The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 3 of 2017

22 March 2017

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

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

Members of the Committee

Current members

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

Secretariat

Ms Anita Coles, Acting Secretary

Mr Glenn Ryall, Principal Research Officer

Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_scrutiny

TABLE OF CONTENTS

Terms of Reference

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, 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.

(b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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 in relation to:

- undue trespass on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient 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 often correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. 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 legislation committee for information.

Chapter 1

Commentary on Bills

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

Australian Broadcasting Corporation Amendment (Restoring Shortwave Radio) Bill 2017

Purpose	This bill seeks to amend the *Australian Broadcasting Corporation Act 1983* to require the Australian Broadcasting Corporation (ABC) to restore its shortwave transmission services, following an announcement by the ABC in December 2016 that it would end its shortwave transmission service in the Northern Territory and to international audiences from 31 January 2017
Sponsor	Senator Xenophon
Introduced	Senate on 13 February 2017

The committee has no comment on this bill.

Appropriation Bill (No. 3) 2016-2017

Purpose	This bill provides for additional appropriations from the Consolidated Revenue Fund for the ordinary annual services of the government in addition to the appropriations provided for by the *Appropriation Act (No. 1) 2016-2017* and the *Supply Act (No. 1) 2016-2017*
Portfolio	Finance
Introduced	House of Representatives on 9 February 2017

Parliamentary scrutiny—ordinary annual services of the government

1.2 The committee first considered this bill and, in particular, the potential inappropriate classification of new measures as ordinary annual services of the government in *Scrutiny Digest No. 2 of 2017*.[1]

1.3 Following receipt of further advice, the committee takes this opportunity to revise and replace the list of items identified as potentially being inappropriately classified as ordinary annual services, as listed on pages 3–4 of *Scrutiny Digest No. 2 of 2017*.[2]

1.4 The committee considers that the following item may have been inappropriately classified as ordinary annual services of the government and therefore improperly included in Appropriation Bill (No. 3) 2016-2017 as this expenditure appears to relate to a new policy not previously authorised by special legislation:

- Onshore Gas Social and Economic Research Fund—establishment – $4 million over 4 years.[3]

1.5 In addition, the following items may also be considered as being inappropriately classified as ordinary annual services of the government in the event that Appropriation Bill (No. 3) 2016-2017 is considered and passed by the Senate prior to the relevant authorising legislation:

---

1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 2 of 2017,* 15 February 2017, pp 1-5.

2 In this regard it appears that the following items have not been (as originally identified) inappropriately classified as ordinary annual services of the government: 'Launch into Work pilot—establishment', and the 'Royal Commission into the Protection and Detention of Children in the Northern Territory'.

3 Mid-Year Economic and Fiscal Outlook 2016-17, p. 179.

- Rural Health Commissioner and Pathway for Rural Professionals—establishment – $4.4 million over four years;[4]
- Seasonal Work Incentives for Job Seekers—trial – $27.5 million over two years.[5]

1.6 The government has previously advised the committee that it will continue to prepare appropriation bills in a manner consistent with the view that only administered annual appropriations for new outcomes (rather than appropriations for expenditure on new policies not previously authorised by special legislation) should be classified as non-ordinary annual services expenditure.

1.7 The committee again notes that this approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010 relating to the classification of ordinary annual services expenditure in appropriation bills.[6]

1.8 The committee reiterates its agreement with the comments made on this matter by the Senate Standing Committee on Appropriations and Staffing, and in particular that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing outcome should be classified as ordinary annual services expenditure.

1.9 The committee draws the 2010 Senate resolution to the attention of Senators and notes that the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

1.10 The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to some items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 3) 2016-2017 which should only contain appropriations that are not amendable by the Senate).

---

4 Mid-Year Economic and Fiscal Outlook 2016-17, p. 173. The proposed authorising legislation for this item is the Health Insurance Amendment (National Rural Health Commissioner) Bill 2017.

