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Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

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.

Australia's Foreign Relations (State and Territory Arrangements) Bill 2020

Purpose	This bill seeks to establish a legislative scheme for Commonwealth engagement with arrangements between State or Territory governments and foreign governments, to foster a systemic and consistent approach to foreign engagement across all levels of Australian government
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 3 September 2020

Broad discretionary power[1]

1.2 The bill seeks to establish a legislative scheme to ensure that the Commonwealth is able to protect and manage Australia's foreign relations by ensuring that any arrangement between a State/Territory entity and a foreign entity:

- does not, or is unlikely to, adversely affect Australia's foreign relations; and
- is not, or is unlikely to be, inconsistent with Australia's foreign policy.[2]

1.3 Subclause 5(2) provides that 'Australia's foreign policy' includes policy that the minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia. The policy does not have to be written or publicly available or have been formulated, decided upon, or approved by any particular member or body of the Commonwealth. The explanatory memorandum states:

> The breadth and inclusivity of this definition reflects that, under this Act, the Minister may take into account a range of matters relating to Australia's foreign policy when assessing a particular proposed negotiation

1 General comment. The committee draws senators attention to this bill pursuant to Senate Standing Order 24(1)(a)(ii).

2 Subclause 5(1).

> or arrangement, some of which may not be written or formalised. The range of negotiations and arrangements that are likely to come before the Minister necessitate this level of flexibility and discretion.[3]

1.4 The bill provides the minister with a number of decision-making powers including to approve the commencement of negotiations of core foreign arrangements,[4] or approve parties entering into core foreign arrangements.[5] In approving negotiations or the entering of arrangements, the minister must be satisfied that the proposed negotiation or proposed arrangement would not adversely affect Australia's foreign relations and would not be inconsistent with Australia's foreign policy. Similarly, the minister may also make declarations about non-core foreign arrangements which provide that State/Territory entities must not start or continue negotiations,[6] or must not enter arrangements.[7]

1.5 The committee notes the explanation provided in the explanatory memorandum and acknowledges that the range of considerations which may be relevant to Australia's foreign policy is broad and may change over time. However, the committee has scrutiny concerns that the breadth of the discretionary power provided to the minister may make it very difficult for relevant entities to enter into negotiations for an arrangement and to consider whether a declaration is likely to be made because it will be difficult for entities to assess whether a proposed arrangements is likely to be inconsistent which such a broadly defined concept of Australia's foreign policy.

1.6 Additionally, the committee's scrutiny concerns about this broad discretionary power are heightened by a number of factors, including the exclusion of procedural fairness,[8] the exclusion of the operation of the *Administrative Decisions (Judicial Review) Act 1977*,[9] and the exclusion of any form of merits review for affected parties. In this context, the committee considers that judicial review of a decision by the minister under section 39B of the *Judiciary Act 1903* would have limited practical utility as a mechanism to diminish the scope for arbitrary exercise of the power. In this regard the committee notes that while clause 51 provides that the minister must take a number of matters into account when making a declaration in relation to non-core arrangements, without a requirement to provide reasons for

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3 Explanatory memorandum, p. 32.

4 Subclause 17(2).

5 Subclause 24(2).

6 Clause 35.

7 Clause 36.

8 See paragraphs 1.27–1.32.

9 See pages 10–11 in relation to the Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020.

making a declaration it would be very difficult for a failure to consider these matters to be proven in a court.

1.7 The committee's scrutiny concerns are furthered heightened by:

- the very broad scope of 'arrangements' covered by the bill,[10]
- the fact that the minister's powers under the bill may be extended by a broad power to expand key definitions in the rules,[11] and
- the fact that the bill applies to entities that are not conventionally understood to be associated with government policy programs, such as universities.

1.8 As a result, at a general level, the committee considers that the bill provides the minister with what may be characterised as an unfettered discretionary power.

1.9 Noting the committee's scrutiny concerns outlined above, including in relation to the exclusion of both procedural fairness and merits review and the limitation on judicial review, the committee requests the minister's more detailed advice regarding why it is necessary and appropriate to provide the minister with such broad discretionary powers under the bill.

1.10 The committee also requests the minister's advice as to the appropriateness of omitting paragraph 5(2)(d) from the bill to narrow the scope of the definition of 'Australia's foreign policy' so that such policy does not explicitly include policy that has not 'been formulated, decided upon, or approved by any particular member of body of the Commonwealth'.

Broad delegation of legislative power—exempt arrangements[12]

1.11 Clause 4 of the bill provides that 'exempt arrangement' means an arrangement of a kind that is prescribed by the rules to be an exempt arrangement. The explanatory memorandum states:

> For example, the Minister's power to prescribe exempt arrangements may include prescribing:
>
> - thematic types of arrangements, such as research arrangements;
> - arrangements entered into during particular time periods, such as arrangements;
> - entered into prior to a certain date; and

10 Clause 9.

11 See paragraphs 1.17–1.26.

12 Clauses 4 and 13. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- arrangements necessary to address emergency situations, such as arrangements in relation to disaster management or urgent public health matters.[13]

1.12 Additionally, clause 13 of the bill provides that the bill applies in relation to a variation of an arrangement in the same way it applies for an arrangement. Subclause 13(4) provides that the rules may prescribe that variations of arrangements of a kind are exempt, even if the rules do not prescribe that arrangements of that kind are exempt. The explanatory memorandum states:

> This subsection therefore enables the rules to prescribe certain types of variations to be exempt where it might not be necessary to exempt the type of arrangements they vary. For example, the rules could prescribe that variations to correct minor errors in foreign arrangements are exempt from the application of this Act.[14]

1.13 In the view of the committee, the definition of exempt arrangement in clause 4 and the ability to exempt variations of arrangements in subclause 13(2) appear to confer a broad power on the minister to exempt arrangements 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.

1.14 In this instance, the committee acknowledges that clause 4 and subclause 13(2) do not enable delegated legislation to modify primary legislation, but rather enable the minister to override the usual operation of the primary legislation in particular circumstances. However, the committee remains concerned about the breadth of the proposed power, and its potential impact on parliamentary scrutiny.

1.15 In light of these matters, the committee would expect a sound justification for the power conferred on the minister under clause 4 and subclause 13(2) to be provided in the explanatory memorandum. The committee notes that the explanatory memorandum does not directly provide such a justification, but instead outlines the circumstances in which such an exemption may be made.

1.16 In light of the above, the committee requests the minister's more detailed advice as to:

- **why it is proposed to confer on the minister the broad power to exempt arrangements from the application of the law; and**

13 Explanatory memorandum, p. 20.

14 Explanatory memorandum, p. 50.

- **whether the bill could be amended to include at least high-level guidance regarding the circumstances where it will be appropriate for the minister to exempt an arrangement from the operation of the bill.**

Significant matters in delegated legislation[15]

1.17 Clause 4 provides the definition of the circumstances in which a party is considered to 'give effect to' an arrangement for the purposes of the bill. Paragraph (c) of the definition provides that a party gives effect to an arrangement if they do anything of a kind prescribed by the rules. Paragraph 4(f) provides that the definition does not include doing anything of a kind prescribed by the rules.

1.18 In addition, clause 4 sets out the definition of 'regulated Australian party'. Paragraph (e) of the definition provides that this includes any other entity prescribed by the rules to be a regulated Australian party. Clause 4 further provides that the definition does not include an entity prescribed by the rules as not being a regulated Australian party.

1.19 Clause 7 sets out the definition of what will be considered to be a State/Territory entity. Paragraph 7(f) provides that this includes an entity that is prescribed by the rules to be a State/Territory entity. Conversely, paragraph 7(i) provides that the definition does not include an entity that is prescribed by the rules as not being a State/Territory entity.

1.20 Clause 8 sets out the definition of what will be considered to be a foreign entity. Paragraph 8(1)(i) provides that a foreign entity includes a university that is located in a foreign country and does not have 'institutional autonomy'. Subclause 8(2) provides that a university does not have institutional autonomy if, and only if, the rules prescribe circumstances in which a university is taken not to have institutional autonomy and those circumstances exist in relation to that university.

1.21 In addition, paragraph 8(1)(j) provides that this includes an entity that is external to Australia and is prescribed by the rules to be a foreign entity. Conversely, paragraph 8(1)(l) provides that the definition does not include an entity that is prescribed by the rules as not being a foreign entity.

1.22 Subclause 10(4) sets out when a foreign entity will be a core foreign entity. Paragraph 10(4)(b) provides that this will include an entity that is external to Australia and is prescribed by the rules to be a core foreign entity.

1.23 Clause 12 provides that an arrangement is a subsidiary arrangement of a foreign arrangement if the arrangement is entered under the auspices of the foreign arrangement and the arrangement is not a foreign arrangement. Paragraph 12(2)(c)

15 Clauses 4, 7, 8, 10 and 12. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

provides that an arrangement is entered under the auspices of a foreign arrangement if the arrangement is entered at the same time, or after, the foreign arrangement is entered, and the arrangement and the foreign arrangement have a relationship of a kind prescribed by the rules.

1.24 The committee's view is that significant matters, such as key definitions regarding the scope of the bill, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In relation to each of the above clauses, the explanatory memorandum states that setting out the scope of key definitions in delegated legislation is necessary to provide sufficient flexibility.[16]

1.25 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. The committee notes that allowing the rules to expand the definition of key terms provides the minister with a broad power to expand the types of entities and arrangements subject to the provisions of the bill. It is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill.

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

- **why it is considered necessary and appropriate to allow delegated legislation to determine the scope of key definitions in the bill; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding the criteria or considerations that the minister must take into account before altering the scope of key definitions in the bill.**

Procedural fairness[17]

1.27 Clause 58 provides that the minister is not required to observe any requirements of procedural fairness in exercising a power or performing a function under the bill. The committee notes that the right to procedural fairness has two basic rules. It requires that decision-makers are not biased and do not appear to be biased, and requires that a person who may be adversely affected by a decision is given an adequate opportunity to put their case before the decision is made. The committee considers that the right to procedural fairness is a fundamental common law right and it expects that any limitation on this right be comprehensively justified

16 Explanatory memorandum, pp. 23, 27, 34–35, 39–40, 44 and 47.

17 Clause 58. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

in the explanatory memorandum. In this instance, the explanatory memorandum states:

> It is appropriate to fully exclude procedural fairness (in terms of both the hearing and bias rules) in the context of this legislative scheme as its object and purpose is to enable the Minister to protect and manage Australia's foreign relations and ensure all Australian government entities act consistently with Australia's foreign policy.
>
> The Minister's decision-making powers and functions under this Act relate to this purpose and involve considerations entirely within the Commonwealth's and, by proxy the Minister's, responsibility and discretion. Australia's foreign relations and foreign policy evolve with time and in response to international events and circumstances, and are not always appropriate to be made public or shared with State/Territory entities, courts or the public at large. This is strengthened by the fact that the Minister's decisions in relation to core foreign arrangements must be personally exercised.
>
> In addition, as this Act predominately regulates the conduct of State or Territory governments, the exclusion of procedural fairness will not unduly trespass on personal rights and liberties.
>
> Given the nature of decisions made under this Act, the Minister's impartiality (or appearance of impartiality) is not relevant to the exercise of his or her decision-making powers. This is because the Minister's decisions will be based on considerations of foreign policy and foreign relations, as determined by the Commonwealth and promulgated through the Minister. For example, whether an arrangement is approved or subject to a Ministerial declaration under this framework is dependent on whether the Minister is satisfied that the arrangement does not adversely affect Australia's foreign relations and is not inconsistent with Australia's foreign policy.
>
> In addition, as the Minister is not required to observe any requirement of procedural fairness, the Minister is not required to afford persons an opportunity to be heard before exercising powers or performing functions under this Act.
>
> This recognises that, in certain circumstances, the provision of reasons itself could adversely affect Australia's foreign relations, especially to the extent that the decision may be based upon classified information. As such, affording a hearing in these circumstances would defeat the object of the Act, which is to protect and manage Australia's foreign relations.[18]

1.28 While acknowledging the explanation provided in the explanatory memorandum, the committee notes that the decisions made under the bill would potentially affect universities, prescribed entities and possibly natural persons.

18 Explanatory memorandum, pp. 167-168.

Additionally the committee notes that, at common law, corporations are also entitled to a fair hearing, not merely individual persons.

1.29 The committee also notes that although clause 51 provides that the minister must take a number of matters into account when making a decision to make a declaration in relation to non-core arrangements, there is no requirement that the minister consider the interests of State/Territory entities.

1.30 The committee considers that it may be appropriate, given the nature of the decision-making involved, for the rule against bias to be excluded to the extent that it might be applied in relation to the expression of or appearance of pre-judgement in relation to particular foreign entities or countries. However, it is unclear to the committee why other bases for the application of the rule need be excluded. This is especially so in relation to decisions made by delegates of the minister as the operation of the rule against bias would not frustrate the exercise of the power (given it need not be exercised personally by the minister).

1.31 The committee also notes that the application of the rule against bias will not invalidate a decision merely on the basis that the decision implements a lawful policy.[19] Moreover, the courts have adopted a restrained approach to the exercise of their judicial review jurisdiction in the context of decisions which have been based on considerations and policy relevant to foreign relations.

1.32 Noting the scrutiny concerns outlined above, the committee requests the minister's more detailed justification regarding why it is necessary and appropriate to remove the requirement to observe *any* requirements of procedural fairness in exercising *any* power or performing *any* function under the bill.

Retrospective application[20]

1.33 Clause 9 of the bill provides that 'arrangement' means any written arrangement, agreement, contract, understanding or undertaking, whether or not it is legally binding, made in Australia or entered before, on or after the commencement day. Schedule 1 to the bill sets out the transitional requirements relating to pre-existing foreign arrangements, including the consequences of a failure to meet minimum notification requirements in relation to pre-existing arrangements.

1.34 The committee has long-standing concerns about provisions that apply retrospectively, as such an approach challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has particular concerns where legislation will, or might, have a detrimental effect on individuals.

19 See *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

20 Clause 9 and Schedule 1. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.35 The committee considers that the minister's power to make declarations about pre-existing arrangements that are currently in operation and were entered into prior to the commencement of the bill has the capacity to upset reasonable expectations of the validity of arrangements as assessed at the time the arrangements were entered into. As such, individuals who may be a party to subsidiary arrangements may be taken by surprise. The committee notes that while the explanatory memorandum states that it is important for the minister to be in a position to have visibility of all arrangements in operation at the commencement of the bill,[21] the explanatory memorandum does not contain a specific justification as to why it is appropriate that the bill apply to arrangements that have already entered into force.

1.36 Noting the committee's scrutiny concerns, the committee requests the minister's advice as to why it is considered necessary and appropriate to apply the measures in the bill to agreements that have already entered into force and whether there may be any detrimental effect on individuals.

