers and associated criminal penalties in order to effectively perform its functions. In this regard, the committee notes that section 35 of the *Ombudsman Act 1976* provides that similar offences against that Act are subject to a maximum penalty of 3 months imprisonment or 10 penalty units. Noting this, the committee does not consider that the explanatory memorandum has sufficiently justified the level of the significant penalties in Part 4 of the bill.

1.6 From a scrutiny perspective, the committee is particularly concerned about the contempt offence in subclause 52(2) of the bill. This provision provides that a person will commit an offence if the person engages in conduct which would constitute a contempt of court. The offence is subject to a maximum penalty of 2 penalty units or imprisonment for 3 months. In relation to this provision the explanatory memorandum states:

> This offence is intended to protect the integrity of the Commissioner's processes and inquiries, and is modelled on section 63 of the *Administrative Appeals Tribunal Act 1975*.[4]

1.7 The committee again acknowledges this explanation, however the committee also considers that the highly emotive subject matter of the Commission's inquiry function distinguishes the Commission from the Administrative Appeals Tribunal. In this regard the committee notes the principles in clause 12 of the bill that the Commissioner should take a trauma-informed and restorative approach and should recognise that families and others affected by defence and veteran deaths by suicide have a unique contribution to make to the Commissioner's functions. As a result, and noting the committee's above comments in relation to the lack of clarity

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

3 Explanatory memorandum p. 3.

4 Explanatory memorandum, p. 46.

regarding the need for the Commission to have powers equivalent to a Royal Commission, the committee does not consider that a sufficient justification for the inclusion of this provision and the level of penalty has been provided.

1.8 The committee therefore requests the Attorney-General's advice as to the justification for the maximum penalties imposed by the offences in Part 4 of the bill, including why it is considered necessary and appropriate to set the level of criminal penalties for a standing body of inquiry at the same level as that set for offences against the *Royal Commissions Act 1902*.

1.9 The committee also requests the Attorney-General's more detailed advice as to the rationale for including the contempt offence in subclause 52(2) of the bill, noting the highly emotive subject matter of the Commission's inquiry function.

Reversal of evidential burden of proof[5]

1.10 Clause 45 makes it an offence to fail to attend a hearing or to fail to give information or produce a document or thing. Subclauses 45(3) and (4) provide two exceptions (offence specific defences) to these offences, stating that the offences do not apply if the person has a reasonable excuse or the offence in subclause 45(2) does not apply if the information, statement, document or thing is not relevant to the matters into which the Commissioner was inquiring. Each offence carries a maximum penalty of two years imprisonment.

1.11 Clause 49 creates offences in relation to claims for legal professional privilege where a person fails to give information or produce documents where a claim of legal professional privilege has been rejected or where a person fails to give information or produce a document for inspection by the Commissioner for the purpose of determining a claim for legal professional privilege. The offences carry a maximum penalty of two years imprisonment. Subclause 49(3) provides that the offences do not apply if the person has a reasonable excuse. Subclause 49(4) states that legal professional privilege is not a reasonable excuse unless a court has found the information, statement, document or thing to be subject to legal professional privilege. Subclause 49(5) provides a defence where the information, statement, document or thing is not relevant to the matters into which the Commission is inquiring.

1.12 Clause 58 provides that a person who is served with a notice under clause 30 or clause 32 of the bill does not commit an offence under a secrecy provision because the person answers a question at a hearing as required by the Commissioner, or gives information or a statement as required by the notice or

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5 Clauses 45, 49 and 58. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

produces a document or thing as required by the notice. The defence in clause 58 includes a note that the defendant bears an evidential burden of proof. In relation to the reversal of the evidential burden of proof the explanatory memorandum states:

> In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, it is appropriate to place this evidential burden on the defendant because the defendant would be best placed to raise or point to evidence that their conduct was in accordance with a requirement imposed by the Commissioner (or the Commissioner's authorised delegate) under subclause 58(1). It would be significantly more difficult and costly for the prosecution to disprove this than for the defendant to establish the matter.[6]

1.13 A nearly identical explanation is provided in relation to the reversal of the evidential burden of proof by subclauses 45(3), 45(4), 49(4) and 49(5).

1.14 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.[7]

1.15 The committee notes that the *Guide to Framing Commonwealth Offences*[8] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[9]

1.16 In this case, it is not apparent that the matters outlined above are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence. In relation to clause 58, it would be within the knowledge of the Commissioner that the defendant provided information or documents to the Commissioner. As such, it does not appear to the committee that this matter would be *peculiarly* within the knowledge of the defendant. In relation to subclauses 45(4) and 49(5), it is unclear to the committee

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6 Explanatory memorandum p. 50.

7 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.

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

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

that whether or not information is relevant to a matter is something that would be peculiarly within the knowledge of the defendant and it may be very difficult for the defendant to be able to raise evidence that suggests that the information or document is not relevant.

1.17 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that:

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[10]

1.18 The committee notes that, in relation to subclauses 45(3) and 49(3), the explanatory memorandum does not contain a justification regarding the use of an offence-specific defence of 'reasonable excuse' or information regarding why it is not possible to design more specific defences.

1.19 The committee therefore requests the Attorney-General's detailed justification as to the appropriateness of including the specified matters as offence-specific defences rather than as elements of the offences, including:

- **how the matters in subclauses 45(4) and 49(5) and clause 58 are peculiarly within the knowledge of the defendant; and**
- **why it is appropriate to use an offence-specific defence of reasonable excuse in subclauses 45(3) and 49(3).**

1.20 The committee suggests that it may be appropriate to amend the provisions identified above to provide that the matters specified are framed as elements of the relevant offence and requests the minister's advice as to whether such amendments could be made to the bill.

Legal professional privilege[11]

1.21 Subclauses 30(5) and 32(5) provide that the power of the Commissioner to require a person to give evidence or information, or to produce a document or thing, includes the power to require the person to give evidence or information, or produce a document or thing, that is subject to legal professional privilege. However, under clause 48 legal professional privilege may be a reasonable excuse for failing to give evidence or information or failing to produce a document or thing.