5 Mid-Year Economic and Fiscal Outlook 2016-17, p. 195. The proposed authorising legislation for this item is Schedule 12 to the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017.

6 *Journals of the Senate*, 22 June 2010, pp 3642–3643.

1.11 The committee will continue to draw this important matter to the attention of Senators where appropriate in the future.

The committee draws Senators' attention to this matter, as the current approach to the classification of ordinary annual services expenditure in appropriation bills may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to make changes to requirements to control exotic mosquitoes and other disease carriers at Australia's airports and seaports, including incoming aircraft and vessels
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 15 February 2017

Reversal of evidential burden of proof[7]

1.12 Section 270 of the *Biosecurity Act 2015* makes it an offence where a person is in charge, or the operator, of a vessel in Australian seas and the vessel discharges ballast water. Item 30 proposes to insert an exception (offence specific defence) to this offence, stating that the offence does not apply if certain conditions are met and certain plans are in place. The offence carries an existing maximum penalty of 2,000 penalty units.

1.13 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.14 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof proposed to be introduced by item 30 has not been addressed in the explanatory materials.[8]

1.15 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it

7 Item 30.

8 Note that the statement of compatibility, at pp 30-31, addresses other provisions which apparently reverse the evidential burden of proof but provides no justification in relation to item 30.

explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[9]

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Strict liability[10]

1.16 Item 126 proposes inserting new section 299A requiring the person in charge, or the operator, of a vessel to make a report where the vessel disposes of sediment in certain circumstances. Proposed subsection (3) makes it an offence of strict liability if the person does not make a report when required. The offence is subject to 120 penalty units.

1.17 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[11]

1.18 The statement of compatibility examines a number of provisions that are said to affect or introduce some strict liability offences, including item 30, and states that the application of strict liability is necessary to prevent potentially significant damage to Australia's marine environment and adverse effects to the related industries. It states that strict liability offences are necessary 'because they are imposed in order to effectively deter contravention of ballast water obligations under the Act'. It goes on to state that the offences are only directed at persons in charge 'who can be expected to be responsible and aware of the requirements for the legislation' and the scheme is of a regulatory nature.[12]

1.19 However, the committee notes that the *Guide to Framing Commonwealth Offences* provides that the application of strict liability is generally only considered appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual.[13] In this case, the proposed strict liability offence is subject to a penalty of up to 120 penalty units. No explanation has been provided as to why the proposed

---

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

10 Item 126, proposed subsection 299A(3).

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

12 Explanatory memorandum, statement of compatibility, p. 33.

13 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

penalty for the strict liability offence is double that which is generally considered appropriate.

1.20 The committee requests the Minister's advice as to why the proposed penalty for the strict liability offence in item 30 is double that which is considered appropriate in the *Guide to Framing Commonwealth Offences*.[14]

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

14 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

Commonwealth Electoral Amendment (Donation Reform and Transparency) Bill 2017

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to: • reduce the disclosure threshold from 'more than $10,000' (indexed to the Consumer Price Index annually) to $1,000; • ensure that for the purposes of the $1,000 threshold and the disclosure of gifts, related political parties are treated as the one entity; • prohibit the receipt of a gift of foreign property and all anonymous gifts by registered political parties, candidates and members of a Senate group; • provide that public funding of election campaigning is limited to declared expenditure incurred by the eligible political party, candidate or Senate group, or the sum payable calculated on the number of first preference votes received where they have satisfied the four per cent threshold, whichever is the lesser; • provide for the recovery of gifts of foreign property that are not returned, anonymous gifts that are not returned and undisclosed gifts; and • introduce new offences and penalties and increase the penalties for existing offences
Sponsor	Mr Bill Shorten MP
Introduced	House of Representatives on 13 February 2017 *This bill is identical to a bill introduced by Senator Farrell in 2016*

1.21 The committee commented on an identical bill when it considered the Commonwealth Electoral Amendment (Donation Reform and Transparency) Bill 2016.[15] The committee takes the opportunity to re-state these comments below.