21 Explanatory memorandum, p. 171.

Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020

Purpose	This bill seeks to make consequential amendments necessary to support the implementation of the scheme proposed to be established by the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 3 September 2020

Exclusion of judicial review under the Administrative Decisions (Judicial Review) Act[22]

1.37 Item 1 of Schedule 1 to the bill seeks to provide that judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) will not be available for decisions made under the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (the Foreign Relations Act).

1.38 Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a detailed justification for the exclusion. In this instance, the explanatory memorandum states:

> The Minister's decision-making powers under the Foreign Relations Bill, and determination of whether an arrangement with a foreign entity adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy, involve considerations within the Commonwealth's remit and discretion. The determination of these matters are at the prerogative of the Commonwealth executive government and the Minister's consideration as to whether these elements are satisfied is not appropriate for judicial adjudication under the ADJR Act.
>
> As such, the exclusion of judicial review under the ADJR Act for these decisions recognises that decisions relating to sensitive governmental matters, such as whether an arrangement between a State or Territory and a foreign entity is consistent with Australia's foreign relations and foreign policy, are not suitable for judicial review.

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

> This exclusion is similar to the exclusion of ADJR review from comparable legislation which relates to matters of foreign relations and the national interest, including decisions under the *Foreign Acquisitions and Takeovers Act 1977* (the FATA).
>
> In addition, as the Foreign Relations Bill predominately regulates the conduct of State and Territory governments, and other non-natural persons, the exclusion of judicial review under the ADJR Act will not unduly trespass on personal rights and liberties.
>
> Although new paragraph (zh) will exclude judicial review under the ADJR Act for decisions under the Foreign Relations Bill, persons affected by a decision under that Bill may still seek judicial review by the Federal Court and the Federal Circuit Court, under subsection 39B(1) of the *Judiciary Act 1903*, or by the High Court, under section 75(v) of the Constitution. These avenues will ensure that affected persons have an avenue to seek review of decisions that affect them. [23]

1.39 The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act 1903*) and also provides for the right to reasons in some circumstances. From a scrutiny perspective, the committee considers that the proliferation of exclusions from the ADJR Act should be avoided.

1.40 While acknowledging the explanation provided in the explanatory memorandum, the committee notes that the decisions made under the Foreign Relations Act may affect non-government entities and possibly natural persons. Additionally, decisions may affect universities, which the committee notes play an important role in civil society that is separate from government policy development and intergovernmental relations. As a result, while noting that judicial review will remain available under the *Judiciary Act 1903* and the Constitution, the committee does not consider that this will be the most effective or practical form of judicial review for a number of potentially affected parties.

1.41 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of excluding decisions made under the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* from judicial review under the ADJR Act.

23 Explanatory memorandum, p. 8.

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Purpose	This bill seeks to amend the *Criminal Code Act 1995* to establish an extended supervision order scheme for high-risk terrorist offenders. It will enable Supreme Courts to make such an order to prevent the risk that a high-risk terrorist offender poses to the community at the end of their custodial sentence
Portfolio	Attorney-General
Introduced	House of Representatives on 3 September 2020

Trespass on personal rights and liberties—general comment[24]

1.42 Schedule 1 to the bill seeks to amend the *Criminal Code Act 1995* (Criminal Code) to establish an extended supervision order scheme for high-risk terrorist offenders. Is it proposed that the scheme would operate in tandem with the existing continuing detention order scheme in Part 5.3 of the Criminal Code (which allows the court to make an order to allow for the continued imprisonment of certain terrorist offenders after completion of their sentence). The orders would be collectively referred to as 'post-sentence orders'.

1.43 Proposed section 105A.6A provides that, on application by the Australian Federal Police (AFP) Minister (or a legal representative of the minister), a State or Territory Supreme Court may make an extended supervision order, including as an alternative to a continuing detention order. Proposed subsection 105A.3(3) provides that the effect of an extended supervision order is to impose conditions on the person contravention of which is an offence punishable by imprisonment of up to five years.[25] Conditions may be imposed on a person under an extended supervision order for a period of up to three years,[26] although another extended supervision order can be made after the original three year period expires.[27] In addition, if an application has been made for an extended supervision order, a court may also make an interim supervision order for a period of up to 28 days.[28]

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

25 Schedule 1, item 133, proposed section 105A.18A.

26 Schedule 1, item 87, proposed paragraph 105A.7A(4)(d).

27 Schedule 1, item 87, proposed subsection 105A.7A(5).

28 Schedule 1, item 95, proposed section 105.9A.

1.44 Proposed paragraph 105A.7A(1)(b) provides that a court may make an extended supervision order if the court is satisfied, on the balance of probabilities, that the offender poses an unacceptable risk of committing a serious Part 5.3 (terrorism) offence. Proposed subsection 105A.7B(1) provides that the conditions that a court may impose on a terrorist offender by an extended or interim supervision order are any conditions that the court is satisfied, on the balance of probabilities, are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 (terrorism) offence. Proposed subsection 105A.7B(3) sets out a non-exhaustive list of the conditions that a court may impose, including that the offender:

- not be present at specified areas or places or classes of areas or places;
- reside at specified premises, and remain there between specified times each day (which should be for no more than 12 hours within any 24 hours);
- not leave Australia or the State or Territory in which they reside;
- not communicate or associate with specified individuals or classes of individuals;
- not access or use specified forms of telecommunications or other technology (including the internet);
- not engage in specified activities or specified work;
- not engage in specified education or training without permission;
- must undertake anything specified in the order or as directed by a specified authority relating to treatment, rehabilitation, intervention programs or activities, or psychological or psychiatric assessment or counselling.

1.45 In 2016 the committee raised significant scrutiny concerns in relation to the continuing detention order scheme in Part 5.3 of the Criminal Code.[29] The committee noted that while proceedings for a continuing detention order are characterised by the usual procedures and rules for civil proceedings, the scheme nevertheless fundamentally inverts basic assumptions of the criminal justice system. In this regard, the committee noted that offenders in our system of law may only be punished on the basis of offences which have been proved beyond reasonable doubt, whereas the scheme proposed to detain persons, who have committed offences and have completed their sentences for those offences, on the basis that there is a high degree of probability they will commit similar offences in the future.

29 For details of the committee's scrutiny concerns in relation to the continuing detention order scheme, see the committee's comments on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 in Senate Standing Committee for the Scrutiny of Bills, *Report 10 of 2016*, pp. 631-643.

This undermines a fundamental postulate of our system of law—that persons should not be imprisoned or punished for crimes that may commit in the future.

1.46 In 2016 the committee acknowledged that in some circumstances detention may be justified on the basis of protecting the public from unacceptable risks without undermining the presumption of innocence, or the principle that persons should not be imprisoned for crimes they may commit.[30] However, where the trigger for the assessment of whether or not a person poses an unacceptable risk to the community is prior conviction for an offence, the protective purpose cannot be clearly separated from the functioning of the criminal justice system. If the continuing detention (or, as is proposed in this bill, the imposition of severe conditions) is triggered by past offending, then it can plausibly be characterised as retrospectively imposing additional punishment for that past offence. Even if the continuing detention (or imposition of severe conditions) is not conceptualised as imposing additional punishment and is instead rationalised on the basis of its protective purpose, the fact that the order is made on the basis of predicted future offending still inverts fundamental principles of the criminal justice system.

1.47 The committee acknowledges that the proposed extended supervision order scheme is less restrictive of liberty than the existing continuing detention order scheme. However, given the severity of conditions that may be imposed on a person subject to an extended supervision order, the committee considers that the extended supervision order scheme may still be characterised as fundamentally inverting basic assumptions of the criminal justice system, including that a person should only be punished for a crime which it has been proved beyond a reasonable doubt that they have committed, not the risk that they may in future commit a crime.

1.48 The committee draws its scrutiny concerns to the attention of senators and leaves the appropriateness of the proposed extended supervision order scheme to the consideration of the Senate as a whole.

Trespass on personal rights and liberties—standard of proof[31]

1.49 As noted above, proposed paragraph 105A.7A(1)(b) provides that a court may make an extended supervision order if the court is satisfied, on the balance of probabilities, that the offender poses an unacceptable risk of committing a serious Part 5.3 (terrorism) offence. The committee notes that this significantly reduces the standard of proof in comparison with that required for making a continuing

30 For example, detention on the basis of risks associated with the spread of communicable disease do not threaten these basic assumptions of our criminal law.

31 Schedule 1, item 87, proposed paragraph 105A.7A(1)(b). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

detention order, which requires a 'high degree of probability' standard. In relation to this, the explanatory memorandum states:

> Requiring the Court to be satisfied on the balance of probabilities reflects the standard of proof that ordinarily applies in civil proceedings and specifically the standard that applies in control order proceedings. This requires a court to determine that it is more likely than not that the offender poses an unacceptable risk. This is a lower standard of proof than that which applies when making a CDO, reflecting the fact that an ESO is a less restrictive measure in comparison to a CDO.[32]

1.50 While the committee acknowledges this explanation, the committee notes that the Independent National Security Legislation Monitor (INSLM), when considering the implementation of an extended supervision order scheme, recommended that the same standard of proof ('high degree of probability') be applied as for the making of a continuing detention order.[33] The committee notes that the explanatory materials do not address why a different standard of proof than that recommended by the INSLM has been applied.

1.51 The committee therefore requests the Attorney-General's advice as to whether proposed paragraph 105A.7A(1)(b) can be amended to require the court be satisfied to a 'high degree of probability' (rather than on the 'balance of probabilities') that an offender poses an unacceptable risk of committing a serious Part 5.3 offence before the court may make an extended supervision order.

Procedural fairness—right to a fair hearing[34]

1.52 Proposed section 105A.14A requires the AFP minister (or their legal representative) to provide offenders and their legal representatives with a copy of the application for a post-sentence order, and additional materials the court seeks from the AFP minister. However, proposed sections 105A.14B–105A.14D provide that the AFP minister may exclude sensitive information from applications or materials where the information is national security information, subject to a claim of public interest immunity, or is terrorism material.

1.53 Relatedly, the bill also seeks to amend the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the National Security Information Act) to

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32 Explanatory memorandum, p. 67.

33 Independent National Security Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detentions Orders*, September 2017, p. 76.

34 Schedule 1, item 120, proposed sections 105A.14B-105A.14D and items 189-210. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

expand the availability of special court orders that are currently only available in control order proceedings, to extended supervision order proceedings.[35] These orders would allow the court to consider and rely on national security information which is not disclosed to the offender or their legal representative. Existing paragraph 38J(1)(c) provides that, in determining whether to make such an order, the court must be satisfied that the offender has been given sufficient information about the allegations on which the application for an extended supervision order is based to enable effective instructions to be given in relation to the allegations. In addition, existing subsection 38J(5) provides that the court must also take into account the risk of prejudice to national security if the order were not made, whether the order would have a substantive adverse effect on the substantive hearing, and any other matter the court considers relevant.

General comment

1.54 The committee has previously raised significant scrutiny concerns in relation to the restriction of access to information to offenders on the basis of national security. In the committee's *Eighth Report of 2016*, in relation to the provisions which currently only apply to control order proceedings, the committee noted that the provisions clearly undermine the fundamental principle of natural justice which includes a fair hearing.[36] In judicial proceedings a fair hearing traditionally includes not only the right of a person to contest any charges against them but also to test any evidence upon which any allegations are based. In many instances it may not be possible, in practice, to contest the case for the imposition of extended supervision order without access to the evidence on which the case is built.

1.55 In 2016 the committee also noted that courts are not well placed to second-guess evaluations by the executive of national security risk, which means that it may be particularly challenging for courts to protect an individual's interest in a fair hearing. The fact that the court has discretion as to how to draw the balance between national security and any adverse effect on the substantive hearing cannot be said to guarantee procedural fairness. In considering the extent to which judges will be able, in the exercise of their discretionary powers, to resist executive claims that a non-disclosure order should be made, it should be noted that judges routinely accept that the courts are 'are ill-equipped to evaluate intelligence'[37] and the possibility that the executive may be wrong in their national security assessments. For this reason, the fact that national security information is read by judges does not mean that they will be well placed to draw a different balance between security risk and fairness than is drawn by the executive.

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35 Schedule 1, item 189-210.

36 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, pp. 472-483.

37 *Leghaei v Director-General of Security* (2007) 241 ALR 141; (2007) 97 ALD 516.

Special advocates

1.56 Existing section 38I of the National Security Information Act provides that where a non-disclosure order is made the offender and their legal representative may be excluded from hearings where the information which the offender has been excluded from seeing is being considered by the court. In such instances, under existing sections 38PA and 38PB, the court may appoint a 'special advocate' to represent the interests of the offender by making oral and written submissions, adducing evidence and cross-examining witnesses. Unless the court otherwise orders, under existing section 38PD offenders are free to communicate with the special advocate before national security information has been disclosed to the advocate. However, under existing section 38PF after national security information has been disclosed to the advocate, communication between the offender and the special advocate is heavily restricted.

1.57 As noted above, existing paragraph 38J(1)(c) provides that, in determining whether to make such a non-disclosure order, the court must be satisfied that the offender has been given sufficient information about the allegations on which the application for an extended supervision order is based to enable effective instructions to be given in relation to the allegations. Noting that communication between an offender and the special advocate is heavily restricted after national security information has been disclosed to the advocate, the committee considers that if an offender is only given 'sufficient information' about the allegations against them after restrictions are placed on communication with the special advocate, there will be limited opportunity for proper instructions to be given to the special advocate. The committee considers that this would appear to severely limit the effectiveness of the special advocate scheme in protecting an offender's right to procedural fairness.

1.58 Furthermore, the committee is concerned that, under existing section 38PA, the court is not required to appoint a special advocate. If a special advocate is not appointed in all cases where the court is relying on secret evidence, the offender may be left with no mechanism to challenge the evidence against them. The committee therefore considers that this also significantly diminishes the effectiveness of the special advocate scheme.

Conclusion

1.59 The committee expects that any restriction on a person's right to a fair hearing to be extensively justified in the explanatory memorandum. In this instance, the explanatory materials highlight the potential national security implications of providing offenders with all relevant information:

> The Bill enables court-only evidence to be considered in ESO proceedings to ensure that the process of applying for an ESO, which seeks to protect the Australian community from the unacceptable risk of a serious terrorism offence, does not itself damage national security. Wherever possible proceedings will be held in open court…the inappropriate

> disclosure of national security information has the potential to prejudice Australia's national security and the security of all Australians. Information relevant to ESO proceedings may disclosure sensitive sources, methodologies and capabilities employed by security agencies to lawfully obtain information about terrorist activities. Revealing this information to the offender risks jeopardising ongoing counter-terrorism and national security investigations and has consequences for the safety of human sources.[38]

1.60 While the committee acknowledges and understands this rationale, from a scrutiny perspective, the committee remains concerned about the impact of the bill on offender's right to procedural fairness, particularly noting the potential limitations on the effectiveness of the special advocate scheme outlined above.