1.22 As outlined above, a person will commit an offence under clause 45 where they fail to attend a hearing or fail to give information or produce a document or

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

11 Subclauses 30(5) and 32(5) and clause 48. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

thing unless they have a reasonable excuse. Clause 48 provides that a claim of legal professional privilege is not a reasonable excuse for the failure to attend a hearing, or to give information or produce a document or thing, unless a court has found the relevant information to be subject to legal professional privilege or a claim of legal professional privilege has been made to and accepted by the Commissioner.

1.23 As recognised by the High Court,[12] legal professional privilege is not merely a rule of substantive law but an important common law right which is fundamental to the administration of justice. The committee considers that abrogating legal professional privilege may unduly trespass on individual rights, as to do so may interfere with legitimate, confidential communications between individuals and their legal representatives. The committee therefore considers that it should only be abrogated or modified in exceptional circumstances. Where a bill seeks to abrogate legal professional privilege, the committee would expect a sound justification in the explanatory memorandum.

1.24 In this instance, the statement of compatibility states:

> The Bill provides that a claim of legal professional privilege is not a reasonable excuse for a failure to attend a hearing, or to give information or produce a document or thing, unless a court has found the information, statement, document or thing to be subject to legal professional privilege (subclause 49(4) refers). Providing discretion for the Commissioner to make a determination whether to accept or reject such a claim in other circumstances is necessary to ensure the Commissioner can conduct full and genuine inquiries, with access to all relevant information. The approach gives weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry.
>
> To the extent the process for claiming legal professional privilege may be viewed as a limitation to fair hearing rights, this limitation is balanced and proportionate. The process is modelled on the equivalent process that a court would undertake in determining a claim of legal professional privilege. A person claiming legal professional privilege is afforded an equivalent ability to press for application of the claim before the Commissioner as they would before a court. The process for claiming legal professional is reasonable, necessary and proportionate as it is not so onerous that it would prevent a person accessing legal advice or assistance. In circumstances where the Commissioner rejects a claim of legal professional privilege, it is not disproportionately burdensome on a person to challenge the determination in a court.[13]

1.25 The committee notes that clause 48 would protect information subject to legal professional privilege in circumstances where a court had already found the

12 See e.g. *Baker v Campbell* (1983) 153 CLR 52.

13 Statement of compatibility, pp. 10 – 11.

information was protected by legal professional privilege or where the Commissioner had accepted a claim of legal professional privilege. However, in circumstances where the Commissioner rejects such a claim, subclause 48(5) provides that the Commissioner may use the information for the purposes of performing the Commissioner's functions. In this regard, the committee notes that under clause 56 the Commissioner's functions include disclosing information to a broad range of entities, including police, the Director of Public Prosecutions and any other Commonwealth or State or Territory body.

1.26 Noting the above, the committee is concerned that information that is properly subject to legal professional privilege may be inappropriately disclosed in circumstances where the Commissioner wrongly rejects a claim of legal professional privilege. While the statement of compatibility notes that it is 'not disproportionately burdensome' for a person to challenge the Commissioner's determination on the existence of legal professional privilege in a court, the committee notes that this would involve a person seeking judicial review or declaratory relief.

1.27 In addition, no detail is provided on the face of the bill as to what criteria the Commissioner must consider in deciding a claim of legal professional privilege or what qualifications, training or experience the Commissioner must have that would ensure that the Commissioner could effectively assess the claim. In this respect, the committee notes that assessing claims of legal professional privilege may be a complex exercise, and is one that is typically undertaken by a judicial officer.

1.28 Finally, the committee considers that where legal professional privilege may be abrogated (for example, where the Commissioner wrongly rejects a claim of legal professional privilege), the legislation should provide that it does not affect a later claim of legal professional privilege that anyone may make in relation to the information, document or record.[14]

1.29 In light of the above, the committee requests the Attorney-General's more detailed advice as to the rationale for, and the appropriateness of, abrogating legal professional privilege in the bill.

1.30 In particular, the committee requests the Attorney-General's advice as to whether the bill can be amended to:

- **set out criteria the Commissioner must consider in deciding a claim of legal professional privilege;**
- **provide that a person must not be appointed as the Commissioner unless the person possesses qualifications, training or experience that would enable him or her to effectively assess claims of legal professional privilege under clause 48 of the bill; and**

14 See, for example, subsections 7A(1E), 8(2E) and 9(5A) of the *Ombudsman Act 1976*.

- **provide that a decision by the Commissioner to reject a claim of legal professional privilege does not affect a later claim of legal professional privilege that anyone may make in relation to the information, document or record.**

Privilege against self-incrimination[15]

1.31 Subclause 50(1) of the bill provides that an individual is not excused from providing information, evidence or a statement, or producing a document or thing under clause 30 or 32 of the bill on the grounds that it might incriminate them in relation to an offence. This provision overrides the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.[16]

1.32 In relation to the abrogation of the privilege against self-incrimination the explanatory memorandum states:

> The privilege against self-incrimination has been overridden in the qualified way outlined above to support the Commissioner's function to inquire into, and report on, matters of public importance. The approach gives weight to the public benefit in equipping the Commissioner with appropriate inquiry powers.
>
> The abrogation of the privilege against self-incrimination operates alongside subclause 50(3), which would limit the use of potentially self-incriminating information in certain criminal proceedings. It also operates alongside the protection that a natural person appearing as a witness or giving or producing evidence or a statement in response to a notice has the same protection as a witness in the High Court (clause 64 refers). This will enable relevant persons to claim the defence of absolute privilege in respect of information disclosed when appearing as a witness or in response to a compulsory notice, for example, in separate criminal or civil proceedings. The Commissioner also has powers under clause 53 to issue a non-publication order to limit the disclosure and use of evidence which may be self incriminating. The inclusion of these provisions is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which provides that 'if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained'.[17]

15 Clause 50. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

17 Explanatory memorandum, pp. 43 – 44.

1.33 The committee acknowledges that subclause 50(3) provides a use immunity for information provided as a result of subclause 50(1) of the bill. Such information is not admissible in evidence against an individual in any criminal proceedings except for an offence of giving false or misleading information or documents under section 137.1 or 137.2 of the *Criminal Code*, or for an offence under Part III of the *Crimes Act 1914*, or proceedings for an offence against the bill. However, a derivative use immunity (which prevents information or evidence indirectly obtained from being used in criminal proceedings against the person) has not been included in the bill. The explanatory memorandum does not contain a justification regarding why a derivative use immunity has not been included.