Vicarious liability[16]

1.22 Vicarious liability is the liability imposed on one person for the wrongful act of another on the basis of the legal relationship between them. Proposed subsection 315(10B) deems officers of certain entities liable for an offence of

15 Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 1 of 2007, pp 8-10.

16 Schedule 1, item 99, proposed subsections 315(10B).

unlawful receipt of a gift where the gift is received by the entity of which they are an officer. For example, if a registered political party unlawfully receives a gift this provision deems the registered officer, secretary or agent of the party liable for the unlawful receipt of gift offence. As such, this proposed provision imposes vicarious liability on these officers. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that 'vicarious, collective or deemed liability should only be used in situations where it can be strictly justified…this is because it cuts across the fundamental principle that an individual should be responsible only for his or her own acts and omissions'.[17]

1.23 **The committee has consistently taken the view that vicarious liability should only be used where the consequences for the offence are so serious that the normal requirement for proof of fault can be put aside. As neither the statement of compatibility nor the explanatory memorandum addresses this issue, the committee requests the Member's advice as to why vicarious liability has been imposed in this instance and whether the principles identified in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*[18] have been considered.**

> *Pending the Member's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Reversal of evidential burden of proof[19]

1.24 Proposed subsection 315(10C) provides exceptions (offence-specific defences) to the vicarious liability offence of unlawful receipt of a gift in proposed subsection 315(10B). Specifically, a person will not commit an offence against subsection 315(10B) if:

- the person does not know of the circumstances because of which the receipt of gift is unlawful; or
- the person takes all reasonable steps to avoid these circumstances occurring.

1.25 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

---

17 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 32–33.

18 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 32–33.

19 Schedule 1, item 99, proposed subsections 315(10C)

1.26 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

1.27 **As neither the statement of compatibility nor the explanatory memorandum addresses this issue, the committee requests the Member's advice as to why offence-specific defences (which reverse the evidential burden of proof) have been used in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**[20]

> *Pending the Member's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

20 See, Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, in particular, pp 50–52.

Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017

Purpose	This bill seeks amend *Competition and Consumer Act 2010* to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives on 13 February 2017

Reversal of evidential burden of proof[21]

1.28 Proposed section 168A(1) makes it an offence to supply, or offer to supply, a thing in trade or commerce which includes an indigenous cultural expression. Proposed subsection 168A(2) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the thing is supplied by, or in accordance with an arrangement with a relevant indigenous community and artist. The offence carries a maximum penalty of $25,000 for an individual ($200,000 for a body corporate).

1.29 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.30 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

1.31 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Member's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[22]

21 Item 4, subsection 168A(2).

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

Pending the Member's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Strict liability[23]

1.32 Proposed subsection 168A(3) makes the offence in subsection 168A(1) a strict liability offence. The explanatory memorandum provides no justification as to why the offence is one of strict liability.

1.33 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

1.34 The committee requests a detailed justification from the Member for the proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[24]

Pending the Member's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

23 Item 4, subsection 168A(3).

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

Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017

Purpose	This bill seeks to amend the *Competition and Consumer Act 2010* and the *Australian Small Business and Family Enterprise Ombudsman Act 2015* to allow: • judges in the Federal Court to waive liability for adverse costs to small business private litigants in cases related to the misuse of market power; • the Small Business and Family Enterprise Ombudsman to provide assistance to small businesses in preparing these cases
Sponsor	Senator Katy Gallagher
Introduced	Senate on 16 February 2017

The committee has no comment on this bill.

Crimes Amendment (Penalty Unit) Bill 2017

Purpose	This bill seeks to amend the *Crimes Act 1914* to: • increase the amount of the Commonwealth penalty unit from $180 to $210, with effect from 1 July 2017; and • delay the first automatic adjustment of the penalty unit to the Consumer Price Index until 1 July 2020, with indexation to occur on 1 July every three years thereafter
Portfolio	Attorney-General
Introduced	House of Representatives on 16 February 2017

The committee has no comment on this bill.