1.61 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- **proposed sections 105A.14B–105A.14D which provide that certain information (such as national security information) may be excluded from the copies of applications and materials provided to an offender and their legal representative; and**
- **the proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* set out in items 189–210 of Schedule 1 which would allow the court to consider and rely on national security information which is not disclosed to the offender or their legal representative.**

1.62 The committee considers that these provisions may negatively impact an offender's ability to effectively contest an application for an extended supervision order that is made against them.

Trespass on personal rights and liberties—expansion of monitoring and surveillance powers[39]

1.63 Part 2 of Schedule 1 to the bill seeks to extend significant monitoring and surveillance powers to the proposed extended (and interim) supervision order scheme, and to decisions concerning the making of a continuing detention order.

38 Statement of compatibility, p. 20.

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

These powers include monitoring warrants under Part IAAB of the *Crimes Act 1914*,[40] surveillance device warrants, surveillance device powers without a warrant and computer access warrants under the *Surveillance Device Act 2004*,[41] and telecommunications service warrants and named person warrants under the *Telecommunications (Interception and Access) Act 1979*.[42]

1.64 In addition, the bill seeks to extend the operation of the proposed international production order (IPO) regime. IPOs would allow Commonwealth, state and territory law enforcement and national security agencies to acquire data held in a foreign country by a designated communications provider, and to allow foreign governments to access private communications data held in Australia.

1.65 The committee has generally had significant scrutiny concerns regarding bills which allow for the extensive use of significant monitoring and surveillance powers. The committee generally expects that provisions allowing for the use of such intrusive powers should be sufficiently justified in the explanatory materials and that appropriate safeguards should be in place to protect the rights and liberties of affected persons. In this instance, the statement of compatibility states:

> It is imperative that our law enforcement agencies have adequate powers to monitor an offender's compliance with the conditions of an ESO or ISO. Without sufficient powers to monitor compliance, community safety may be put at risk if the offender does not choose to comply with the conditions of the order and breaches go undetected. Furthermore, the knowledge that law enforcement is able to use its powers to actively monitor compliance with an order provides a strong disincentive to an offender to breach the conditions of their order. This enhances the effectiveness of the ESO or ISO.[43]

1.66 While noting the explanation provided and acknowledging the need to monitor a person's compliance with the conditions of their extended supervision

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40 These powers include the power to search premises; inspect, examine, measure or test things on the premises; inspect or copy documents; operate electronic equipment to put data into documentary form or to transfer data to a disk, tape or other storage device; and ask the occupier to answer questions and produce any document relevant to determining compliance with the conditions of a relevant order.

41 These powers include allowing law enforcement agencies to obtain surveillance device or computer access warrants in determining whether to apply for either a continuing detention order or an extended supervision order. The warrants may authorise the installation and use of a surveillance device; entry to premises; adding or altering data on a target computer; removing a computer or other thing from premises; or intercepting a communication passing over a telecommunications system.

42 These warrants may authorise interception of communications (including stored communications) and entry on any premises for the purpose of installing, maintaining, using or recovering any equipment used.

43 Statement of compatibility, p. 25.

order, the committee retains scrutiny concerns about the proposed extension of significant monitoring and surveillance powers to the extended (and interim) supervision order scheme. In this respect, the committee is not satisfied that appropriate safeguards exist in the existing legislation to protect the personal rights and liberties of persons subject to an extended supervision order. For example, the committee notes that warrants authorising the use of many of the monitoring and surveillance powers may be issued by members of the Administrative Appeals Tribunal. The committee has a long-standing scrutiny view that the power to issue warrants or orders relating to the use of intrusive powers should only be conferred on judicial officers.

1.67 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of extending significant monitoring and surveillance powers under a number of Acts to persons subject to an extended supervision order, noting that these powers may trespass on a person's rights and liberties.

Bills with no committee comment

1.68 The committee has not considered any bills on which it has no comment since the tabling of *Scrutiny Digest 13 of* 2020.

Commentary on amendments and explanatory materials

National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020

1.69 On 7 October 2020, the House of Representatives agreed to seven government amendments, the Minister for the National Disability Insurance Scheme (Ms Price) presented an addendum to the explanatory memorandum and a supplementary explanatory memorandum, and the bill was read a third time.

1.70 The committee thanks the minister for tabling this addendum which appears to address the committee's scrutiny concerns relating to how provisions of the *National Disability Insurance Scheme Act 2013* guide the exercise of NDIS Commissioner's banning powers under section 73ZN.

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

- Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Bill 2020;[44]
- Transport Security Amendment (Serious Crime) Bill 2019.[45]

44 On 8 October 2020, the Senate agreed to 10 government amendments and one government request for an amendment, the Minister for Trade (Senator Birmingham) tabled a supplementary explanatory memorandum and addendum to the explanatory memorandum, and the bill was agreed to, subject to a request. On 8 October 2020, the House of Representatives agreed to make the amendment requested by the Senate. On 9 October 2020, the bill was read a third time in the Senate.

45 On 7 October 2020, the House of Representatives agreed to three government amendments, the Minister for Home Affairs (Mr Dutton) presented a supplementary explanatory memorandum, and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

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
Bill status	Before the House of Representatives

Significant criminal penalties[1]

2.2 In *Scrutiny Digest 12 of 2020* the committee requested the minister'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*. The committee also requested 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.[2]

Attorney-General's response[3]

2.3 The Attorney-General advised:

Level of criminal penalties

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).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 1-3.

3 The minister responded to the committee's comments in a letter dated 7 October 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 14 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

The Bill implements the Australian Government's commitment that the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) will have inquiry powers broadly equivalent to a Royal Commission. Generally aligning the maximum criminal penalties in Part 4 of the Bill with the *Royal Commissions Act 1902* (Cth) (Royal Commissions Act) is considered a necessary and appropriate part of ensuring the Commissioner's inquiries can closely resemble those of a Royal Commission, including by penalising non-adherence to compulsory requests and similar actions that may undermine the Commissioner's inquiries.

The fact that the Commissioner is an ongoing function means it will have an important role in monitoring the implementation of its recommendations over time, which will ensure accountability, and enable it to build on suicide prevention and defence and veteran wellbeing strategies into the future. The enduring nature· of the function does not inherently point to the need to depart from a Royal Commission-based approach to offences and penalties, given the Commissioner's inquiry and suicide prevention work will continue to be of significant public importance into the future. The proposed maximum penalties are intended to deter the more egregious conduct foreseen, for example, key information that is central to an inquiry being deliberately and dishonestly withheld from the Commissioner, which has the potential to undermine the functions of the Commissioner and the public benefit flowing from longer term policy reforms.

The approach to the penalties for offences in Part 4 of the Bill should also be understood within the context of the features in the Bill promoting the Commissioner obtaining information in a non-adversarial way, including providing opportunities for information to be shared outside of responses to formal notices and hearings. For example:

- It is a guiding principle for the Commissioner's functions that they take a restorative and trauma-informed approach (clause 12), and should recognise that families and people personally affected by a relevant death by suicide will have a unique contribution to make to the Commissioner's work. Applying a restorative and trauma-informed approach will involve the Commissioner considering ways to ensure that families and other people are assisted and supported in providing information and evidence, and that compulsory powers will be exercised in a considered way.
- The Bill includes a mechanism enabling Commonwealth, state and territory officials to volunteer information to the Commissioner to assist its functions (clauses 40 and 41). This will encourage government entities to proactively disclose information they may hold about a particular member or veteran suicide, or any other matter the Commissioner is considering. The proposed pathway for

voluntary and proactive information sharing in the Bill is intended to reduce the need for recourse to compulsory powers.

The following table provides additional information about the basis for the penalties in Part 4 of the Bill, including where the Bill aligns with not only the Royal Commissions Act, but other Commonwealth legislation. [**Table can be accessed in the full ministerial response published on the committee's website at https://www.aph.gov.au/senate_scrutiny**].

Inclusion of contempt offence

The Bill includes the offence of contempt to protect the integrity of the Commissioner's processes. In practice, the offence might arise where a person took serious and deliberate action to prevent the Commissioner from conducting their inquiry. This is consistent with similar contempt provisions in contexts such as:

- section 63 of the *Administrative Appeals Tribunal Act 1975*
- subsection 34A(d) of the *Australian Crime Commission Act 2002*
- sections 94 and 96A of the *Law Enforcement Integrity Commissioner Act 2006*, and
- sections 66, 200 and 220 of the *Australian Securities and Investments Commission Act 2001*.

A number of these contempt provisions carry more significant penalties than the offence in the Bill. For example, in section 66 of the Australian Securities and Investments Commission Act, the penalty is 2 years imprisonment.

The Committee notes subclause 52(2) was modelled on section 63 of the Administrative Appeals Tribunal Act and states that 'the highly emotive subject matter of the Commission's inquiry function distinguishes the Commission from the Administrative Appeals Tribunal'. It is noted that the Administrative Appeals Tribunal may engage with vulnerable people in relation to sensitive and highly emotive subject matters, for example, in reviewing veterans' entitlements, social security, migration and refugee status related decisions. Royal Commissions, such as the Royal Commission into Institutional Responses to Child Sexual Abuse and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, also effectively reconcile considering sensitive subject matters with a contempt offence being available. Noting these precedents and the flexibility the Commissioner will have to sensitively engage with families, there is not considered to be an inherent tension between the availability of a contempt offence and the subject matter into which the Commissioner may inquire.

Committee comment

2.4 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the enduring nature of the Commissioner's function does not inherently point to the need to depart from a Royal Commission-based approach to offences and penalties, given the Commissioner's inquiry and suicide prevention work will continue to be of significant public importance into the future. The committee also notes that the proposed maximum penalties are intended to deter the more egregious conduct foreseen, for example, key information that is central to an inquiry being deliberately and dishonestly withheld from the Commissioner, which has the potential to undermine the functions of the Commissioner and the public benefit flowing from longer term policy reforms.

2.5 The committee also notes the Attorney-General's advice that the approach to the penalties for offences in Part 4 of the bill should also be understood within the context of the features in the bill promoting the Commissioner obtaining information in a non-adversarial way, including providing opportunities for information to be shared outside of responses to formal notices and hearings. The committee further notes the justification for each offence contained in the table provided by the Attorney-General and notes that a number of equivalent penalties in other Commonwealth legislation have been provided.

2.6 In relation to the inclusion of a contempt offence, the committee notes the Attorney-General's advice that in practice, the offence might arise where a person took serious and deliberate action to prevent the Commissioner from conducting their inquiry. The committee also notes that this is consistent with similar contempt provisions in other Commonwealth legislation and that some Commonwealth Acts contain more significant penalties.

2.7 The committee further notes the Attorney-General's advice that the AAT and many Royal Commissions deal with sensitive subject matters while also having contempt offences and that, noting these precedents and the flexibility the Commissioner will have to sensitively engage with families, there is not considered to be an inherent tension between the availability of a contempt offence and the subject matter into which the Commissioner may inquire.

2.8 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Reversal of evidential burden of proof[4]

2.10 In *Scrutiny Digest 12 of 2020* the committee requested the Attorney-General's advice 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).

The committee further suggested 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 requested the minister's advice as to whether such amendments could be made to the bill.[5]

Attorney-General's response

2.11 The Attorney-General advised:

> *Knowledge of the defendant and subclauses 45(4), 49(5) and clause 58*
>
> The defences created by the Bill are consistent with subsection 13.3(3) of the *Criminal Code Act 1995* which provides that 'a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter'.
>
> A defendant relying on the proposed defences in the Bill needs to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist (subsection 13.3(6) of the Criminal Code). Where that evidential burden is discharged by the defendant, the prosecution then has the legal burden of disproving that matter beyond reasonable doubt (subsection 13.1(2) of the Criminal Code).
>
> The Guide 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' (see 4.3.1).
>
> Subclause 45(4) provides that the offence for failure to give information or produce a document or thing under subclause 45(2) does not apply if the information, statement, document or thing required to be provided 'is not relevant to the matters into which the Commissioner was inquiring'. This defence ensures that a person does not commit an offence if they fail to

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

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 3-5.

provide information which is not within the scope of a notice issued to them, for example.

The defendant would be best placed to adduce evidence as to why the information, statement, document or thing is not relevant to the matters into which the Commissioner was inquiring, as the defendant would be in possession of the document or thing the subject of the request. The defendant would, in a range of foreseeable circumstances, have exclusive access to the document or thing, or exclusive knowledge about its contents and origin, satisfying the standard in the Guide that the information is 'peculiarly within' the knowledge of the defendant. Situations where the defendant may have exclusive access to, or knowledge of, the document or thing include where:

- there is only one version of the document or one type of the thing sought by the Commissioner, and that document or thing is held by the defendant
- the defendant has unique knowledge of the context in which the document or thing was produced or came into existence, such that only the defendant is in the position of being able to outline why, based on its unique circumstances, it is not relevant to the Commissioner's request.

It would be significantly more difficult and costly for the prosecution to adduce evidence that suggests the document or thing is relevant to the matters the Commissioner was inquiring into, than for the defendant to adduce evidence demonstrating its irrelevance, given the defendant's expected access to and knowledge of the document or thing.

Clause 49 creates two offences related to claims for legal professional privilege (LPP):

- an offence for a person failing to comply with a notice to give information or a statement, or produce a document or thing for inspection by the Commissioner, for the purpose of deciding whether to accept or reject a claim of LPP (subclause 48(3)), and
- an offence for a person failing to give information or a statement, or produce a document or thing as required in a notice under clause 30 or 32, following the Commissioner's decision to rejected a claim for LPP (subclause 49(1)).

Subclause 49(5) provides that a person will not commit an offence if the information, statement, document or thing required to be produced is not relevant to the matters into which the Commissioner was inquiring. Like subclause 45(4), this defence ensures that a person does not commit an offence if they fail to provide information which is not within the scope of a notice issued to them, for example.

Where a defendant has claimed LPP over a document or thing, which is the context of the offences under subclauses 48(3) and 49(1), it is likely the

defendant would consider the material to be sensitive and confidential, and that access to the document would be carefully controlled (for example, limited to the scope of the lawyer-client relationship). Given the sensitivity of the material and the defendant's expected interest in maintaining confidentiality, the defendant (along with their legal representative) would in a range of situations maintain exclusive access to or knowledge of the contents of the document, satisfying the standard in the Guide that this information is 'peculiarly within' the knowledge of the defendant.

It would be significantly more difficult and costly for the prosecution to adduce evidence that suggests the information, statement, document or thing is relevant to the matters the Commissioner was inquiring into, than for the defendant to adduce evidence demonstrating its irrelevance, given the defendants expected access to, knowledge of, and interest in preserving the confidentiality of, the information or thing.

Subclause 58(1) provides circumstances where a person who is served with a notice under clause 30 or clause 32 does not commit an offence, and is not liable to a penalty, under a secrecy provision. These circumstances are where the person:

- answers a question at a hearing that the Commissioner requires the person to answer
- gives information or a statement that the person is required to give in accordance with the notice, or
- produces a document or thing that the person is required to produce in accordance with the notice.