1.34 The committee accepts that the privilege against self-incrimination may be overridden where there is a compelling justification for doing so. In general, however, the committee considers that any justification for abrogating the privilege will be more likely to be considered appropriate if accompanied by a use *and* derivative use immunity (providing that the information or documents produced or answers given, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings). In this case, the committee notes that the bill includes a use immunity but not a derivative use immunity.

1.35 The committee therefore requests the Attorney-General's advice as to why it is proposed to abrogate the privilege against self-incrimination without also providing a derivative use immunity.

Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020

Purpose	This bill seeks to amend the *Radiocommunications Act 1992* to implement recommendations of the 2015 Spectrum Review (the Spectrum Review) and fulfil the Australian Government's commitment to modernise the legislative framework for spectrum management
Portfolio	Communications, Cyber Safety and the Arts
Introduced	House of Representatives on 27 August 2020

Delegated legislation not subject to disallowance—ministerial policy statements[18]

1.36 Item 2 of Schedule 2 seeks to insert proposed section 28B into the *Radiocommunications Act 1992* (the Act) to provide that the minister may, by notifiable instrument, specify a policy of the government that is to apply in relation to the performance of any of the Australian Communications and Media Authority's (ACMA) spectrum management functions or the exercise of any of the ACMA's spectrum management powers.

1.37 The committee notes that notifiable instruments are not subject to the tabling, disallowance, sunsetting or consultation requirements applying to legislative instruments. As such, there is no parliamentary scrutiny of a notifiable instrument. Given the impact on parliamentary scrutiny by not making such an instrument a legislative instrument, the committee would expect the explanatory memorandum to provide a sound justification for the use of a notifiable instrument. In this instance, the explanatory memorandum states:

> The making of an MPS by notifiable instrument allows the Minister to provide formalised policy guidance, without compelling ACMA by legislative instrument or Ministerial direction. The approach is less prescriptive and fits within the broader policy intent of the Bill, to empower ACMA, as the regulator, to manage the administration of the spectrum and to reduce the Minister's involvement in the day-to-day administrative processes of ACMA.[19]

1.38 While noting this explanation, it remains unclear to the committee why any guidance from the minister regarding the performance of spectrum management

18 Schedule 2, item 1, proposed section 28B. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

19 Explanatory memorandum, p. 22.

functions or exercise of spectrum management powers could not be in legislative instruments. The committee notes that the directions from the minister could be non-binding on the ACMA and merely provide matters that the ACMA should take into account when considering a matter. Specifying that such directions are to be made by legislative instrument would provide increased opportunities for parliamentary scrutiny.

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

- **why it is necessary and appropriate for guidance from the minister under proposed section 28B to be a notifiable instrument; and**
- **whether the bill can be amended to provide that any instrument made under proposed section 28B will be a legislative instrument.**

Delegated legislation not subject to disallowance—bans on equipment[20]

1.40 Item 24 of Schedule 4 seeks to insert proposed section 167 into the Act, which would allow the ACMA to impose an interim ban on equipment of a specified kind by notifiable instrument. Proposed section 168 provides that an interim ban will remain in force for 60 days and that the ACMA may extend, by notifiable instrument, the period of the interim ban by an additional 30 days. Proposed section 169 provides that the ACMA may revoke an interim ban by notifiable instrument. Proposed section 179 provides that the ACMA may, by notifiable instrument, declare a specified period as an amnesty period for a specified permanent ban.

1.41 The committee notes that notifiable instruments are not subject to the tabling, disallowance, sunsetting or consultation requirements that apply to legislative instruments. As such, there is no parliamentary scrutiny of a notifiable instrument. Given the impact on parliamentary scrutiny by not making such an instrument a legislative instrument, the committee would expect the explanatory memorandum to provide a sound justification for the use of a notifiable instrument. In this instance, the explanatory memorandum states:

> The notice would need to be published on ACMA's website and the legislative rules may set out additional requirements of ACMA to publish a notice. However, a failure of ACMA to publish such a notice on their website is not intended to invalidate an interim ban. The requirement of ACMA to publish an interim ban on its website is intended to provide increased transparency and awareness amongst radiocommunications users. The power conferred on ACMA to impose an interim ban on equipment is by way of notifiable instrument. Notifiable instruments are

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20 Schedule 4, item 24, proposed sections 167, 168, 169 and 179. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

required to be registered on the Federal Register of Legislation, and these publication requirements are in addition to that requirement.[21]

1.42 While noting this explanation, it remains unclear to the committee why interim bans on equipment, the extension and revocation of interim bans and the declaration of amnesty periods for permanent bans could not be specified by legislative instrument. The committee notes that such an approach would provide appropriate parliamentary oversight of these matters. In this regard, the committee notes that proposed section 172 appropriately provides for the ACMA to make permanent bans on equipment by legislative instrument.

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

- **why it is necessary and appropriate for interim bans on equipment, the extension and revocation of interim bans and the declaration of amnesty periods for permanent bans to be made by notifiable instrument; and**
- **whether the bill can be amended to provide that any instrument made under proposed sections 167, 168, 169 and 179 will be a legislative instrument.**

Computerised decision making[22]

1.44 Item 10 of Schedule 8 seeks to insert proposed section 305A into the Act to allow the ACMA to rely on computer programs when exercising its powers. Specifically, under proposed section 305A the AMCA may use any computer program under its control for any purposes under the Act or under a legislative instrument made under the Act to make a decision, or exercise any power or comply with any obligation, or do anything else in relation to making a decision or exercising a power or complying with an obligation.

1.45 The committee notes that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions and circumstances where the exercise of a statutory power is

21 Explanatory memorandum, p. 59.

22 Schedule 8, item 10, proposed section 305A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.46 With reference to these matters, the committee notes that proposed section 305A authorises the ACMA's use of automated decision making for any decisions or exercising any powers under the Act or any legislative instruments made under it. This has a potentially extremely broad application given the large number of decisions and powers that the ACMA is authorised to make or use under the Act, notwithstanding any further decision making powers and other powers provided to the ACMA by legislative instruments. The committee notes that at least some of these decisions may invariably involve complex or discretionary considerations. For example, sections 74 and 77 of the Act provide that the ACMA may cancel a spectrum licence if it is satisfied that the person authorised to operate a radiocommunications device has contravened a licence condition or the Act, or operated the licence in contravention or in the course of contravention of any written or unwritten law of the Commonwealth, a State or Territory.