Disability Services Amendment (Linking Upper Age Limits for Disability Employment Services to Pension Age) Bill 2017

Purpose	This bill seeks to amend the *Disability Services Act 1986* to link the upper age limit of the Disability Employment Services – Disability Management Service program to the age pension eligibility age under the *Social Security Act 1991*
Portfolio	Social Services
Introduced	House of Representatives on 16 February 2017

The committee has no comment on this bill.

Education and Other Legislation Amendment Bill (No. 1) 2017

Purpose	This bill seeks to amend various Acts relating to tertiary education and research to: • insert a new Part IIE establishing the office of the VET Student Loans Ombudsman and make consequential amendments; • update indexation against appropriation funding caps for existing legislated amounts and includes an additional forward estimate amount
Portfolio	Education and Training
Introduced	House of Representatives on 16 February 2017

Privilege against self-incrimination[25]

1.35 Proposed section 20ZS applies certain provisions of the *Ombudsman Act 1976* to the VET Student Loans Ombudsman, including section 9 (relating to the power to obtain information and documents). Paragraph 9(4)(aa) of the Ombudsman Act provides that a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under the Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question might tend to incriminate the person or make the person liable to a penalty. This provision therefore overrides the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.[26]

1.36 A use immunity is included in subsection 9(4) as the information or documents produced, or answers given, are not admissible in evidence in most proceedings. Although the committee welcomes the inclusion of the use immunity, the explanatory memorandum does not provide a justification for removing the privilege against self-incrimination or for not also providing a derivative use immunity.

1.37 The committee therefore requests the Minister's advice as to why it is proposed to abrogate the privilege against self-incrimination, particularly by

25 Schedule 1, item 4, proposed section 20ZS (application of section 9 of the *Ombudsman Act 1976*).

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

reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[27]

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Reversal of evidential burden of proof[28]

1.38 Proposed section 20ZS applies certain provisions of the *Ombudsman Act 1976* to the VET Student Loans Ombudsman, including section 36 (relating to offences). Subsection 36(1) of the Ombudsman Act makes it an offence to refuse or fail to attend before the Ombudsman, to be sworn or make an affirmation, to furnish or publish information, answer a question or produce a document or record, or to give a report when so under the Act. Subsection 32(2A) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the person has a reasonable excuse. The offence carries a maximum penalty of imprisonment for 3 months or 10 penalty units.

1.39 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.40 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The explanatory materials do not provide reasons for applying the reversal of the evidential burden of proof in subsection 32(2A) of the Ombudsman Act to the VET Student Loans Ombudsman scheme.

1.41 As the explanatory materials do not directly address this issue, the committee requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[29]

---

27 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 94–99.

28 Schedule 1, item 4, proposed section 20ZS (application of section 36 of the *Ombudsman Act 1976*).

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

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Broad delegation of administrative powers[30]

1.42 Proposed subsection 34(4) will give the VET Student Loans Ombudsman the power to delegate to a person generally any or all of his or her powers under the Ombudsman Act with some exceptions.[31]

1.43 While the bill provides for these limited exclusions to the broad general power of the Ombudsman to delegate his or her powers under the Ombudsman Act, many significant powers will still be able to be delegated to any person under this provision. These powers include the power to examine witnesses and the power to enter premises.[32]

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

1.45 The committee therefore requests the Minister's advice as to why it is considered necessary to allow for the delegation of almost all of the Ombudsman's powers to any person (including significant powers such as the power to examine witnesses and the power to enter premises) and whether the bill can be amended to provide further legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

---

30 Schedule 1, item 6, proposed subsection 34(3).

31 This does not apply to his or her powers under section 20ZV (reports to VET student loan scheme provides), section 20ZW (Minister to table reports about VET student loan scheme provides in Parliament), and section 20ZX (annual and other reports by the VET Student Loans Ombudsman.