Subclause 58(2) provides a person of a Commonwealth, state or territory body or entity, acting within their authority, who provides information to the Commissioner consistent with clause 40 or 41, does not commit an offence and is not liable to a penalty under a secrecy provision. 'Secrecy provision' is defined in clause 5 of the Bill.

The defendant would be best placed to raise or point to evidence that conduct, which may otherwise contravene a secrecy provision, was in accordance with a requirement imposed by the Commissioner (or the Commissioner's authorised-delegate) under subclause 58(1). The factual circumstances to support the existence of the person having being compelled to answer a question or provide information will be known to the defendant (for example, when the request was issued, and what it addressed). The defendant could readily bring a copy of the notice or a hearing transcript to the attention of the prosecution. This is an appropriate burden to place on the defendant.

As the Committee notes, the Commissioner would also have knowledge that a defendant provided information or documents to the Commissioner. However, the approach in the provision also accounts for the significantly greater cost and difficulty for the prosecution to adduce

evidence that suggests the information, statement, document or thing was not provided in response to a request issued by the Commissioner, than for the defendant to adduce evidence demonstrating it was. It is also noted that the Commissioner may have concerns with sharing information about the exercise of their powers (which are subject to an immunity under subclause 64(1)), especially if they related to matters connected with a private hearing, for example.

The defendant would also be best placed to raise or point to evidence that they disclosed information on behalf of a Commonwealth, state or territory body to the Commissioner in accordance with the requirements imposed by clause 40 or 41, which may otherwise contravene a secrecy provision, under subclause 58(2).

The factual circumstances to support that a person had appropriate authority to provide information on behalf of a Commonwealth, state or territory body to the Commissioner, and that the information was for the purpose of assisting the Commissioner, will be known to the defendant. The defendant could readily bring to the attention of the prosecution evidence of their authority to act on behalf of the particular body. It would be significantly more difficult and costly for the prosecution to disprove that the person disclosing information to the Commissioner was doing without the appropriate authority, as they will be outside of the relevant body. This is an appropriate burden to place on the defendant.

Reasonable excuse in subclauses 45(3) and 49(3)

The Bill defines a 'reasonable excuse' to mean:

- in relation to any act or omission by a witness before the Commissioner—an excuse which would excuse an act or omission of a similar nature by a witness before a court of law
- in relation to any act or omission by a person summoned as a witness before the Commissioner—an excuse which would excuse an act or omission of a similar nature by a person summoned as a witness before a court of law, or
- in relation to any act or omission by a person given a notice under section 32 or subsection 48(3)—an excuse which would excuse an act or omission of a similar nature by a person served with a subpoena in connection with a proceeding before a court of law' (clause 5).

The accompanying part of the Explanatory Memorandum to the Bill outlines that:

> 'Reasonable excuse' is defined by reference to whether the excuse is one which would excuse a person before a court. The definition applies this test to the appropriateness or quality of an excuse in the case of a witness before the Commissioner, a person summoned as a witness, and a person given a notice to produce

> information, a document or thing. 'Reasonable excuse' is defined consistently with the Royal Commissions Act, recognising that the Commissioner's powers are closely aligned to those of a Royal Commission.
>
> The defence of reasonable excuse ensures a person is not penalised where they may be unable legitimately to produce a document or attend a hearing due to circumstances beyond their control, or where there is some other good and acceptable reason. It also allows for claims such as public interest immunity to be made in defence of material not being produced, for example, and for the quality of that claim to be examined on a case by case basis'.

Subclause 45(3) provides that the offences for failure to attend a hearing, or to give information or produce a document or thing under subclauses 45(1) and (2) respectively, do not apply if the person has a reasonable excuse.

Subclause 49(3) provides that the following offences in subsections 49(1) and (2) related to claims for LPP do not apply if the person has a reasonable excuse:

- an offence for a person failing to comply with a notice to give information or a statement, or produce a document or thing for inspection by the Commissioner, for the purpose of deciding whether to accept or reject a claim of LPP (subclause 48(3)), and
- an offence for a person failing to give information or a statement, or produce a document or thing as required in a notice under clause 30 or 32, following the Commissioner's decision to rejected a claim for LPP (subclause 49(1)).

The offence-specific defences of reasonable excuse in subclauses 45(3) and 49(3) are appropriate, recognising that the Bill defines 'reasonable excuse' in clause 5, which both narrows the scope of the defence and provides greater clarity as to the matters that would need to be adduced to establish it (4.3.3 of the Guide refers).

The defences of 'reasonable excuse' also appropriately recognise the breadth of circumstances which may affect a defendant's ability to meet a requirement of the Commissioner under the relevant offences. For example, a defendant is best placed to assert claims of privilege, such as public interest immunity, as well as to assert evidence about practical matters which affected a defendant's ability to meet a request from the Commissioner in the circumstances of each case. It would be significantly more difficult and costly for the prosecution to disprove these matters, such as the non-existence of a privilege claim, as well as circumstantial matters known only to the defendant, than for the defendant to establish these matters.

Committee comment

2.12 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that, in relation to subclause 45(4), the defendant would be best placed to adduce evidence as to why the information, statement, document or thing is not relevant to the matters into which the Commissioner was inquiring, as the defendant would be in possession of the document or thing the subject of the request. The defendant would, in a range of foreseeable circumstances, have exclusive access to the document or thing, or exclusive knowledge about its contents and origin, satisfying the standard in the Guide that the information is 'peculiarly within' the knowledge of the defendant.

2.13 In relation to subclause 49(5), the committee notes the Attorney-General's advice that given the sensitivity of the material and the defendant's expected interest in maintaining confidentiality, the defendant (along with their legal representative) would in a range of situations maintain exclusive access to or knowledge of the contents of the document, satisfying the standard in the Guide that this information is 'peculiarly within' the knowledge of the defendant.

2.14 In relation to clause 58, the committee notes the Attorney-General's advice that the factual circumstances to support that a person had appropriate authority to provide information on behalf of a Commonwealth, state or territory body to the Commissioner, and that the information was for the purpose of assisting the Commissioner, will be known to the defendant and that the defendant could readily bring to the attention of the prosecution evidence of their authority to act on behalf of the particular body. The committee also notes the Attorney-General's advice that the approach in the provision also accounts for the significantly greater cost and difficulty for the prosecution to adduce evidence that suggests the information, statement, document or thing was not provided in response to a request issued by the Commissioner, than for the defendant to adduce evidence demonstrating it was. While noting this advice, it remains unclear to the committee that the reversal of the evidential burden of proof in clause 58 is *peculiarly* within the knowledge of the defendant.

2.15 In relation to the appropriateness of the offence-specific defences of reasonable excuse in subclauses 45(3) and 49(3), the committee notes the Attorney-General's advice that the bill defines 'reasonable excuse' in clause 5, which both narrows the scope of the defence and provides greater clarity as to the matters that would need to be adduced to establish it. The committee also notes the Attorney-General's advice that defences of 'reasonable excuse' appropriately recognise the breadth of circumstances which may affect a defendant's ability to meet a requirement of the Commissioner under the relevant offences, and that it would be significantly more difficult and costly for the prosecution to disprove these matters, such as the non-existence of a privilege claim, as well as circumstantial matters known only to the defendant, than for the defendant to establish these matters.

2.16 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.17 In relation to the reversal of the evidential burden of proof in subclauses 45(4) and 49(5) and the inclusion of an offence-specific defence of reasonable excuse in subclauses 45(3) and 49(3), the committee makes no further comment on these matters.

2.18 In relation to clause 58, the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in this instance.

Legal professional privilege[6]

2.19 In *Scrutiny Digest 12 of 2020* the committee requested the Attorney-General's advice as to the rationale for, and the appropriateness of, abrogating legal professional privilege in the bill. In particular, the committee requested 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
- 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.[7]

Attorney-General's response

2.20 The Attorney-General advised:

> *General rationale for and appropriateness of abrogating LPP*
>
> The approach in the Bill is closely modelled on section 6AA of the Royal Commissions Act and is intended to ensure the Commissioner can conduct

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6 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).

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 5-8.

full inquiries with access to all relevant information, whilst allowing affected parties to make a claim. As acknowledged in the Explanatory Memorandum, the approach taken in the Bill gives weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry.

Qualifications of the Commissioner

It is not proposed that there be a formal qualification standard for a person to be eligible for appointment as the Commissioner. However, the person must, in the Governor General's opinion, be suitable for appointment because of their qualifications, training or experience (see clause 16(2)). This will enable a broad range of potential candidates to be considered by Government for appointment, which is appropriate given the unique and sensitive nature of this role. It will provide scope for the Governor-General to consider, among a range of other relevant factors, whether the person's qualifications, training or experience would enable them to effectively assess claims of LPP.

Further, the Commissioner will be supported by legal and other specialist staff in the Office of the National Commissioner as required. As such, the Commissioner will be able to draw on expert assistance and advice when assessing claims of LPP.

Considerations in deciding a claim of LPP

In deciding a claim of LPP under subclause 48(2), it is intended that the Commissioner would apply the established common law principles relevant to determining a claim of LPP. This clause substantially replicates subsection 6AA(2) of the Royal Commissions Act, which sets out the process for the production of documents and the making of a claim, but does not expressly set out the test to be applied.

In applying the common law principles, the Commissioner will have regard to the information presented by the party making the claim (noting that the Commissioner would need to afford procedural fairness to the affected parties in deciding that claim). The Commissioner could also seek additional information, as required.

Further, it is intended that a decision to reject a claim of LPP would be an administrative decision subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), as well as under section 39B of the *Judiciary Act 1903* (Cth). As such, even leaving aside the ability of an affected party to seek a declaration from a court that the relevant information is subject to LPP, there will be appropriate judicial oversight where there are concerns as to whether the Commissioner has applied the relevant common law principles correctly.

Consequences for later claims of LPP

The Committee has commented that the Bill could provide that a decision by the Commissioner to reject a claim of LPP does not affect a later claim of LPP that anyone may make in relation to the information, document or

record. We note that there is nothing in the Bill that seeks to exclude a later claim of LPP in relation to any material. The Bill expressly abrogates LPP only to the extent that it might provide a basis on which to resist a summons or requirement to provide information under clauses 30 and 32, and only to the extent that it would not be possible for a person to establish a 'reasonable excuse' within the terms of clause 48.

The Committee cites various provisions of the *Ombudsman Act 1976* (Cth) which expressly state that disclosure to the Ombudsman of information subject to LPP does not otherwise affect a claim of LPP that anyone may make in relation to that information. It is important to note, however, that the Ombudsman's powers with respect to information subject to LPP are significantly greater than the powers that would be exercised by the Commissioner. Under paragraph 9(4)(ab) of the Ombudsman Act, a person is required to furnish material when required to do so by that Act, even where this would involve disclosing certain advice or communications subject to LPP.

In contrast, the information disclosure regime under the Bill, like that under the Royal Commissions Act, allows a person to resist disclosure by making a claim to the Commissioner and, alongside other things, seeking a declaration from a court that the information sought by the Commissioner is subject to LPP. In particular, this means that the person has the option of seeking a conclusive judicial determination of whether the material is protected by LPP before any use or disclosure to the Commission. This diminishes the need to provide for the implications of such use or disclosure on future claims of LPP (because, in such cases, the court will already have determined whether or not the information is privileged).

Committee comment

2.21 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the approach in the bill is closely modelled on section 6AA of the Royal Commissions Act and is intended to ensure the Commissioner can conduct full inquiries with access to all relevant information, whilst allowing affected parties to make a claim of legal professional privilege.

2.22 In relation to the requirements for appointment as Commissioner, the committee notes the Attorney-General's advice that it is not proposed that there be a formal qualification standard for a person to be eligible for appointment as the Commissioner but that the person must suitable for appointment because of their qualifications, training or experience. The committee also notes the Attorney-General's advice that this will enable a broad range of potential candidates to be considered by government for appointment, which is appropriate given the unique and sensitive nature of this role, and that it will provide scope for the Governor-General to consider whether the person's qualifications, training or experience would enable them to effectively assess claims of legal professional privilege.

2.23 In relation to the criteria the Commissioner must consider in deciding a claim of legal professional privilege, the committee notes the Attorney-General's advice that it is intended that the Commissioner would apply the established common law principles relevant to determining a claim of legal professional privilege, and that in applying these principles the Commissioner will have regard to the information presented by the party making the claim (noting that the Commissioner would need to afford procedural fairness to the affected parties in deciding that claim). The committee further notes the Attorney-General's advice that it is intended that a decision to reject a claim of legal professional privilege would be an administrative decision subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

2.24 In relation to the consequences of the Commissioner's rejection of a claim of legal professional privilege for later claims, the committee notes the Attorney-General's advice that there is nothing in the bill that seeks to exclude a later claim of LPP in relation to any material and that the bill expressly abrogates LPP only to the extent that it might provide a basis on which to resist a summons or requirement to provide information under clauses 30 and 32, and only to the extent that it would not be possible for a person to establish a 'reasonable excuse' within the terms of clause 48.

2.25 While noting this advice, the committee reiterates that 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.

2.26 From a scrutiny perspective, the committee remains 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. However, the committee also notes the Attorney-General's advice that the approach taken in the bill is intended to give weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry. While acknowledging this advice, the committee remains of the view that there are insufficient legislative safeguards to ensure that legal professional privilege is only abrogated in appropriate circumstances.

2.27 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.28 The committee leaves to the Senate as a whole the appropriateness of abrogating legal professional privilege in circumstances where there are limited safeguards on the face of the bill to ensure that any abrogation is appropriate.

Privilege against self-incrimination[8]

2.29 In *Scrutiny Digest 12 of 2020* the committee requested 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.[9]

Attorney-General's response

2.30 The Attorney-General advised:

> The Guide provides that 'the privilege against self-incrimination may be overridden by legislation where there is clear justification for doing so' and 'if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained' (9.5.3-4 of the Guide refers).
>
> As explained in the Explanatory Memorandum, the justification for a partial abrogation of the privilege against self-incrimination is to support the Commissioner's function to inquire into, and report on, a matter of public importance: the prevention of, defence member and veteran deaths by suicide. In doing so, the approach gives weight to the public benefit and expectation that the Commissioner will have appropriate inquiry powers. The abrogation of the privilege against self-incrimination is not absolute and there are limits and safeguards on the abrogation.
>
> The partial abrogation of the privilege against self-incrimination 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 of Australia (clause 64). 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 direction to limit the fu1ther disclosure or publication of evidence which may be self-incriminating.
>
> It is acknowledged that the Commissioner may disclose information to listed entities, including the police or the Director of Public Prosecutions, where the Commissioner considers the information will assist the entity to perform its functions or exercise its powers (clause 56). During the course

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

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 8-9.