1.47 In relation to proposed section 305A the explanatory memorandum states:

> This item inserts Section 305A, which allows AMCA to use computer programs in the exercise of its powers and specifies how this system is applied in the legislative framework of the Act. This enables ACMA to arrange for computer programs under the control of ACMA to make decisions, exercise any powers, or do anything related to the making of a decision or complying with obligations. Should ACMA utilise a computer program for this purpose, it is determined to have made a decision or taken action for the purposes of the Act. This decision is able to be reviewed by ACMA at any time. Conversely, a decision made by a computer program must be overridden by ACMA if it is satisfied that the initial decision by the computer program is incorrect. Formalising this computerised process modernises the Act and ensures that it remains fit-for-purpose as technology presents increasing opportunity to streamline services, particularly routine administrative decisions such as the renewal of most apparatus licences.[23]

1.48 While the committee acknowledges this explanation, in light of the potential impacts on administrative decision-making outlined above, the committee would expect the explanatory materials to include a more comprehensive justification for allowing any decisions or powers of the AMCA under both the Act and any legislative instrument made pursuant to it to be performed by computer program. The committee also considers that it would be useful for the explanatory materials to explain how automated decision-making will comply with relevant administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).

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23 Explanatory memorandum, p. 103.

1.49 As the explanatory materials do not appear to adequately address this matter, the committee requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to permit the AMCA to arrange for the use of computer programs for any decisions, powers or obligations it has under the *Radiocommunications Act 1992* and any legislative instruments made pursuant to the Act;**
- **whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and**
- **whether consideration has been given to including a requirement on the face of the bill that certain administrative actions and powers (for example, complex or discretionary decisions) must be taken or exercised by a person rather than by a computer.**

Broad delegation of investigatory powers[24]

1.50 Item 31 of Schedule 6 seeks to insert proposed sections 284A and 284B into the Act to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014*. Proposed subsections 284A(13) and 284B(11) provide that an authorised person may be assisted by 'other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

1.51 The committee's consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have the appropriate training and experience. The committee's concerns in this instance are heightened by the provisions allowing for the use of force.[25]

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

- **why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised person; and**
- **whether the bill can be amended to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.**

24 Schedule 6, item 31, proposed sections 284A and 284B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

25 See proposed subsections 284A(14) and 284B(13).

Significant matters in delegated legislation[26]

1.53 Item 24 of Schedule 4 seeks to insert a new Part 4.1 into the Act. Proposed section 156 provides that the ACMA may, by legislative instrument, make equipment rules. The equipment rules must be directed towards achieving a number of objectives, including ensuring the electromagnetic compatibility of equipment. Proposed section 158 provides that the equipment rules may prescribe standards for equipment. Proposed section 159 provides that the equipment rules may impose obligations or prohibitions in relation to equipment. This includes, for example, prohibiting the operation, supply or possession of equipment or prohibiting a person from doing an act or a thing unless the person holds a permit issued by the ACMA. Proposed section 160 seeks to impose a number of criminal and civil penalties for breaches of the equipment rules and permit conditions.

1.54 The committee has consistently drawn attention to framework provisions, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as a scheme to manage the operation, supply and possession of equipment, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains limited justifications regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.55 The committee's scrutiny concerns in this instance are heightened by the inclusion of offence provisions where the detail regarding how an offence will be committed is left to delegated legislation. The committee notes that this limits the ability of Parliament to have appropriate scrutiny over offence provisions and may create confusion for persons subject to such offences as it is not clear on the face of the bill what conduct will constitute an offence.

1.56 In light of the above, the committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave the details of the scheme to manage the operation, supply and possession of equipment to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding the intended operation of the scheme.**

26 Schedule 4, item 24, proposed Division 2 of Part 4.1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

Broad delegation of administrative powers

Adequacy of review rights

Parliamentary scrutiny[27]

1.57 Item 12 of Schedule 8 seeks to insert proposed section 313B into the Act to provide that the minister may, by legislative instrument, make rules prescribing matters required or permitted by the Act or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Proposed subsection 313B(4) provides that the rules may make provision in relation to a matter by conferring a power to make a decision of an administrative character on a person who holds a specified kind of accreditation. Proposed subsection 313B(5) provides that the rules may authorise a person who holds a specified kind of accreditation to charge fees in relation to the exercise by the person of a power conferred by the rules. A number of provisions in the bill allow for both legislative and notifiable instruments to confer powers on accredited persons to make decisions of an administrative character and charge fees.

1.58 The committee has consistently drawn attention to legislation that allows the broad delegation of administrative powers. 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. 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. In this instance, the explanatory memorandum contains limited information about why it is necessary to confer powers to make decisions of an administrative character on accredited persons. For example, in relation to proposed subsection 27(2A), the explanatory memorandum states:

> The ability to make administrative decisions in relation to exemptions under section 27 could allow ACMA to be more flexible and responsive to the needs of exemption holders, while also providing for a measure of transparency in the form of the registration of notifiable instruments. This Bill includes a number of provisions that enable ACMA to empower itself and others to make administrative decisions. These additional express

27 Schedule 3, item 3A, proposed subsection 27(2A); Schedule 4, item 24, proposed subsection 162(2) and proposed section 163; Schedule 5, item 4, proposed subsection 71(5); Schedule 5, item 4, proposed subsection 73A(3); Schedule 5, item 6, proposed subsection 100(4B); Schedule 5, item 10, proposed subsection 110A(7); Schedule 5, item 11, proposed subsection 111A(4); Schedule 5, item 13, proposed subsection 145(3A); Schedule 5, item 20, proposed subsection 298A; Schedule 8, item 12, proposed subsection 313B(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii), (iii) and (iv).