32 See sections 13 and 14 of the *Ombudsman Act 1976*.

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to: • introduce higher penalties for 'serious contraventions' of prescribed workplace laws; • increase penalties for record-keeping failures; • prohibit employers asking for 'cash back' from their employees; • clarify the accessorial liability provisions relating to underpayments by franchisees or subsidiaries; • provide the Fair Work Ombudsman with new formal evidence-gathering powers; and • prohibit anyone from hindering or obstructing an investigator, or giving the Fair Work Ombudsman false or misleading information or documents
Portfolio	Employment
Introduced	House of Representatives on 1 March 2017

Privilege against self-incrimination[33]

1.46 Proposed section 713 provides that a person is not excused from giving information, producing a record or document or answering a question under specified sections of the *Fair Work Act 2009* on the ground that to do so might tend to incriminate them or expose them otherwise to a penalty or liability. This provision therefore overrides the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.[34]

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

1.48 The explanatory memorandum explains why it is necessary to abrogate the privilege, noting that it is necessary to ensure the Fair Work Ombudsman (FWO) has all the available, relevant information to carry out its statutory functions and without

33 Schedule 1, item 39, proposed new section 713 of the *Fair Work Act 2009*.

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

abrogating the privilege the information may not be gathered and this could lead to significant delays in workers recovering unpaid entitlements or there could be insufficient evidence to commence proceedings.[35]

1.49 In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee generally expects that any information gained through abrogating the privilege should only be available for use in criminal proceedings when they are proceedings for giving false or misleading information in relation to the disclosure of information the person has been forced to make. This therefore requires a use and derivative use immunity to be included to ensure that the information or documents produced, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings.

1.50 A use and derivative use immunity is included where a person produces a record or document as required under paragraph 709(d) or 712(1) of the *Fair Work Act 2009*. However, only a use immunity is provided in relation to an individual who gives information, produces a record or document, or answers a question under a FWO notice. A derivative use immunity (which prevents information or evidence *indirectly* obtained from being used in criminal proceedings against the person) has not been included. The explanatory memorandum explains why this was not included:

> Provision of a derivative use immunity means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings, even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently.
>
> The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (now the Australian Securities and Investment Commission) were amended to remove derivative use immunity. The explanatory memorandum to the Corporations Legislation (Evidence) Amendment Bill 1992 [at p. 1] provides that derivative use immunity placed:
>
> > *…an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity…*[36]

35 Explanatory memorandum, p. 19.

36 Explanatory memorandum, p. 21.

1.51 The committee appreciates it may be difficult and time-consuming to prove that an item of evidence was not obtained as a result of a person being required to answer questions or give information or documents to the Fair Work Ombudsman. However, the committee notes that this provision applies in the context of employees or employers who may be compelled to give evidence – it does not apply in the context of corporate regulation. The committee considers that the privilege against self-incrimination is an important right under the common law and any abrogation of that right represents a significant loss to personal liberty. As such, the committee considers it would be more appropriate if a derivative use immunity were included to ensure information or evidence indirectly obtained from a person compelled to answer questions or provide information or documents under a FWO notice could not be used in evidence against them.

1.52 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the abrogation of the privilege against self-incrimination.

> *The committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Reversal of evidential burden of proof[37]

1.53 Proposed section 707A(1) introduces a civil penalty provision in relation to intentionally hindering or obstructing the Fair Work Ombudsman or an inspector. Proposed subsection 707A(2) provides two exceptions to this civil penalty provision, stating that it does not apply if the person has a reasonable excuse or the person was not shown the Ombudsman or inspector's identity card or they were not told about the effect of this section. The maximum penalty for contravention of the provision is 60 penalty units.