> of their work, the Commissioner may uncover information indicating a crime may have been committed. Introducing a 'derivative use' immunity to prevent any incriminating evidence being used to gather other evidence against the person may unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters the Commissioner identifies. This consideration has been central in the design of the approach taken in the Bill.
>
> The approach in the Bill to partially abrogate the privilege against self-incrimination, and not to provide a 'derivative use' immunity is consistent with the approach taken in other inquiry legislation, such as the Royal Commissions Act and subsection 9(4) of the Ombudsman Act.

Committee comment

2.31 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the justification for a partial abrogation of the privilege against self-incrimination is to support the Commissioner's function to inquire into, and report on, a matter of public importance: the prevention of, defence member and veteran deaths by suicide.

2.32 The committee also notes the Attorney-General's advice that introducing a derivative use immunity to prevent any incriminating evidence being used to gather other evidence against the person may unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters the Commissioner identifies.

2.33 While noting this explanation, the committee reiterates its consistent scrutiny view that any justification for abrogating the privilege will be more likely to be considered appropriate if accompanied by a use *and* derivative use immunity. The committee notes that the privilege against self-incrimination is a fundamental common law right and, from a scrutiny perspective, the committee does not generally consider that the hindering of law enforcement investigations is a sufficient justification for not providing a derivative use immunity in circumstances where the privilege is abrogated.

2.34 The committee leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination in circumstances where a derivative use immunity is not provided.

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
Bill status	Before the House of Representatives

Delegated legislation not subject to disallowance—ministerial policy statements[10]

2.35 In *Scrutiny Digest 12 of 2020* the committee requested the minister's 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.[11]

Minister's response[12]

2.36 The minister advised:

> As noted by the Committee in the Scrutiny Digest, an MPS is designed to provide formalised policy guidance to the Australian Communications and Media Authority (ACMA) on the performance of its spectrum management functions and the exercise of its spectrum management powers.
>
> As part of efforts to better delineate the role of the Minister and ACMA, in line with the recommendations of the 2015 Spectrum Review, these policy statements are intended to provide a new tool that enables the Minister to set strategic policy and to require ACMA to have regard to this policy guidance.

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

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 10-11.

12 The minister responded to the committee's comments in a letter dated 2 October 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 14 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

> As such, they are designed to provide guidance, without compelling ACMA by legislative instrument or Ministerial direction. This means that MPSs are not legislative in nature, as they do not determine or alter the content of the law, nor do they create, vary or remove an obligation or right. MPSs are not intended as a prescriptive approach and instead serve to emphasise the Minister's role in setting strategic policy priorities.
>
> As policy guidance from the Minister to the regulator, it is not appropriate that MPSs be subject to parliamentary disallowance, as would generally be the case for a legislative instrument. However, it is appropriate to provide a high level of transparency on the matters covered by MPSs.
>
> In this context, making MPSs notifiable instruments will help provide the necessary and appropriate transparency, and allow for parliamentary and stakeholder visibility of the content of MPSs.
>
> In comparison, where ACMA is required to exercise its powers in a manner consistent with a Ministerial direction (for example, under section 60 of the Act or under section 14 of the *Australian Communications and Media Authority Act 2005*), these directions will generally be made as legislative instruments.
>
> As such, I do not consider it to be appropriate for MPSs to be made by legislative instrument. The transparency afforded by being a notifiable instrument will be complemented by any consultation the Minister undertakes on draft MPSs, as well as the consultation ACMA undertakes on its annual work program, which will provide an opportunity for stakeholders to comment on how ACMA will exercise its spectrum management functions.

Committee comment

2.37 The committee thanks the minister for this response. The committee notes the minister's advice that as part of efforts to better delineate the role of the minister and the ACMA, in line with the recommendations of the 2015 Spectrum Review, ministerial policy statements under proposed section 28B are intended to provide a new tool that enables the minister to set strategic policy and to require ACMA to have regard to this policy guidance.

2.38 The committee also notes the minister's advice that ministerial policy statements are designed to provide guidance, without compelling the ACMA by legislative instrument or ministerial direction and that this means that ministerial policy statements are not legislative in nature, as they do not determine or alter the content of the law, nor do they create, vary or remove an obligation or right.

2.39 While noting this explanation, it remains unclear to the committee why ministerial policy statements regarding the performance of the ACMA's spectrum management functions or the exercise of its spectrum management powers could not be legislative instruments to provide appropriate opportunities for parliamentary scrutiny.

2.40 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that ministerial policy statements under proposed section 28B are to be notifiable instruments which are not subject to parliamentary disallowance, rather than legislative instruments.

Delegated legislation not subject to disallowance—bans on equipment[13]

2.41 In *Scrutiny Digest 12 of 2020* the committee requested the minister's 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.[14]

Minister's response

2.42 The minister advised:

> Non-compliant equipment can pose significant risks of harmful interference to radiocommunications or to the health and safety of the community. The power to make an interim ban is focussed on managing the risk of immediate harm to persons posed by equipment in the short term, so that ACMA is given sufficient time to determine whether a permanent ban ought to be issued.
>
> The power to make an interim ban is intended to be used as a temporary, short-term administrative measure to appropriately manage risks of immediate harm. For this reason an interim ban may be imposed if ACMA has a reasonable belief that the situation meets the requirements of proposed section 167 of the Bill. In addition, an affected person may seek a review of a decision to impose an interim ban (refer to item 29 of Schedule 4 to the Bill).
>
> Under the proposed changes to the Act, an interim ban on equipment would only be valid for 60 days, in which time ACMA could, if necessary, develop a permanent ban. A permanent ban on equipment would require the making of a legislative instrument and, therefore, be subject to parliamentary scrutiny.
>
> While performing a different function, an amnesty may be a tool that ACMA decides to draw on to reduce the risk of hazardous equipment, the

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13 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).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 11-12.

> subject of a permanent ban, continuing to circulate in the industry. To promote the effectiveness of the regulatory response, an amnesty may need to be declared when a permanent ban is imposed to support the risks proposed by the banned equipment are adequately addressed. An amnesty is designed as an administrative tool to increase the effectiveness of a permanent ban by ameliorating the potential harshness of a permanent ban on persons who are in possession of prohibited equipment and the time the ban comes into force.
>
> An amnesty will mitigate the risk of further use of harmful devices, which may be discarded while operable, rather than surrendered to ACMA as part of an amnesty. The possession of equipment would not have been prohibited by any preceding interim ban (which would only prohibit the supply or operation of such equipment). While not designed to be legislative in nature, transparency is critical for the effective administration of amnesties and as such, providing that an amnesty may be made by notifiable instrument is appropriate.
>
> Given the factors outlined, notifiable instruments are considered to be a more appropriate tool for the management of interim bans (including the extension of such bans) and the declaration of amnesties.

Committee comment

2.43 The committee thanks the minister for this response. In relation to interim bans on equipment being made by notifiable instrument, the committee notes the minister's advice that the power to make an interim ban is intended to be used as a temporary, short-term administrative measure to appropriately manage risks of immediate harm and that for this reason an interim ban may be imposed if the ACMA has a reasonable belief that the situation meets the requirements of proposed section 167 of the bill. The committee also notes that an affected person may seek review of a decision to impose an interim ban, and that a permanent ban on equipment would be by legislative instrument and therefore subject to parliamentary scrutiny and disallowance.

2.44 In relation to the declaration of amnesty periods for permanent bans by notifiable instrument, the committee notes the minister's advice that an amnesty may be a tool that the ACMA decides to draw on to reduce the risk of hazardous equipment, the subject of a permanent ban, continuing to circulate in the industry. The committee also notes the minister's advice that an amnesty is designed as an administrative tool to increase the effectiveness of a permanent ban by ameliorating the potential harshness of a permanent ban on persons who are in possession of prohibited equipment at the time the ban comes into force.

2.45 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

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

Computerised decision making[15]

2.47 In *Scrutiny Digest 12 of 2020* the committee requested the minister's 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.[16]

Minister's response

2.48 The minister advised:

> The area where automated decision making will have the greatest importance for ACMA is in the issuance and renewal of apparatus licences, the majority of which are short term licences, meaning a large number of decisions need to be made on an annual basis (there are currently over 40,000 licensees holding over 170,000 licences). Most of these licence applications and renewals are simple processes wherein the only requirements are compliance with administrative technical requirements and payments of fees. In this instance, a requirement that each application be manually assessed for renewal would involve additional processing time and increased application fees for licensees and introduce the potential for human error. For the vast majority of cases that ACMA manage, it is more appropriate to have an automated computerised

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

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 12-14.

system to facilitate the consideration of the application, having regard to the mandatory matters under the Act.

A number of controls have been factored into the design of the computerised decision making process to take into account administrative law requirements including ACMA being required to substitute a decision where it is satisfied that the computerised decision making system has made the wrong decision. In addition, ACMA would be able to facilitate the efficient consideration of matters relevant to the application, and adjust the system so that the use of a computerised system does not lead to inappropriate outcomes. For example, in the case of licence renewal, where ACMA must not renew a licence where it would be inconsistent with the Australian Radiofrequency Spectrum Plan (due to the operation of section 104 of the Act), ACMA would be able to identify licences falling into this category following a change in the ARSP and mark them so they are not able to be renewed by the system. In this way, human administrative judgment would oversee the system where it may make a decision that is contrary to the interests of an individual. In addition, formal decisions made by ACMA, including computerised decisions, are subject to a right of review.

Consideration has also been given to whether certain actions must be undertaken by a person rather than an automated system. However, it is difficult to predetermine which decisions should be appropriately made by a person or by an automated computer system. Taking again the example of licence renewals, the majority of short term licences are appropriate for renewal by computer decision. However, the renewal of a 20 year apparatus licence (also undertaken under section 130 of the Act) is more likely to be appropriate for consideration by an officer of ACMA. As such, the decision of when to use an automated computer system for decision making under the Act is best left to the judgment of ACMA.

Committee comment

2.49 The committee thanks the minister for this response. The committee notes the minister's advice that the area where automated decision making will have the greatest importance for the ACMA is in the issuance and renewal of apparatus licences, the majority of which are short term licences, meaning a large number of decisions need to be made on an annual basis (noting there are currently over 40,000 licensees holding over 170,000 licences) and that most of these licence applications and renewals are simple processes wherein the only requirements are compliance with administrative technical requirements and payments of fees.

2.50 The committee also notes the minister's advice that a number of controls have been factored into the design of the computerised decision making process to take into account administrative law requirements including the ACMA being required to substitute a decision where it is satisfied that the computerised decision making system has made the wrong decision.

2.51 The committee further notes the minister's advice that consideration has also been given to whether certain actions must be undertaken by a person rather than an automated system but that it is difficult to predetermine which decisions should be appropriately made by a person or by an automated computer system.

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

2.53 The committee acknowledges that there is merit in improving the timeliness and accuracy of decision-making, and notes there are mechanisms in place to ensure that errors made by the operation of a computer program can be quickly corrected. However, from a scrutiny perspective, the committee does not consider that the minister's response has provided an adequate justification for allowing all of the ACMA's administrative functions to be assisted or automated by computer programs (other than decisions reviewing other decisions).

2.54 In light of the committee's scrutiny concerns, the committee requests the minister's further advice as to whether the minister proposes to bring forward amendments to the bill to:

- **limit the types of decisions that can be made and powers that may be exercised by computers on the face of the primary legislation;**
- **provide that only decisions and powers prescribed in a legislative instrument may be made or exercised by computers; [17] and/or**
- **provide that the ACMA must, before determining that a type of decision can be made or power may be exercised by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made or power to be exercised by a computer rather than a person.**

2.55 The committee also requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in

17 For examples of this approach, see clause 182 of the Recycling and Waste Reduction Bill 2020 and proposed section 541A of the *Biosecurity Act 2015* in the Agriculture Legislation Amendment (Streamlining Administration) Bill 2019.

the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

Broad delegation of investigatory powers[18]

2.56 In *Scrutiny Digest 12 of 2020* the committee requested 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.[19]

Minister's response

2.57 The minister advised:

> Subsections 284A(14) and 284B(l3) of the Bill provide for an inspector to be assisted by other persons exercising powers or performing functions under Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). A person assisting may exercise these powers or perform these functions for the purposes of assisting an inspector to monitor a provision or to investigate the contravention of a civil penalty or an offence provision.
>
> It is unnecessary to specify in legislation that persons assisting inspectors have particular skills or attributes relating to their or experience, given the role performed by a person assisting an inspector will depend on the circumstances in which their assistance is necessary. Such circumstances will not always require that person to have particular skills and experience relating to the exercise of any coercive regulatory powers.
>
> In most circumstances, a person assisting an inspector will already be an authorised person of ACMA. In other circumstances, a person may assist an inspector by providing relevant expertise and advice to inform an inspector in determining whether a person has complied with a monitored provision, or in gathering evidential materials relating to a contravention of a civil penalty or offence provision.
>
> A person assisting is not expected to assist an inspector by independently determining compliance or gathering evidential material under Parts 2 and

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18 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).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, p. 14.

3 of the Regulatory Powers Act. These matters would be the responsibility of the inspector. A person assisting would also be subject to any directions given by an inspector who will continue to have direct responsibility and oversight of the powers exercised and functions performed under Parts 2 and 3 of the Regulatory Powers Act.

Committee comment

2.58 The committee thanks the minister for this response. The committee notes the minister's advice that it is unnecessary to specify in legislation that persons assisting inspectors have particular skills or attributes relating to their or experience, given the role performed by a person assisting an inspector will depend on the circumstances in which their assistance is necessary.

2.59 The committee also notes the minister's advice that a person may assist an inspector by providing relevant expertise and advice to inform an inspector in determining whether a person has complied with a monitored provision, or in gathering evidential materials relating to a contravention of a civil penalty or offence provision. The committee further notes that a person assisting is not expected to assist an inspector by independently determining compliance or gathering evidential material under Parts 2 and 3 of the Regulatory Powers Act.

2.60 While the committee acknowledges the minister's advice as to how it is intended this power will be exercised, there is nothing on the face of the bill to limit it in the way set out in the response. The committee reiterates its consistent scrutiny view in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have appropriate training and experience.

2.61 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing authorised officers who are exercising monitoring and investigation powers to be assisted by other persons with no requirement that the other person has appropriate training or experience.

Significant matters in delegated legislation[20]

2.62 In *Scrutiny Digest 12 of 2020* the committee requested 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

20 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).