> powers are not intended to impact the powers that ACMA previously had to confer such powers, with this provision avoiding doubt about whether such a power exists after the amendments made by this Bill.[28]

1.59 The committee's scrutiny concerns in this instance are heightened by the fact that there is little guidance on the face of the primary legislation as to who the persons who hold a specified kind of accreditation will be, whether the person will have the appropriate skills, training or qualifications to make decisions of an administrative character or the nature of the kinds of decisions that will be made.

1.60 Additionally, the committee has scrutiny concerns regarding the ability of accredited persons to charge fees in circumstances where there is no information on the face of the bill as to how the fees will be calculated or any cap on the maximum amount imposed by fees (other than a requirement that the fee must not be such as to amount to taxation). There is also no information in the explanatory memorandum regarding how the amount of any fee will be calculated or how the ACMA will ensure that a fee charged by another person is either necessary or appropriate.

1.61 Finally, the committee also has scrutiny concerns regarding the right of review for any persons who may be impacted by a decision of an administrative character made by an accredited person. The committee notes that the *Radiocommunications Act 1992* provides for review by the Administrative Appeals Tribunal for a number decisions made by the ACMA. However, noting the limited information provided in the explanatory memorandum, it is unclear to the committee what the review rights would be for decisions made by accredited persons or whether such review rights would be necessary.

1.62 The committee therefore requests the minister's more detailed advice regarding:

- **why it is necessary and appropriate to allow both legislative and notifiable instruments to delegate the power to make decisions of an administrative character and the power to charge fees to persons who hold a specified accreditation;**
- **the nature of decisions of an 'administrative character' that may be made by persons who hold a specified accreditation;**
- **whether the bill can be amended to provide that the ACMA must be satisfied that the persons who hold a specified accreditation have the appropriate training, expertise or qualifications to make decisions of an administrative character;**
- **whether judicial review and independent merits review will be available for decisions of an administrative character made by accredited persons;**

28 Explanatory memorandum, p. 26.

- **how the amount of any fee charged will be calculated and how the ACMA will ensure that the level of fee imposed by another person is appropriate;**
- **whether the bill can be amended to provide at least high-level guidance on the face of the bill regarding how fees will be calculated; and**
- **whether proposed section 298A can be amended so that an instrument made under that section by the ACMA is a legislative instrument rather than a notifiable instrument to ensure that such instruments are subject to appropriate parliamentary scrutiny.**

Broad delegation of legislative power[29]

1.63 Item 9 of Schedule 8 seeks to insert proposed section 302 into the Act, which provides that a number of sections are compliance provisions and that the ACMA may, by legislative instrument, determine that one or more specified acts are exempt from one or more of the compliance provisions or that one or more persons are exempt from one or more of the compliance provisions.

1.64 In the view of the committee, proposed section 302 appears to confer a broad administrative power on the ACMA to exempt acts and persons from the application of the law. This is therefore akin to a Henry VIII clause, which enables delegated legislation to alter or override the operation of primary legislation. The committee has significant concerns with Henry VIII-type clauses, as such clauses have the potential to impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.

1.65 In this instance, the committee acknowledges that proposed section 302 does not enable delegated legislation to modify primary legislation, but rather enables the ACMA to override the operation of the primary legislation. However, the committee remains concerned about the breadth of the proposed power, and its potential impact on parliamentary scrutiny.

1.66 In light of these matters, the committee would expect a sound justification for the power conferred on the ACMA under proposed subsection 302(2) to be provided in the explanatory memorandum. The committee notes that the explanatory memorandum provides no such justification, but does state that:

> In determining the public interest, ACMA will weigh the broader benefits (as well as the individual benefits accrued to the recipient of an exemption) against any detriments that may flow from an exemption. ACMA will also consider the intrinsic principle of the compliance provision from which an act is being exempted. In many situations, such as the supply of prohibited devices, there must be a strong public interest case

29 Schedule 8, item 9, proposed section 302. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

for an exemption to be granted. There are a range of circumstances in which exemptions may be appropriate. These exemptions are designed to help promote innovation and industry development opportunities within Australia.[30]

1.67 In light of the above, the committee requests the minister's detailed justification regarding:

- **why it is proposed to confer on the ACMA the broad power to exempt acts and persons from the application of the law; and**
- **whether the bill could be amended to include at least high-level guidance regarding the circumstances where it will be appropriate for the ACMA to exempt an act or person from the compliance provisions.**

30 Explanatory memorandum, p. 103.

Recycling and Waste Reduction Bill 2020

Purpose	This bill seeks to establish a legislative framework to enable Australia to more effectively manage the environmental and human health and safety impacts associated with the disposal of waste materials and products
Portfolio	Environment
Introduced	House of Representatives on 27 August 2020

Significant matters in delegated legislation[31]

1.68 The bill seeks to establish a legislative framework to enable Australia to more effectively manage the environmental and human health and safety impacts of products and waste material.

1.69 Significant elements of the legislative framework are left to be determined in delegated legislation including in relation to:

- what kind of waste material will be 'regulated waste material' for the purposes of the new regime for the regulation of the export of waste materials, as well as the conditions that will apply to the export of waste material;[32]
- the accreditation of voluntary arrangements;[33]
- the scheme for the management of co-regulatory arrangements, including who is a liable party and the outcomes and matters to be dealt with by co-regulatory arrangements;[34]
- the requirements for mandatory product stewardship;[35]
- matters relating to audits undertaken under the bill;[36]
- the functions and powers of authorised officers;[37]

31 Clauses 17, 18, 70, 77–80, 92, 112, 138, 142, 144, 155 and 159. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

32 Clauses 17 and 18.

33 Clause 70.

34 Clauses 77 – 80.

35 Clause 92.

36 Clause 112.

37 Clause 138.

- the requirements for making and retaining records;[38]
- the requirements for providing and disseminating information;[39]
- the charging of fees;[40] and
- the imposition of a waste management charge, including when a charge will be due, penalties for non-payment of the charge and the review of decisions made under the rules.[41]

1.70 The committee has consistently raised concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as those outlined at paragraph 1.69 above, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. For example, in relation to clause 18 relating to the conditions that will apply to the export of waste material, the explanatory memorandum states:

> Setting the prescribed export conditions in the rules will give the Minister the flexibility to regulate the export of regulated waste material to suit the requirements of a particular waste stream. For instance, it may not be appropriate for exports of waste glass to be subject to the same prescribed export conditions as exports of waste plastics, given the different properties of the waste material concerned.[42]

1.71 While noting the advice in the explanatory memorandum and acknowledging the complexity surrounding the different requirements for particular waste materials and the proposed new legislative framework more generally, the committee has generally not considered that a desire for administrative flexibility is, of itself, is a sufficient justification for leaving significant matters to delegated legislation. In this regard the committee notes that delegated legislation, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.72 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant elements

38 Clause 142.

39 Clause 144.

40 Clause 155.

41 Clause 159.

42 Explanatory memorandum, pp. 15–16.

of the proposed new legislative framework for the management of the environmental and human health and safety impacts of products and waste material to be determined in delegated legislation.