1.54 The explanatory memorandum indicates that a person wishing to make a 'reasonable excuse' bears an evidential burden (requiring that person to raise evidence about the matter), but not a legal burden (requiring the person to positively prove the matter).[38] While the explanatory memorandum provides reasons for reversing the burden of proof in relation to this 'reasonable excuse' exception, no reasons are provided for reversing the burden of proof in relation to the exception where the person was not shown the relevant identity card or told about the effect of the section. The committee expects any such reversal of the evidential burden of proof to be justified, particularly as it is not clear to the committee why such matters would be peculiarly within the knowledge of the person who may be subject to the penalty.

---

37 Schedule 1, item 48, proposed paragraph 707A(2)(b) of the *Fair Work Act 2009*.

38 Explanatory memorandum, p. 24.

1.55 As the explanatory materials do not address this issue, the committee requests the Minister's advice as to why it is proposed to place an evidential burden on a person seeking to rely on the exception in proposed paragraph 707A(2)(b) (i.e. where the person was not shown the inspector's identity card or told about the effect of the section).

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017

Purpose	This bill seeks to amend *Fair Work Act 2009* to: • repeal the requirement for four yearly reviews of modern awards from 1 January 2018; • enable the Fair Work Commission to overlook minor procedural or technical errors when approving an enterprise agreement; • apply the complaint-handling powers of the Minister for Employment and President of the Fair Work Commission (FWC) to all FWC Members; and • apply the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* in relation to FWC Members
Portfolio	Employment
Introduced	House of Representatives on 1 March 2017

Search and entry powers, privacy, reversal of evidential burden of proof and privilege against self-incrimination[39]

1.56 Proposed section 641B aims to modify the application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (the JMIPC Act) to allow a Commission to be established by the Houses of Parliament to investigate and report on alleged misbehaviour or incapacity of a Fair Work Commission (FWC) Member. The JMIPC Act establishes a framework for the conduct of investigations by a Parliamentary Commission, with powers to hold hearings and take evidence on oath, require the production of documents and issue search warrants.

1.57 The committee raised a number of scrutiny issues in relation to the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (the JMIPC Bill) when it was before the Parliament. As this bill seeks to expand the ambit of the JMIPC Act to include FWC Members, the committee takes this opportunity to direct Senators' attention to its previous comments about the JMIPC Bill in relation to:

- the power of a Commission to issue search warrants;[40]

39 Schedule 3, item 1, proposed section 641B of the *Fair Work Act 2009*.

40 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 4 of 2012*, 21 March 2012, pp 8–9.

- balancing privacy and reputational interests of persons subject to investigation by a Commission;[41]
- reversal of the evidential burden of proof where a person wishes to use a 'reasonable excuse' defence to offences relating to failure of a witness to appear or failure of a witness to produce a document or thing;[42] and
- abrogation of the privilege against self-incrimination.[43]

1.58 The committee draws these scrutiny comments to the attention of Senators and leaves to the Senate as a whole the appropriateness of expanding the ambit of the JMIPC Act to include FWC Members.

> *The committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

41 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 4 of 2012*, 21 March 2012, p. 9.

42 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 4 of 2012*, 21 March 2012, p. 10.

43 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 4 of 2012*, 21 March 2012, pp 10–11.

Infrastructure Australia Amendment (Social Sustainability) Bill 2017

Purpose	This bill seeks to amend the *Infrastructure Australia Act 2008* to require Infrastructure Australia to evaluate the social and community benefits of Infrastructure projects, giving equal treatment to the economic and productivity gains
Sponsor	Ms Cathy McGowan MP
Introduced	House of Representatives on 13 February 2017

The committee has no comment on this bill.