- 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.[21]

Minister's response

2.63 The minister advised:

> Part 4 of Chapter 4 of the Act sets out a technical regulation framework that applies to equipment that uses or is affected by radio emissions, in order to contain interference, promote electromagnetic compatibility of equipment, establish standards and compliance monitoring, control the sale and supply of non-standard devices, and protect the health and safety of those using the equipment. This is currently achieved through setting technical standards and requirements for testing, labelling and record-keeping in the form of delegated legislation.
>
> Currently, the regulation of equipment is governed by provisions in the Radiocommunications Regulations 1993, as well as 18 standards made by legislative instrument under section 162 of the Act and four notices about labelling of devices made as legislative instruments under section 182 of the Act.
>
> The Bill proposes to replace the existing framework, which involves many legislative instruments for regulating equipment, with a modem comprehensive regulatory framework that consists of a single set of equipment rules. These equipment rules, made as a legislative instrument under the Act, will prescribe standards for equipment, impose obligations or prohibitions on the operation, supply, offer to supply, possession and import of equipment, and create a power to grant permits to do an act or thing otherwise prohibited under the rules.
>
> The Act would continue to provide for:
>
> - offences for breaching the equipment rules or permit conditions;
> - provisions prohibiting the use of a protected symbol otherwise in accordance with the Act and the effect of labelling equipment with protected symbol (being that the equipment complies with the relevant standards in the equipment rules);
> - regulatory tools for ACMA including:
>   - interim bans on equipment made by ACMA in the form of a notifiable instrument and offences for non-compliance with a ban;
>   - permanent bans on equipment made by ACMA in the form of a legislative instrument and offences for non-compliance with a ban;

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, p. 15.

- an amnesty on equipment subject to a permanent ban made by ACMA in the form of a notifiable instrument.

The proposed amendments address the significant elements of the scheme, specifically, important definitions, the scope of standards, prohibitions and obligations that can be made in delegated legislation, the nature of offences, penalties, presumptions and defences, the powers and functions of ACMA and accredited persons and independent review of specified administrative decision. None of the significant elements of the scheme have been left to be established in delegated legislation. Noting the complexity of the matters addressed by the Act, for example, there are currently 18 standards and four notices about labelling of devices made as delegated legislation, it would be impracticable to include this type of material in the Bill.

The amendments proposed in the Bill provide an opportunity to simplify the complexity of the Act, and the delegated legislation made under the Act. Reducing the complexity of the laws is likely to increase its readability for users, such as operators in the sector, and, as a consequence, increase the level of understanding about responsibilities and obligations and, ultimately, compliance with regulatory expectations.

In addition, allowing for the detailed rule-making to be developed under delegated legislation would allow those instruments to be amended in a timely manner, as appropriate, to ensure they can adapt to regulatory and policy issues being experienced in the industry. Further, providing this degree of flexibility, while ensuring that the significant elements of the scheme are set out in primary legislation, would enable Australia to meets its international obligations, such as changes in technical standards in a timely and considered manner.

Committee comment

2.64 The committee thanks the minister for this response. The committee notes the minister's advice that the amendments proposed in the bill provide an opportunity to simplify the complexity of the Act, and the delegated legislation made under the Act. The committee also notes the minister's advice that reducing the complexity of the laws is likely to increase its readability for users, such as operators in the sector, and, as a consequence, increase the level of understanding about responsibilities and obligations and, ultimately, compliance with regulatory expectations.

2.65 The committee further notes the minister's advice that providing this degree of flexibility, while ensuring that the significant elements of the scheme are set out in primary legislation, would enable Australia to meets its international obligations, such as changes in technical standards in a timely and considered manner.

2.66 While noting this advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification of itself for leaving

significant matters to delegated legislation. 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.

2.67 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the details of the scheme to manage the operation, supply and possession of equipment to delegated legislation.

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

Broad delegation of administrative powers

Adequacy of review rights

Parliamentary scrutiny[22]

2.69 In *Scrutiny Digest 12 of 2020* the committee requested the minister's advice as to:

- 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;

22 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).

- whether judicial review and independent merits review will be available for decisions of an administrative character made by accredited persons;
- 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.[23]

Minister's response

2.70 The minister advised:

> Accredited persons generally provide services to licensees and assist licensees in their application for a licence as part of a suite of commercial consulting services that they offer to the licensee. As accredited persons, the information that they provide to ACMA, such as a frequency assignment certificate to support an application for an apparatus licence, is used by ACMA to assist it in the decision it makes under the Act. Neither ACMA nor the Commonwealth will be a party to such contracts between licensees and accredited persons.
>
> As a part of providing commercial services, while the Act permits the charging of fees for these services, it is not appropriate to govern how the amount of the fee will be charged (other than it must not amount to taxation).
>
> The information and administrative functions performed by accredited persons are preliminary steps to final decisions that are made by ACMA. As such, the appropriate point of judicial or administrative review is the decision of ACMA, with relevant decisions subject to reconsideration and review under section 285 of the Act. ACMA will retain all formal decision-making powers under the Act, such as issuing a permit under the equipment rules. In this case, the Bill allows accredited persons to undertake work of an administrative character, such as reviewing a permit application and making a recommendation to ACMA as the formal decision-maker and for that person to charge the applicant for this work. The Bill allows for the review of formal decisions, with decisions of ACMA under the Equipment Rules capable of being reviewed under section 285 of the Act (subject to the provisions of the Equipment Rules).
>
> Paragraph 266(2)(d) of the Act provides that, as part of the Accreditation Rules, ACMA is able to determine the qualifications and other

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 16-18.

> requirements required before a person can be given a kind of accreditation. The Bill allows accredited persons to undertake work for licensees and applicants under the Act. ACMA's decisions under the Accreditation Rules will be capable of reconsideration and review under section 285 of the Act (subject to the provisions of the Accreditation Rules).
>
> Accredited persons have become significant contributors to the management of radiocommunications licensing over the last 20 years. The expansion of accreditation arrangements in this Bill would provide more opportunities for spectrum users to participate in spectrum management, consistent with the recommendations of the Spectrum Review. ACMA will consult stakeholders on any expanded accreditation arrangements as it develops and implements arrangements under the Bill.

Committee comment

2.71 The committee thanks the minister for this response. The committee notes the minister's advice that accredited persons generally provide services to licensees and assist licensees in their application for a licence as part of a suite of commercial consulting services that they offer to the licensee and that the information that they provide to the ACMA, such as a frequency assignment certificate to support an application for an apparatus licence, is used by the ACMA to assist it in the decision it makes under the Act.

2.72 The committee also notes the minister's advice that as a part of providing commercial services, while the Act permits the charging of fees for these services, it is not appropriate to govern how the amount of the fee will be charged (other than it must not amount to taxation).

2.73 The committee further notes the minister's advice that the information and administrative functions performed by accredited persons are preliminary steps to final decisions that are made by the ACMA. As such, the appropriate point of judicial or administrative review is the decision of the ACMA, with relevant decisions subject to reconsideration and review under section 285 of the Act.

2.74 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. 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. The committee does not consider that these concerns have been adequately addressed by the minister or that appropriate safeguards exist on the face of the primary legislation.

2.75 In addition, the committee continues to have 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 minister's response or 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.

2.76 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.77 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing 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.

Broad delegation of legislative power[24]

2.78 In *Scrutiny Digest 12 of 2020* the committee requested 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.[25]

Minister's response

2.79 The minister advised:

> The Bill proposes to allow ACMA to exempt certain acts or persons from compliance provisions if it is satisfied that the exemption is in the public interest, or the exemption is of a kind specified in the legislative rules. In both instances, ACMA is able to make the exemptions subject to

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

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 18-19.

conditions. These exemptions are designed to help promote innovation and industry development opportunities within Australia.

The explanatory memorandum sets out the kind of matters that ACMA should consider in determining an exemption based on public interest. In determining the public interest, ACMA will need to 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 for an exemption to be granted.

The Act contains provisions that require the operation of radiocommunications devices to occur under licence and with the use of compliant equipment, consistent with the object of the Act, which is the promotion of the long-term public interest derived from the use of the spectrum is achieved, particularly through minimising interference between spectrum users. However, it would also be consistent with the object of the Act to empower ACMA to grant exemptions to support innovations and research and manufacturing in Australia, although the development of new equipment, by its nature, may not be licensable or capable of complying with standards.

Accordingly, it is appropriate that ACMA should be able to assess whether it is in the public interest for a person conducting a particular activity to be exempted from the relevant offence provisions, so that the offence provisions in the Act do not undermine the object of the Act.

As exemptions would be granted through a legislative instrument, section 17 of the *Legislation Act 2003* requires that the instrument-maker be satisfied that appropriate consultation has occurred. It is noted that section 197, which prohibits the causing of interference, is not included under proposed section 302 as a compliance provision from which ACMA can grant an exemption. As such, any research would need to be undertaken in frequencies that are not currently licensed, or in conditions that eliminate interference, like a Faraday cage. This will allow for protections to remain in place for existing licensees and services, for example in the case that ACMA grants an exemption for the operation of a banned device capable of operating on frequencies that are covered by a spectrum licence or an apparatus licence.

Committee comment

2.80 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate that the ACMA should be able to assess whether it is in the public interest for a person conducting a particular activity to be exempted from the relevant offence provisions so that the offence provisions in the Act do not undermine the object of the Act.

2.81 The committee reiterates that proposed section 302 appears to confer a broad 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. From a scrutiny perspective, the committee does not consider that this provision has been appropriately justified in the minister's response.

2.82 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring on the ACMA the broad power to exempt acts and persons from one or more compliance provisions by legislative instrument in circumstances where there is limited guidance on the face of the bill regarding when it will be appropriate for the ACMA to exempt an act or person from these provisions.

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
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[26]

2.83 In *Scrutiny Digest 12 of 2020* the committee requested the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee suggested 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 requested the minister's advice in relation to this matter.[27]

Minister's response[28]

2.84 The minister advised:

> *Offences for knowingly or recklessly making false or misleading representations*
>
> Subclauses 21(2), 22(2), 23(2) and 24(2) of the Bill will provide offences for knowingly or recklessly making false or misleading representations relating to the export of regulated waste material. Subclauses 21(5), 22(5), 23(5) and 24(5) provide an exception to the offence if the representation was not false or misleading in a material particular. They do not broaden the offence or remove any existing burden on the prosecution to establish the offence, and consequently, are beneficial for defendants.
>
> In accordance with subsection 13.3(3) of the *Criminal Code Act 1995* (Criminal Code), it is the defendant who bears the evidential burden to show that the representation was not false or misleading in a material

26 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).

27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 22-24.

28 The minister responded to the committee's comments in a letter dated 2 October 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 14 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

particular. In accordance with subsection 13.1. of the Criminal Code, if the defendant discharges the evidential burden, the prosecution must disprove those matters beyond a reasonable doubt.

As the Committee noted, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* 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 in 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.

Whether a representation is false or misleading in a material particular is something that is peculiarly in the knowledge of the defendant, because only the defendant would know the nature of their representation and, importantly, the materiality of the false and misleading aspect of that representation. My Department does not have a presence within, for example, the administration of voluntary or co-regulatory product stewardship arrangements, or waste processing facilities, and would be reliant on the information provided by the person. The defendant would be in a better position to point to evidence indicating how material the false and misleading part of their representation is.

The matter would also be significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to supply the evidence. In order for the prosecution to disprove the matter, the prosecution may need to obtain evidence from entities that are not regulated by the scheme (who may not be willing to cooperate and who may not have sufficient knowledge of the context to provide accurate evidence).

Offence for contravention of a direction by an authorised officer

Subclause 106(7) of the Bill provides that a person commits an offence if they are given a direction to take specified action within a specified period, and the person engages in conduct that contravenes that direction. Subclause 106(9) provides an exception to the offence if:

- the direction was in writing but did not include a statement that a failure to comply with the direction could result in a criminal or civil penalty; or
- the direction was given orally, and reasonable steps were not taken to inform the person that a failure to comply with the direction could result in a criminal or civil penalty.

Subclause 106(9) does not broaden the offence or remove any existing burden on the prosecution to establish the offence, and consequently, is beneficial for defendants.

Whether a written direction given to the defendant included a statement informing them of the consequences of failing to comply with a direction is a matter peculiarly in the knowledge of the defendant. The defendant will have received the notice and have access to it. It would be significantly more difficult and costly for the prosecution to prove that the written notice given to the defendant did not contain the required statement, rather than for the defendant to supply the written direction.

Similarly, whether an oral direction included reasonable steps to inform the defendant of the consequences of failing to comply with a direction is a matter peculiarly in the knowledge of the defendant. The defendant would be able to adduce evidence that the steps taken, or not taken, by the authorised officer did not go far enough to inform the defendant of the consequences of failing to comply with a direction.

In order for the prosecution to disprove the matter, the prosecution would need to be in possession of the written direction, or audio of the oral direction between the authorised officer and defendant, which would be difficult, or impossible, to obtain.

Offence for failure to return identity card

Subclause 124(1) of the Bill provides that it is an offence for a person that has been issued an identity card not to return the card within 14 days of ceasing to be an authorised officer, an approved auditor, or another person prescribed by the rules. Subclause 124(2) provides an exception to the offence if:

- an authorisation of an authorised officer has been suspended; or
- the identity card has been lost or destroyed.

Subclause 131(5) of the Bill will provide that, if a person's authorisation as an authorised officer is suspended, the person is taken not to be an authorised officer during the period of suspension. The intent of including paragraph 124(2)(a) was to clarify that an authorised officer who has been suspended does not commit an offence if they fail to return their identity card. This recognises that, in some instances, a suspension of a person's authorisation will be revoked, and the person will continue to be an authorised officer.

My Department will be able to establish whether a person's authorisation as an authorised officer was suspended, and therefore whether the person was required to return their identity card. This accords with subsection 13.3(4) of the Criminal Code, which provides that the defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court. In practice, my Department would not institute proceedings in circumstances where the authorisation was suspended. The exception is enlivened when the authorisation is suspended and not whether the defendant can establish they had been given or received a notice of suspension.

Whether an identity card has been lost or destroyed is a matter peculiarly in the knowledge of the defendant. The defendant would be able to adduce, or point to evidence, as to the loss or destruction of the identity card, for example, the date or location of the loss. My Department is reliant on the defendant to inform it of the loss or destruction, and would not have that information available to it.

The matter would be significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to supply evidence of the loss or destruction of the identity card. In order to disprove the matter, the prosecution would need to obtain indirect circumstantial evidence, which would be difficult or impossible to obtain.

Offence for using or disclosing commercially sensitive information

Subclause 148(1) of the Bill provides that it is an offence for a person to use or disclose protected information obtained in the course of, or for the purposes of, performing functions or duties under the Bill, if there is a risk that the use or disclosure may substantially prejudice the commercial interests of another person. Subclause 148(2) provides an exception to the offence if the use or disclosure is authorised by clause 149.

Clause 149 provides a number of authorised uses and disclosures, including if a prejudiced person has provided consent, if the use or disclosure is required or authorised by another Australian law, or if the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of a person.