1.73 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Reversal of the evidential burden of proof[43]

1.74 Clauses 21, 22, 23 and 24 provide offences for persons who knowingly or recklessly make false or misleading representations in relation to either regulated waste material that is entered for export or export declarations. Subclauses 21(5), 22(5), 23(5), 24(5) provide exceptions (offence-specific defences) where the representation is not false or misleading in a material particular. The explanatory memorandum for each provision notes that this is appropriate on the basis that knowledge of that matter would be peculiar to that person.[44]

1.75 Clause 106 provides that an authorised officer may give directions to certain persons. Subclause 106(6) provides that a person will commit an offence if they are given a direction and engage in conduct that would contravene the direction. Subclause 106(9) provides an exception to the offence where the direction, either in writing or orally, does not include information that a person may commit an offence or be liable to a civil penalty if they fail to comply with the direction. The explanatory memorandum notes that this is appropriate on the basis that knowledge of that matter would be peculiar to that person.[45]

1.76 Clause 124 provides that a person who has been issued an identity card will commit an offence if they do not return the identity card to the Secretary within 14 days of ceasing to be an authorised officer, approved auditor or person performing functions or duties under the bill. Subclause 124(2) provides an exception to the offence in circumstances where an authorised officer's authorisation has been suspended or where the identity card has been lost or destroyed. The statement of compatibility states:

> Reversing the burden in these circumstances is reasonable because whether the defendant's identity card has been lost or destroyed is something peculiarly within the knowledge of the defendant alone and proving the contrary beyond reasonable doubt will require significant and difficult to obtain indirect and circumstantial evidence.[46]

43 Subclauses 21(5), 22(5), 23(5), 24(5), 106(9), 124(2) and 148(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

44 Explanatory memorandum, pp. 20, 22, 23 and 24.

45 Explanatory memorandum, p. 101.

46 Statement of compatibility, p. 14.

1.77 Clause 148 provides that a person will commit an offence where the person uses or discloses protected information obtained in the course of performing functions or duties under the bill where there is a risk that the use or disclosure of the information might substantially prejudice the commercial interests of another person. Subclause 148(2) provides an exception to the offence where the use or disclosure is authorised by clause 149. The statement of compatibility states:

> It is appropriate that the evidential burden in relation to these matters is placed on the defendant as whether the defendant used or disclosed protected information in reliance on one or more of the exemptions in subclause 149(1) is peculiarly within the knowledge of the person. Further, there are a number of authorised uses and disclosures set out in subclause 149(1). In the event of a prosecution, it will be significantly more difficult and costly for the prosecution to disprove all the circumstances set out in paragraphs 149(1)(a)-(h) than it will be for a defendant to establish the existence of one of those circumstances. Consequently, in order to effectively protect information under clause 148, it is reasonable, necessary and proportionate to require a defendant to adduce or point to evidence that suggests a reasonable possibility that one of the exceptions listed in clause 149 applies, and for clause 149 to limit the right to the presumption of innocence.[47]

1.78 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.[48]

1.79 The committee notes that the *Guide to Framing Commonwealth Offences*[49] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[50]

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47 Statement of compatibility, p. 15.

48 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.

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

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

1.80 In this case, it is not apparent that the matters set out in the offence-specific defences referred to above are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. For example, the committee notes that the information contained on a written direction issued under clause 106 would not be peculiarly within the knowledge of the defendant as it would also be within the knowledge of the authorised officer who issued the direction. The committee also notes, in relation to clause 124, that whether an authorised officer had been suspended would likely not be peculiarly within the knowledge of the defendant. The committee further notes that many of the protected disclosures set out in clause 149 would also be within the knowledge of multiple people in addition to the defendant, for example paragraph 149(1)(c) provides that a disclosure is a protected disclosure where the affected person has consented to the disclosure. As a result, these matters appear to be matters more appropriate to be included as an element of the offence.

1.81 The committee requests the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee suggests that it may be appropriate if subclauses 21(5), 22(5), 23(5), 24(5), 106(9), 124(2), and 148(2) were amended to be elements of the relevant offences and requests the minister's advice in relation to this matter.

Strict liability[51]

1.82 Subclause 81(1) provides that the administrator of an approved co-regulatory arrangement in relation to a product must take all reasonable steps to ensure that the arrangement achieves the outcomes specified under clause 79 in relation to that product and comply with any requirements prescribed by rules made for achieving those outcomes. Subclause 81(2) provides that a person commits an offence of strict liability if the person contravenes subclause 81(1).

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

51 Clause 81. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[52]

1.84 In this instance, the explanatory memorandum states:

> Strict liability is proposed for this offence having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the *Senate Scrutiny of Bills Committee Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Consistent with these documents, strict liability is considered appropriate as:
>
> - the offence is not punishable by imprisonment;
> - the offence is subject to a maximum penalty of 60 penalty units for an individual;
> - the actions which trigger the offence are simple, readily understood and easily defended. The offence is triggered if the administrator of an approved co-regulatory arrangement does not take all reasonable steps to ensure the arrangement achieves the specified outcomes, or does not comply with requirements specified in the rules;
> - offences relating to achieving the outcomes of co-regulatory schemes need to be dealt with efficiently to ensure industry confidence in the regulatory regime;
> - the offence will be subject to an infringement notice (see clause 102);
> - the absence of strict liability may adversely affect the capacity to prosecute offenders. Requiring administrators of approved co-regulatory arrangements to take all reasonable steps to ensuring the specified outcomes for that arrangement is integral to the operation of co-regulatory product stewardship and the overarching product stewardship framework set out in this Bill. Whether or not a defendant intentionally or negligently did not take all reasonable steps is a matter that is peculiarly within the knowledge of the defendant alone. Proving the contrary beyond reasonable doubt will require significant and difficult to obtain indirect and circumstantial evidence.[53]

1.85 While acknowledging this explanation, it remains unclear to the committee that the requirement to take 'all reasonable steps' is an action that is simple, readily understood and easily defended. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that:

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

53 Explanatory memorandum, p. 75.

> Strict liability should not be justified by reference to broad uncertain criteria, such as offences being intuitively against community interests or for the public good. Criteria should be more specific.[54]

1.86 The committee considers that the requirement to take 'all reasonable steps' may be broad and uncertain. As a result, the committee considers that the offence may more appropriately be a fault-based offence.