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

Purpose	This bill seeks to amend the *Native Title Act 1993* following a decision of the Full Federal Court in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10, regarding area Indigenous Land Use Agreements (area ILUAs) to: • confirm the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC); • enable registration of agreements which have been made but have not yet been registered on the Register of Indigenous Land Use Agreements; and • ensure that in the future, area ILUAs can be registered without requiring every member of the RNTC to be a party to the agreement
Portfolio	Attorney-General
Introduced	House of Representatives on 15 February 2017

Retrospective application

1.59 In *McGlade v Native Title Registrar*[44] (*McGlade*), handed down on 2 February 2017, the Full Federal Court held that it was necessary for *all* members of a 'registered native title claimant' (RNTC) to sign an Indigenous Land Use Agreement (ILUA) for that agreement to be validly registered by the Native Title Registrar. The purpose of this bill is to expunge the consequences which flow from the decision in *McGlade* and to reinstate the law as previously interpreted,[45] which did not require unanimity amongst the RNTC. The explanatory memorandum does not give details about the number of ILUAs which may have been invalidly registered on the (now mistaken) basis of the law as previously understood.

1.60 As the explanatory memorandum explains, the bill makes various amendments to the Act in order to:

(a) secure existing agreements which have been registered on or before 2 February 2017 but do not comply with *McGlade*;

44 [2017] FCAFC 10.

45 *QGC Pty Ltd v Bygrave (No 2*) [2010] 189 FCR 412.

(b) enable registration of agreements which have been made and have been lodged for registration on or before 2 February 2017 but do not comply with *McGlade*; and

(c) clarify who must be a party to an area ILUA in the future unless the claim group determines otherwise.[46]

1.61 The amendments associated with the first two objectives operate retrospectively. The bill preserves the position prior to *McGlade* for agreements registered under the Act or that were pending registration on or before the date of the *McGlade* decision. The bill also prospectively overturns the position in *McGlade* that every person who comprises the RNTC must to be a party to an ILUA in relation to agreements. According to the explanatory memorandum:

> The amendments to ILUA requirements support the integrity of authorisation processes, by ensuring that native title claim groups can nominate who will carry out the will of the claim group and execute the agreement. The amendments also give primacy to the role of authorisation, reflecting the view that authorisation, along with other check and balances established under the Act, provides sufficient protection for the claim group.[47]

1.62 The fact that a court overturns previous authority is not, in itself, a sufficient basis for Parliament to retrospectively reinstate the earlier understanding of the previous legal position. In saying this, the committee recognises that when precedent is overturned this itself necessarily has a retrospective effect and may overturn legitimate expectations about what the law requires. Nevertheless, the committee considers that where Parliament acts to validate decisions which are put at risk, in circumstances where previous authority has been overturned, it is necessary for Parliament to consider:

- whether affected persons will suffer any detriment by reason of the retrospective changes to the law and, if so, whether this would lead to unfairness; and
- that too frequent resort to retrospective legislation may work to sap confidence that the Parliament is respecting basic norms associated with the rule of law.

1.63 In justifying the retrospective application of the amendments which are designed to reinstate the law as understood prior to *McGlade*, the explanatory memorandum states:

> These amendments preserve the status quo for agreements registered on or before the date of the *McGlade* decision, providing certainty about

46 Explanatory memorandum, p. 3.

47 Explanatory memorandum, p. 4.

> interests granted and benefit paid in reliance on the agreement. It will also allow for consideration of agreements which had been lodged for registration on or before *McGlade* and ensure that the will of the native title claim group in authorising the agreement is not frustrated only because of the effect of the *McGlade* decision.[48]

1.64 However, the explanatory materials do not sufficiently explain the necessity, appropriateness and fairness of the proposed retrospective application of amendments in this bill. No indication is given of the number of ILUAs affected or likely to be affected. No context is provided as to why the agreements challenged in *McGlade* proved controversial within the RNTC group (or whether or not there were significant factual differences between the *McGlade* case and the earlier *Bygrave* case). Nor is there any discussion of the severity of the consequences thought to arise from *McGlade* in light of any alternative means for addressing those consequences. It is noted that if the bill is held by a court to involve an acquisition of property, then the Commonwealth will be liable to pay a reasonable amount of compensation, as provided for in clause 13 of the bill.