For each of the exceptions in clause 149, it is readily and specifically within the knowledge of the defendant who uses or discloses the information in the course of performing functions or exercising powers under the Bill to adduce or point to evidence that suggests a reasonable possibility that the relevant exception applies. While some of the exceptions may be able to be established by adducing evidence from third parties (such as where a third party consent to the disclosure of the protected information), this will not always be the case and the information will generally (and in some cases only) be accessible to the defendant. For example, if the disclosure was due to the defendant's belief on reasonable grounds that disclosure was required in order to prevent or lessen a serious threat to life or health, the defendant is better placed to point to this. Likewise, if there was evidence suggesting that a disclosure was made to another person for use in that person's performance of duties, functions or exercise of a power under the Bill, it would be more readily accessible to the defendant.

In addition, it would be significantly more difficult and costly for the prosecution to disprove all exceptions in subclause 149(1), rather than for the defendant to supply evidence of their reliance on one of the authorised disclosures. This is particularly the case given the breadth in the nature and scope of the authorised disclosures listed in clause 149.

On this basis, I do not consider it appropriate for subclauses 21(5), 22(5), 23(5), 24(5), 106(9), 124(2), and 148(2) to be amended to be elements of the relevant offences

Committee comment

2.85 The committee thanks the minister for this response. In relation to subclauses 21(5), 22(5), 23(5) and 24(5), the committee notes the minister's advice that whether a representation is false or misleading in a material particular is something that is peculiarly in the knowledge of the defendant, because only the defendant would know the nature of their representation and, importantly, the materiality of the false and misleading aspect of that representation.

2.86 In relation to subclause 106(9), the committee notes the minister's advice that whether a written direction given to the defendant included a statement informing them of the consequences of failing to comply with a direction is a matter peculiarly in the knowledge of the defendant, and that the defendant will have received the notice and have access to it. The committee further notes the minister's advice that, in relation to oral directions, that the defendant would be able to adduce evidence that the steps taken, or not taken, by the authorised officer did not go far enough to inform the defendant of the consequences of failing to comply with a direction.

2.87 In relation to subclause 124(2), the committee notes the minister's advice that the department will be able to establish whether a person's authorisation as an authorised officer was suspended, and therefore whether the person was required to return their identity card and that this accords with subsection 13.3(4) of the Criminal Code, which provides that the defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

2.88 In relation to subclause 148(2), the committee notes the minister's advice that for each of the exceptions in clause 149, it is readily and specifically within the knowledge of the defendant who uses or discloses the information in the course of performing functions or exercising powers under the bill to adduce or point to evidence that suggests a reasonable possibility that the relevant exception applies.

2.89 While acknowledging this advice, the committee considers that 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 in all circumstances be difficult or costly for the prosecution to establish the matters.

2.90 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

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

Strict liability[29]

2.92 In *Scrutiny Digest 12 of 2020* the committee requested 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.[30]

Minister's response

2.93 The minister advised:

> Subclause 81(2) of the Bill will create an offence of strict liability where an administrator of a coregulatory arrangement fails to take all reasonable steps to ensure that the arrangement achieves the outcomes prescribed under clause 79 in relation to a product, and comply with any requirements prescribed by rules made for achieving those outcomes.
>
> As noted in the explanatory memorandum accompanying the Bill, the use of strict liability for this offence is consistent with the principles relating to strict liability in the *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*.
>
> Notably:
>
> - 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;
> - offences relating to achieving the outcomes of co-regulatory schemes need to be dealt with efficiently to ensure the integrity of, and confidence in, the regulatory regime;
> - the offence will be subject to an infringement notice;
> - 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 ensure the

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

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 24-26.

specified outcomes for that arrangement is integral to the operation of the co-regulatory product stewardship scheme and the overarching product stewardship framework set out in the 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.

I note the Committee's concern that 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. However, this 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. These outcomes and requirements will be clearly set out in rules made for the purpose of clause 79 of the Bill.

For example, outcomes for co-regulatory arrangements may include:

- providing reasonable access to collection services in metropolitan areas, inner regional areas, outer regional areas and remote areas;
- the recycling target must be met; or
- the material recovery target must be met.

Therefore, the triggers for the offence will be simple, certain, and easily understood. Reasonable steps to ensure that an arrangement achieves the prescribed outcomes and complies with any requirements could include:

- assessing the approved co-regulatory arrangement on an ongoing basis to determine whether outcomes are being met and requirements complied with;
- having effective policies in place;
- seeking advice on whether outcomes or requirements are being met; or
- working with liable parties to eliminate risks and ensuring any issues are addressed.

Further, in setting the penalties in the Bill, specific regard was given to the principle articulated at Chapter 3.1.2 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that there should be consistent penalties for offences of a similar kind or of a similar seriousness.

Most offences that relate specifically to the co-regulatory product stewardship scheme under the Bill are strict liability offences of 60 penalty units for an individual. This approach was guided by existing penalty provisions in the *Product Stewardship Act 2011*. If this provision was made a fault-based offence, it would be appropriate to increase the penalty units

> in accordance with other fault-based offences, such as clause 92 of the Bill, which relates to the mandatory product stewardship scheme. However, failing to comply with requirements in rules in relation to the mandatory product stewardship scheme is a more serious breach in the context of the Bill. If subclause 81(2) were made a fault-based offence and the maximum penalty increased, it would not be comparable to the penalties that apply in respect of similar prohibited behaviours under co-regulatory product stewardship, such as those under clauses 72, 76, 82 and 83.
>
> On this basis, I consider that it is not necessary to amend the Bill to provide that the strict liability offence in subclause 81(2) is a fault-based offence.

Committee comment

2.94 The committee thanks the minister for this response. The committee notes the minister's advice that 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. The committee also notes the minister's advice that the outcomes and requirements will be clearly set out in rules made for the purpose of clause 79 of the bill.

2.95 While acknowledging the minister's 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. The committee considers that the requirement to take 'all reasonable steps' may be broad and uncertain. In this regard, the committee notes that the types of things that may constitute taking reasonable steps are not specified on the face of the primary legislation and may be very subjective, such as having effective policies in place. As a result, from a scrutiny perspective, the committee considers that the offence may more appropriately be a fault-based offence.

2.96 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.97 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that the offence in subclause 81(2) is one of strict liability, which means that the offence will be made out without the need for the prosecution to prove a fault (mental) element for each physical element of the offence.

Broad delegation of investigatory powers[31]

2.98 In *Scrutiny Digest 12 of 2020* the committee requested 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.[32]

Minister's response

2.99 The minister advised:

> Subclauses 97(4) and 99(3) of the Bill will provide that an authorised person may be assisted by 'other persons' in exercising powers or performing functions or duties under Part 2 (monitoring) and Part 3 (investigation) of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act).
>
> The Bill will trigger the Regulatory Powers Act as the accepted baseline of Commonwealth powers required for a monitoring and investigation regime. Sections 23 and 53 of the Regulatory Powers Act, as triggered by subclauses 97(4) and 99(3) of the Bill, will confer monitoring and investigation powers on the person assisting an authorised person, subject to specific safeguards.
>
> It is necessary to confer monitoring or investigatory powers on person assisting an authorised person because there may be circumstances where:
>
> - no other authorised person may be available to assist;
> - the premises that are subject to monitoring or investigation may be large;
> - there may be a large number of documents or material that needs to be reviewed;
> - there may be a large number of things that need to be searched, inspected, examined or sampled;
> - the person assisting may be more familiar with the premises, or have particular skills or knowledge that would enable the authorised person to effectively exercise their powers and perform their functions or duties; or

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

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, p. 26.

- things may be heavy or difficult to move without assistance.

It would not be appropriate to amend the Bill to specify the expertise or training that persons assisting are required to possess. A person assisting an authorised person will need to have different expertise and training depending on the circumstances and the purpose of the assistance required, such as the purpose of the entry to premises (such as for monitoring or investigation purposes), the nature of the premises or things, and the anticipated needs of the authorised officer in exercising their powers under the Bill. For example, a person assisting may need to be a specialist in operating electronic equipment, a person with scientific knowledge of the waste material that are the subject of the exercise of powers, a person with knowledge of the business operations of the premises, or a person who is trained to review financial records. In addition, the circumstances in which the assistance of another person will be necessary and reasonable will not always require that person to have particular skills and experience relating to the exercise of regulatory powers.

It is therefore more appropriate for operational requirements to determine who is appropriate to assist an authorised officer in the particular circumstances, based on the relevance of their training and experience to the situation for which assistance is required.

Further, paragraphs 23(1)(a) and 53(1)(a) of the Regulatory Powers Act provide that a person exercising monitoring or investigation powers may only be assisted by another person if the assistance is necessary and reasonable. It is not intended that a person assisting will assist an authorised officer to determine compliance or gather evidential material by separately determining compliance or gathering evidential material under Parts 2 and 3 of the Regulatory Powers Act. The intention is that a person assisting to exercise monitoring or investigatory powers will support the authorised officer in the exercise of their powers to monitor and investigate compliance with the Bill.

A person assisting would also be subject to any directions given by an authorised person in accordance with paragraphs 23(2)(d) and 53(2)(d) of the Regulatory Powers Act who will continue to have direct responsibility and oversight of the powers exercised and functions performed under Parts 2 and 3 of the Regulatory Powers Act.

In addition, subsections 23(3) and 53(3) of the Regulatory Powers Act make it clear that a power exercised by a person assisting an authorised person is taken to have been exercised by the authorised person him or herself. It will therefore be the authorised person who will ultimately be accountable for the activities performed by the person assisting them.

On this basis, I consider that it is not appropriate to amend the Bill to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.

Committee comment

2.100 The committee thanks the minister for this response. The committee notes the minister's advice that it would not be appropriate to amend the bill to specify the expertise or training that persons assisting are required to possess. The committee also notes the minister's advice that a person assisting an authorised person will need to have different expertise and training depending on the circumstances and the purpose of the assistance required, such as the purpose of the entry to premise, the nature of the premises or things, and the anticipated needs of the authorised officer in exercising their powers under the bill.

2.101 The committee further notes the minister's advice that it is not intended that a person assisting will assist an authorised officer to determine compliance or gather evidential material by separately determining compliance or gathering evidential material under Parts 2 and 3 of the Regulatory Powers Act. Instead, it is intended that a person assisting to exercise monitoring or investigatory powers will support the authorised officer in the exercise of their powers to monitor and investigate compliance with the bill.

2.102 While the committee acknowledges the minister's advice as to how it is intended this power will be exercised, there is nothing on the face of the bill to limit it in the way set out in the response. The committee reiterates its consistent scrutiny view in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have appropriate training and experience.

2.103 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing authorised officers who are exercising monitoring and investigation powers to be assisted by other persons with no requirement that the other person has appropriate training or experience.

Delegated legislation not subject to parliamentary disallowance[33]

2.104 In *Scrutiny Digest 12 of 2020* the committee requested the minister's advice as to:

- 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.[34]

33 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).

34 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 27-28.

Minister's response

2.105 The minister advised:

> The determinations made by the Secretary of the Department of Agriculture, Water and the Environment under subclauses 125(7), 129(1) and 166(3) of the Bill will set out the training and qualification requirements for authorised officers, authorised government enforcement officers and analysts, respectively. Training and qualification requirements may relate to specific classes of authorised officer, authorised government enforcement officer or analyst. Subclauses 125(8), 129(2) and 166(4) of the Bill will provide that determinations made under subclause 125(7), 129(1) and 166(3) are not legislative instruments.
>
> I note that subsections 8(1) and (4) of the *Legislation Act 2003* have the combined effect that an instrument that is made under a power delegated by Parliament and has one or more provisions that have legislative character (rather than administrative character) will be a legislative instrument—unless the relevant Act expressly exempts the instrument from being a legislative instrument.
>
> In *Visa International Services Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 424 (Visa International), the Federal Court identified a number of factors that are likely to have bearing on whether a decision is to be characterised as being of administrative or legislative character. The list included (at paragraph 29):
>
> - whether the decision determined rules of general application, or whether there was an application of rules to particular cases;
> - whether there was Parliamentary control of the decision;
> - whether there was public notification of the making of the decision;
> - whether there was public consultation;
> - whether there were broad policy considerations imposed;
> - whether the regulations (or other instrument) could be varied;
> - whether there was power of executive variation or control;
> - whether there was provision for merits review; and
> - whether there was binding effect.
>
> The case law makes it clear that no one of these factors will determine whether the decision is of administrative or legislative character. Rather, it is necessary to consider the decision in light of all these factors.
>
> Legislative and administrative decisions can also be distinguished because legislative decisions determine the content of the law as a 'rule of conduct' or 'declaration as to power, right or duty' whilst administrative decisions

apply the law in particular cases (*Roche Products Pty Limited v National Drugs and Poisons Schedule Committee* [2007] FCA 1352 per Branson J).

Applying these factors to the instruments made under subclauses 125(7), 129(1) and 166(3), I am satisfied that none of these instruments determine a 'rule of conduct' or declare a 'power, right or duty'. Notably, the inclusion of training and qualification requirements does not determine the future lawfulness of conduct by or in relation to authorised officers, authorised government enforcement officers or analysts, and thus does not determine the content of rules of general application. Rather, the instruments will apply the law to particular cases, by setting training and qualification requirements for the different individuals or classes of individuals as appropriate for their position and their powers, functions and duties under the Bill.

In addition, the determination will not have binding effect on any of the individuals concerned; nor will it require them to do or not do any act or omission. Furthermore, there is no public consultation required for making the instrument, nor is there any requirement to notify the public when the instrument is made. The policy considerations imposed are narrow, being confined to Commonwealth regulatory and compliance policy, and do not generally affect the public.

In light of this, I consider that the determinations under subclauses 125(7), 129(1) and 166(3) will be instruments of administrative character, rather than legislative character. The statements in subclauses 125(7), 129(1) and 166(3) that the relevant instruments are not legislative instruments, are declarations of the law and do not provide an exemption from the *Legislation Act 2003*.

However, the legislative versus administrative character test is complex and likely to be beyond the knowledge of many persons who are reading the Bill. The declaratory statement will therefore assist readers of the Bill to understand that the instruments are not legislative instruments.

On this basis, I consider that it is not necessary or appropriate to specify that determinations made under subclauses 125(7), 129(1) and 166(3) are not legislative instruments and do not consider that Bill could be amended to provide that these determinations are legislative instruments.

Committee comment

2.106 The committee thanks the minister for this response. The committee notes the minister's advice that none of the instruments determine a 'rule of conduct' or declare a 'power, right or duty' and that the inclusion of training and qualification requirements does not determine the future lawfulness of conduct by or in relation to authorised officers, authorised government enforcement officers or analysts, and thus does not determine the content of rules of general application.

2.107 The committee also notes the minister's advice that the determination will not have binding effect on any of the individuals concerned; nor will it require them

to do or not do any act or omission. The committee further notes that the policy considerations imposed are narrow, being confined to Commonwealth regulatory and compliance policy, and do not generally affect the public.

2.108 While acknowledging the minister's advice, it remains unclear to the committee that determinations setting out training and qualification requirements are instruments of an administrative, rather than a legislative, character. From a scrutiny perspective, the committee therefore remains of the view that it would be appropriate for the bill to be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.