1.87 The committee suggests that it may be appropriate to amend subclause 81(2) to provide that the offence is not one of strict liability. The committee therefore requests the minister's advice as to whether the bill can be amended to provide that the offence in subclause 81(2) is a fault-based offence.

Broad delegation of investigatory powers[55]

1.88 Clauses 97 and 99 seek to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014*. Subclauses 97(4) and 99(3) provide that an authorised person may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

1.89 The committee's consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have the appropriate training and experience. The committee's concerns in this instance are heightened by the provisions allowing for the use of force.[56]

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

- **why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised person; and**
- **whether the bill can be amended to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.**

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

55 Clauses 97 and 99. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

56 See subclauses 98(5) and 100(5).

Delegated legislation not subject to parliamentary disallowance[57]

1.91 Clause 125 provides that the Secretary may authorise a person to be an authorised officer. Subclause 125(7) provides that the Secretary must determine, in writing, the training and qualification requirements for authorised officers. Subclause 125(8) provides that a determination under subclause 125(7) is not a legislative instrument.

1.92 Clause 129 provides that the Secretary must determine, in writing, training and qualification requirements for authorised government enforcement officers in relation to the performance of functions or duties under the Regulatory Powers Act. Subclause 129(2) provides that the determination is not a legislative instrument.

1.93 Clause 166 provides that the Secretary may appoint a person to be an analyst. Subclause 166(3) provides that the Secretary must determine, in writing, training and qualification requirements for analysts. Subclause 166(4) provides that that the determination is not a legislative instrument.

1.94 The committee notes that a determination that is not a legislative instrument will not be subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As such there is no parliamentary scrutiny of non-legislative determinations. Given the impact on parliamentary scrutiny, the committee would expect the explanatory materials to include a justification for why the determination is not legislative in character. In this instance, the explanatory memorandum for each clause merely notes that the determinations are not legislative instruments. For example, in relation to clause 125, the explanatory memorandum states:

> Subclause 125(8) will provide that a determination under subclause 125(7) is not a legislative instrument. This is declaratory of the law and included to assist readers. It is not intended to be an exemption for the purposes of the *Legislation Act 2003*.[58]

1.95 While acknowledging this explanation, it is unclear to the committee why determinations setting out the training and qualification requirements for persons authorised to perform functions under the bill are not considered to be legislative in character. The committee considers that the ability to set training and qualification requirements for whole classes of persons may determine or alter the content of the law and therefore be of legislative character.

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57 Subclauses 125(8), 129(2) and 166(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

58 Explanatory memorandum, p. 112.

1.96 The committee requests the minister's more detailed advice regarding:

- **why it is necessary and appropriate to specify that determinations made under clauses 125, 129 and 166 are not legislative instruments; and**
- **whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

Immunity from civil liability[59]

1.97 Clause 180 provides that no civil liability will arise from any action taken by the Commonwealth, the minister, the secretary, an authorised officer or an officer or employee of the department in relation to anything done in good faith in the performance, or purported performance, of a function or duty, the exercise of a power or by providing assistance, information or documents to a person performing a duty, function or power under the bill. This therefore removes 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 personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.98 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 states:

> These protections are considered necessary and appropriate to ensure efficient and effective administration of the Bill. Acts or omissions that are not performed in good faith will still be subject to potential civil proceedings, which is considered appropriate as powers, duties and functions under legislation must be exercised in good faith for a proper purpose.[60]

1.99 While acknowledging this explanation, the committee considers that it does not adequately justify why such a broad immunity from civil liability has been provided in this instance. It is not clear, in particular, why it is necessary to grant immunity to the Commonwealth as an entity.

1.100 The committee requests the minister's advice as to why it is considered appropriate to provide the Commonwealth and a number of protected persons

59 Clause 180. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

60 Explanatory memorandum, p. 145.

with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

1.101 The committee considers that it may be appropriate to amend the bill to remove the civil immunity for the Commonwealth as an entity and requests the minister's advice in relation to this.

Computerised decision making

Significant matters in delegated legislation[61]

1.102 Clause 182 provides that the secretary may arrange for the use of computer programs for any purposes for which the secretary or the minister may or must make a decision that is prescribed by the rules. Subclause 182(3) provides that the Secretary must take all reasonable steps to ensure that decisions made by the operation of a computer program are correct.

1.103 The committee notes that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by a computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.104 The explanatory memorandum states:

> Consistent with the Administrative Review Council's *Best-practice principles of automated assistance in administrative decision making*, it is intended that the Minister will only prescribe decisions that are suitable for automated decision-making, such as decisions that involve non-discretionary elements. Decisions made by computer programs under arrangements made under subclause 182(1) will still be required to comply with general administrative law principles and will be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.
>
> As additional safeguards, subclause 182(3) will impose an obligation on the Secretary to take all reasonable steps to ensure that decisions made by a computer system are correct, while subclause 182(5) would allow the Secretary or Minister (as the case requires) to override the computer

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61 Clause 182. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii), (iii) and (iv).

> system and substitute a new decision if satisfied that the decision made by the computer system was incorrect. It is intended that, for any decisions that are automated, the Department will have a robust system-testing process in operation to ensure the initial and continued accuracy and effectiveness of the relevant computer program.[62]

1.105 The committee acknowledges the explanation that the minister intends to only prescribe decisions that are suitable for automated decision-making. However, the committee notes that this limitation is not set out on the face of the bill.