2.109 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that determinations setting out training and qualification requirements for authorised officers, authorised government enforcement officers and analysts are not legislative instruments and are therefore not subject to any form of parliamentary oversight, including disallowance.

Immunity from civil liability[35]

2.110 In *Scrutiny Digest 12 of 2020* the committee requested the minister's advice as to why it is considered appropriate to provide the Commonwealth and a number of protected persons 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. The committee considered that it may be appropriate to amend the bill to remove the civil immunity for the Commonwealth as an entity and requested the minister's advice in relation to this.[36]

Minister's response

2.111 The minister advised:

> Subclause 180(1) of the Bill will provide the Commonwealth and protected persons with immunity from civil proceedings in relation to any act or omission done in good faith in the performance or purported performance of a duty, function or power under the Bill, or in the assistance or purported assistance of a person performing a duty, function or power under the Bill. A protected person is defined in subclause 180(3) of the Bill as the Minister, Secretary, an authorised officer or a Departmental officer or employee.

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

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 28-29.

Subclause 180(2) will provide equivalent protection to a person who is assisting a protected person as a result of a request, direction or other requirement imposed by the protected person in the performance (or purported performance) of a duty, function or power under the Bill, so long as the assistance was provided by the person in good faith.

These protections are considered necessary and appropriate to ensure efficient and effective administration of the Bill. Immunity from civil liability where good faith is shown is necessary to maintain the integrity of the regulatory framework. In the absence of immunity to protected persons (or those assisting them), it would be difficult to effectively administer the scheme. For example, protected persons may be unwilling to perform functions and powers under the Bill if there was a risk they could be held personally liable even if they acted honestly and in good faith.

Similarly, providing the Commonwealth as an entity with immunity from civil proceedings in respect of acts done in good faith is appropriate given the nature and scope of the powers and functions in the Bill.

Acts or omissions that are not performed in good faith (such as those performed with malice) 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. In addition, clause 180 does not protect the Commonwealth, protected persons, or persons assisting protected persons from criminal proceedings.

The granting of immunity to the Commonwealth is also relatively common across Commonwealth legislation. In this regard, clause 180 was modelled on, and is consistent with, similar immunities that protect the Commonwealth and protected persons against liability for acts performed in good faith in the performance of legislative functions. These include:

- section 430 of the *Export Control Act 2020*;
- section 441 of the *Biosecurity Act 2015*; and
- section 74T of the *Broadcasting Services Act 1992*.

On this basis, it is not appropriate for the Bill to be amended to remove the civil immunity for the Commonwealth as an entity.

Committee comment

2.112 The committee thanks the minister for this response. The committee notes the minister's advice that immunity from civil liability where good faith is shown is necessary to maintain the integrity of the regulatory framework and that in the absence of immunity to protected persons (or those assisting them), it would be difficult to effectively administer the scheme. The committee also notes the minister's advice that protected persons may be unwilling to perform functions and powers under the bill if there was a risk they could be held personally liable even if they acted honestly and in good faith.

2.113 The committee further notes the minister's advice that providing the Commonwealth as an entity with immunity from civil proceedings in respect of acts done in good faith is appropriate given the nature and scope of the powers and functions in the bill and that a number of similar Acts provide the Commonwealth with immunity from civil liability.

2.114 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

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

Computerised decision making

Significant matters in delegated legislation[37]

2.116 In *Scrutiny Digest 12 of 2020* the committee requested the minister's 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
- 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.[38]

Minister's response

2.117 The minister advised:

> *Whether the secretary should be permitted to arrange for the use of computer programs for any decision made under the Bill*

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

38 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 29-31.

Clause 182 of the Bill provides that the Secretary of the Department of Agriculture, Water and the Environment may arrange for the use of computer program for any purpose for which the Secretary or Minister may or must make a decision under the Bill, that is prescribed by the rules.

The purpose of permitting the Secretary to arrange for the automation of prescribed decisions is to allow high volume decisions that are suitable for automation because they have no discretionary elements to be made by a computer program. Automation of such decisions is consistent with the Administrative Review Council's report to the Attorney General on *Automated Assistance in Administrative Decision making* (the ARC Report). It will also lessen the operational burden and allow my Department to focus resources on high priority areas whilst potentially reducing administrative burden and fees for industry. This accords with recommendations supported by the Government to reduce fees and streamline and reduce administrative burden under the product stewardship framework, following the recent Review of the *Product Stewardship Act 2011*.

It is not intended that the Secretary will be able to arrange for the automation of any decision under the Bill. Rather, the Minister will decide which decisions can potentially be automated by prescribing those decisions in rules. Such rules will be subject to Parliamentary scrutiny processes such as disallowance. This is a necessary and appropriate limitation on the Secretary's power to arrange for the automation of decisions.

As mentioned above, it is also intended that the Minister will only prescribe decisions in the rules where there is a pressing need or where there are compelling benefits for using automated decision making, and importantly where the nature of the decision is suitable for automated decision making, including where the decision does not contain any discretionary elements. For example, if an authorised officer wishes to suspend their authorisation under clause 135 of the Bill, this could be automated, as there is no discretion involved.

Decisions that require interpretation or evaluation of evidence, such as where fact finding or weighing of evidence is required, or that involve discretion on the part of the decision-maker, will be automated. Again, this is consistent with the principles set out in the ARC Report. For example, decisions to grant or refuse an export licence for regulated waste material or decisions to grant or refuse an application for an exemption involve discretion on the part of the decision-maker and are therefore not intended to be automated.

The Bill also has several safeguards in place to ensure that the correct and most suitable decision is made in accordance with the objectives of the Bill. For example:

- subclause 182(3) will impose an obligation on the Secretary to take all reasonable steps to ensure decisions made by the operation of a computer program are correct; and
- subclause 182(5) provides for the Secretary or the Minister to substitute a new decision for a decision made by a computer program is satisfied that the original decision is incorrect.

On this basis, I consider it is necessary and appropriate to permit the Secretary to arrange for the use of computer programs for decisions made under the Bill, within the parameters provided by clause 182.

Consideration to compliance with administrative law requirements

Consideration has been given to how automated decision-making processes will comply with administrative law requirements. The inclusion of an automated decision-making power will not unduly limit or exclude administrative law requirements such as the requirement to consider relevant matters and the rule against fettering of discretionary power.

As stated above, implementation of automated decision-making under the Bill will be guided by the best practice principles developed by the ARC Report.

This will ensure that automated decision making is consistent with the administrative law values of lawfulness, fairness, rationality, transparency and efficiency. These best practice principles in relation to expert systems (automated systems that make or support decisions) include (but are not limited to) the following:

- expert systems that make a decision, as opposed to helping a decision maker make a decision, would generally be suitable only for decisions involving non-discretionary elements;
- expert system should not automate the exercise of discretion;
- if expert systems are used as an administrative tool to assist in exercising discretion, they should not fetter the decision maker;
- the construction of an expert system, and the decision made by or with the assistance of expert systems, must comply with administrative law standards; and
- expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy.

As also mentioned above, it is intended that only non-discretionary decisions will be automated. This will mean that a computer system will not be used to exercise discretion, and administrative law requirements, such as not fettering a decision-maker's discretion, will not be compromised.

In addition, administrative law requirements to take account of relevant considerations will still be complied with, as:

- a human will be responsible for ensuring all relevant considerations for a decision are entered into the computer program. Failure to do so would leave the decision open to challenge on judicial review grounds; and
- where the relevant considerations are subject to the decision-maker's discretion, or are required to be assessed and evaluated (as opposed to facts that are already established), the decision will not be considered appropriate for automation.

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*, the *Judiciary Act 1903* and the Constitution.

Whether decisions should be made under specific provisions listed in the primary legislation

As set out above, subclause 182(2) of the Bill will require the rules to prescribe the decisions that may be made by a computer program. Rules will be subject to Parliamentary scrutiny as disallowable legislative instruments.

Allowing the rules to specify decisions subject to automated decision-making will provide a level of flexibility to take into account changes in technology, while striking a balance by ensuring that Parliament retains scrutiny of what decisions can be automated. In addition, it is likely that automation will only be used for non-discretionary decisions of high volume, where automation will provide a clear operational benefit. Allowing such decisions to be prescribed in a legislative instrument, rather than being specified in the primary legislation itself will allow the Minister to consider which nondiscretionary decisions are being made in sufficiently high volumes to justify automation.

While administrative flexibility is not generally considered by the Committee to be sufficient justification for including significant matters in delegated legislation, the flexibility of Australia's waste export system into the future is one of its most important aspects. It must be adaptable, to effectively respond to and manage emerging and evolving environmental issues in Australia. Flexibility is also key for effective regulation of product stewardship scheme. The Bill enables this flexibility.

On this basis, it is not appropriate to amend the Bill to limit the use of computerised decision-making to decisions made under specific provisions listed in the primary legislation.

Committee comment

2.118 The committee thanks the minister for this response. The committee notes the minister's advice that the purpose of permitting the Secretary to arrange for the automation of prescribed decisions is to allow high volume decisions that are suitable for automation because they have no discretionary elements to be made by a computer program and that automation of such decisions is consistent with the Administrative Review Council's report to the Attorney General on *Automated Assistance in Administrative Decision Making*.

2.119 The committee also notes the minister's advice that it is intended that the minister will only prescribe decisions in the rules where there is a pressing need or where there are compelling benefits for using automated decision making, and importantly where the nature of the decision is suitable for automated decision making, including where the decision does not contain any discretionary elements.

2.120 The committee further notes the minister's advice that consideration has been given to how automated decision-making processes will comply with administrative law requirements and that the inclusion of an automated decision-making power will not unduly limit or exclude administrative law requirements such as the requirement to consider relevant matters and the rule against fettering of discretionary power.

2.121 Finally, the committee notes the minister's advice that allowing the rules to specify decisions subject to automated decision-making will provide a level of flexibility to take into account changes in technology, while striking a balance by ensuring that Parliament retains scrutiny of what decisions can be automated. In addition, it is likely that automation will only be used for non-discretionary decisions of high volume, where automation will provide a clear operational benefit.

2.122 While the committee acknowledges that Parliament will retain a level of scrutiny over what decisions can be automated through the requirement to specify decisions in the rules, the committee continues to have scrutiny concerns that the types of decisions that will be automated 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. From a scrutiny perspective, the committee does not consider that the minister's response adequately justifies why the decisions suitable for automated decision-making cannot be contained in the primary legislation.

2.123 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.124 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the minister to determine the decisions that may be made by computers in delegated legislation rather than specifying them on the face of the primary legislation.

Incorporation of external materials as in force from time to time[39]

2.125 In *Scrutiny Digest 12 of 2020* the committee requested 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.[40]

Minister's response

2.126 The minister advised:

> Section 188 of the Bill will provide for a general rule-making power. Rules will be subject to Parliamentary scrutiny as disallowable legislative instruments. Several rules are proposed to provide the basis for product stewardship schemes which will replace existing instruments under the *Product Stewardship Act 2011*. Other rules will impose requirements and conditions on the export of certain kinds of waste material. This will implement the commitment of the Australian Governments (through the former Council of Australian Governments) to ban the export of waste glass, plastic, tyres and paper.
>
> Subclause 188(3) of the Bill will provide that despite subsection 14(2) of the *Legislation Act 2003*, 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.
>
> As stated in the explanatory memorandum, the kind of documents that are likely to be incorporated are reference materials that are regularly updated. Specifically, the rules may apply, adopt or incorporate documents that include:
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> - industry processing standards relating to waste material;
> - Australian census data;

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

40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 31-32.

- Australian standards;
- standards published by the International Organisation for Standardisation (ISO); and
- an instrument or writing made by an authority or government body in an importing country, setting out requirements that must be met prior to waste material being imported into that country.

The majority of documents applied, adopted or incorporated into the rules will be publicly available either on my Department's website or through a link on that website to where the documents may be found on the website of the relevant authority or body. For example, Australian census data and most processing standards will be publicly available.

Processing standards for regulated waste materials will be an important concept in the waste export rules. Export licence holders will be required to ensure goods are processed to an acceptable standard prior to export. This will reduce the impact of waste material on the environment in accordance with the objects of the Bill. However, the intention is that an exporter will not be required to comply with a processing standard that is not publicly available free of charge. It is intended that the waste export rules will incorporate a variety of different processing standards. In some circumstances, a standard that sets out processing requirements for waste material, such as an ISO standard, will not be freely available. However, the rules will only incorporate such a standard in circumstances where compliance with that standard is optional.

An exporter will be able to choose from the different standards (including those that are publicly available) to demonstrate the requirements of the Bill have been met. An alternative mechanism for an exporter to meet the processing requirements will be to provide the Department with contracts of sale that detail the processing specifications. An exporter will also be able to propose new, individual standards that will be considered by my Department. This approach provides flexibility to regulated entities to choose a waste processing standard which meets their specific situation and circumstances.

It is necessary and appropriate that the proposed rules are able to apply, adopt or incorporate documents as in force or existing from time to time to ensure that exporters are required to comply with the most up to date processing techniques and requirements, without the need to amend the rules every time a processing standard is updated. This will, in turn, help to ensure that the export of waste material will have minimal environmental impact. Similarly, incorporating Australian census data as existing from time to time will ensure that the recycling targets for co-regulatory product stewardship will accurately reflect Australian demographics.

All explanatory statements for the rules will include information about the incorporated documents, and where they can be freely accessed in

accordance with the Guideline on incorporation of documents published by the Senate Scrutiny of Delegated Legislation Committee.

Committee comment

2.127 The committee thanks the minister for this response. The committee notes the minister's advice that the majority of documents applied, adopted or incorporated into the rules will be publicly available either on the department's website or through a link on that website to where the documents may be found on the website of the relevant authority or body.

2.128 The committee also notes the minister's advice that the intention is that an exporter will not be required to comply with a processing standard that is not publicly available free of charge. The committee further notes the minister's advice that it is intended that the waste export rules will incorporate a variety of different processing standards and that in some circumstances, a standard that sets out processing requirements for waste material, such as an ISO standard, will not be freely available. Finally, the committee notes the minister's advice that the rules will only incorporate such a standard in circumstances where compliance with that standard is optional.

2.129 While acknowledging this advice, the committee notes that the limitations set out in the minister's response are 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.

2.130 The committee takes this opportunity to reiterate that it is a fundamental principle of the rule of the law that every person subject to the law should be able to freely and readily access its terms. As a result, the committee will have scrutiny concerns when external materials that are incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law.

2.131 In light of the above, the committee considers that the bill should be amended to provide that any document incorporated into delegated legislation made under clause 188 must either be freely available or that compliance with the document is not mandatory.

2.132 The committee otherwise draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that documents may be incorporated into delegated legislation as in force from time to time in circumstances where not all the relevant documents may be freely available.

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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

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