1.106 The committee also acknowledges that mechanisms will be in place to ensure that errors made by the operation of a computer program can be quickly corrected. However, in light of the potential impacts on administrative decision-making outlined above, the committee would expect the explanatory materials to include a more comprehensive justification for allowing decisions to be made by computer programs. The committee also considers that it would be useful for the explanatory memorandum to further explain how automated decision-making will comply with the relevant administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).

1.107 Additionally, the committee has scrutiny concerns that the types of decisions that will be appropriate for computerised decision-making will be determined via a legislative instrument rather than being included on the face of the primary legislation. The committee's longstanding scrutiny view is that significant matters, such as the decisions suitable for computerised decision-making should be included in the primary legislation unless a sound justification is provided. In this instance, the explanatory memorandum provides no justification for why delegated legislation is being used. While the committee acknowledges that the determinations will be subject to parliamentary disallowance, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing the proposed changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to permit the secretary to arrange for the use of computer programs for any decision made under the bill;**
- **whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and**

62 Explanatory memorandum, p. 146.

- **the appropriateness of amending the bill to limit the use of computerised decision-making to decisions made under specific provisions listed in the primary legislation, rather than leaving the determination of which decisions may be made by computer programs to delegated legislation.**

Incorporation of external materials existing from time to time[63]

1.109 Clause 188 provides that the minister may make rules prescribing matters required or permitted by the bill or necessary or convenient to carry out or give effect to the bill. Subclause 188(3) provides that the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The explanatory memorandum states:

> This is considered appropriate because the types of materials that are likely to be incorporated by reference in the rules will generally be reference materials that are regularly updated. For example, to ensure appropriate processing standards are used in relation to regulated waste materials, the rules will incorporate references to written industry standards that relate to the waste material and are listed on the Department's website.[64]

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

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.111 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it

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63 Subclause 188(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

64 Explanatory memorandum, p. 148.

should be freely and readily available to all those who may be interested in the law. The committee notes that the explanatory memorandum states:

> While it is possible that the content of some standards listed on the Department's website will only be available to exporters for a fee, exporters have a choice as to whether they use one of those standards, another more freely available standard, or their own nominated standard if it better suits their export operation.[65]

1.112 While the committee acknowledges this explanation, the committee notes that this is not reflected on the face of the primary legislation. As a result, there is nothing on the face of the bill preventing the incorporation of standards or other documents that are not freely and readily accessible.

Noting the above comments, the committee requests the minister's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclause 188(3), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

65 Explanatory memorandum, p. 149.

Recycling and Waste Reduction Charges (Customs) Bill 2020
Recycling and Waste Reduction Charges (Excise) Bill 2020
Recycling and Waste Reduction Charges (General) Bill 2020

Purpose	These bill seek to enable the Commonwealth Government to recover the costs of regulating the export of certain waste materials where appropriate, in accordance with the Australian Government Charging Framework
Portfolio	Environment
Introduced	House of Representatives on 27 August 2020

Significant matters in delegated legislation[66]

1.113 The bills seek to impose charges in relation to the costs of regulating the export of certain waste materials. Clause 7 of each bill provides that the regulations may prescribe a charge in relation to a matter that relates to the export of regulated waste material, and that the charges are imposed as taxes. Subclause 8(1) of each bill provides that the regulations may specify either the amount of the charge or a method for working out the amount of the charge. Subclause 8(2) of each bill provides that before regulations are made prescribing a charge in relation to a matter, the minister must be satisfied that the amount of the charge is set at a level that is designed to recover no more than the Commonwealth's likely costs in connection with the matter.

1.114 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).[67] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, where there is any possibility that a charge could be characterised as general taxation, the committee considers that guidance in

66 Clauses 7 and 8 of each bill. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

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

relation to the level of a charge should be included on the face of the primary legislation. In particular, where charges are to be prescribed by regulation the committee considers that, at a minimum, some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny. In this instance, the committee notes that while the method of setting the charge is left to delegated legislation, before regulations are made the minister must be satisfied that the amount of the charge is set at a level that is designed to recover no more than the Commonwealth's likely costs.

1.115 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing charges in relation to the export of regulated waste material to be set in delegated legislation.

1.116 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Bills with no committee comment

1.117 The committee has no comment in relation to the following bills which were introduced into the Parliament between 24–27 August 2020:

- National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020
- Radiocommunications (Receiver Licence Tax) Amendment Bill 2020
- Radiocommunications (Transmitter Licence Tax) Amendment Bill 2020
- Recycling and Waste Reduction (Consequential and Transitional Provisions) Bill 2020

Commentary on amendments and explanatory materials

Australian Citizenship Amendment (Citizenship Cessation) Bill 2020

1.118 On 2 September 2020, the House of Representatives agreed to one Government amendment, the Minister for Home Affairs (Mr Dutton) presented an addendum to the explanatory memorandum and a supplementary explanatory memorandum, and the bill was read a third time.

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

Payment Times Reporting Bill 2020

1.120 On 3 September 2020, the Senate agreed to 17 Government amendments and one Pauline Hanson's One Nation amendment, the Minister for Employment, Skills, Small and Family Business (Senator Cash) tabled an addendum to the explanatory memorandum and a supplementary explanatory memorandum, and the bill was read a third time.

1.121 In *Scrutiny Digest 9 of 2020*, the committee raised concerns regarding the definition of small business being included in delegated legislation rather than on the face of the primary legislation.

1.122 The committee welcomes the amendments that set out the definition of 'small business' on the face of the primary legislation and thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.

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

- Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020;[68]

68 On 1 September 2020, the Senate agreed to six Government amendments, the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum, and the bill was read a third time.

- Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020.[69]

69 On 2 September 2020 the Senate agreed to eight Government and three Opposition amendments, the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum, and the committee reported progress. On 3 September 2020, the bill was reported with amendments and 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.

2.2 The committee has not considered any responses since the tabling of *Scrutiny Digest 11 of 2020* on 2 September 2020.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

3.4 The committee will comment on bills which establish or amend standing appropriations or establish, amend or continue in existence special accounts introduced in the sitting period from 24 August – 3 September 2020 in the next Scrutiny Digest.

Senator Helen Polley
Chair

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1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.