1.65 As Justice Mortimer in the *McGlade* case noted, an area ILUA may deal with the extinguishment of native title rights and interests by their surrender to the Commonwealth, a state or a territory.[49] The committee considers the retrospective extinguishment of native title for persons who do not agree to the ILUA to be a significant consequence for such individuals.

1.66 The committee has a long-standing scrutiny concern that provisions that apply retrospectively challenge a basic value of the rule of law that, in general, laws should only operate prospectively. This bill seeks to preserve the position prior to the recent case of *McGlade* for Indigenous Land Use Agreements registered (or pending registration) on or before the date of the *McGlade* decision, in order to remove uncertainty. The committee notes that the fact that a court overturns previous authority is not, in itself, a sufficient basis for Parliament to retrospectively reinstate the earlier understanding of the previous legal position.

1.67 Although the committee recognises that the appropriateness of retrospective legislation may in some cases give rise to reasonable disagreements, in considering this bill the committee considers Senators would be assisted by a more comprehensive treatment of the appropriateness of the retrospectively applied provisions. The committee therefore seeks the Attorney-General's advice as to:

- **the number of ILUAs affected or likely to be affected by the amendments in this bill;**

48 Explanatory memorandum, p. 4.

49 *McGlade*, Mortimer J at [398].

- **the number of people likely to be adversely affected by the retrospective application of these amendments and how they will be affected, including the effect on the claimants in *McGlade*;**
- **the severity of the consequences thought to arise from *McGlade* and whether there are any alternative means for addressing those consequences.**

> *Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Parliamentary Entitlements Amendment (Ending the Rorts) Bill 2017

Purpose	This bill seeks to amend the *Parliamentary Entitlements Act 1990* to provide for a retrospective audit of all Members' and Senators' travel claims from the period following the 2013 federal election to the present and requires annual audits to take place in the future
Sponsor	Mr Andrew Wilkie MP
Introduced	27 February 2017

The committee has no comment on this bill.

Personal Property Securities Amendment (PPS Leases) Bill 2017

Purpose	This bill seeks to amend the *Personal Property Securities Act 2009* to: • extend the minimum duration of Personal Property Securities (PPS) leases from more than one year, to more than two years; and • require registration of leases with an indefinite term once they have exceeded a period of more than two years
Portfolio	Attorney-General
Introduced	House of Representatives on 1 March 2017

The committee has no comment on this bill.

Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017

Purpose	This bill seeks to amend the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement amendments of the *International Convention for the Prevention of Pollution from Ships 1973,* to ensure that there are strict discharge restrictions for oil, noxious liquid substances, sewage and garbage for certain ships operating in polar waters
Portfolio	Infrastructure and Regional Development
Introduced	House of Representatives on 16 February 2017

Strict liability[50]

1.68 Proposed subsection 26BCC(3) and (4) make it an offence of strict liability if the master and the owner of a ship discharge sewage from the ship in the Antarctic Area and Artic waters in certain circumstances. The offence carries a significant penalty of 500 penalty units. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability offences are generally only considered appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate).[51]

1.69 The explanatory memorandum provides the following justification as to why the offences are subject to strict liability:

> The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to the pristine natural environments of the Antarctic Area and Arctic waters. Further, the offences do not include imprisonment as a penalty and this approach ensures drafting consistency with the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.[52]

1.70 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences,*

50 Item 14, subsection 26BCC(3) and (4).

51 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p 23.

52 Explanatory memorandum, p. 6.

Infringement Notices and Enforcement Powers. In particular, the committee expects clear justification where the proposed penalty for a strict liability offence exceeds 60 penalty units. This has not been explained in the explanatory memorandum.

1.71 The committee requests a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,[53] in particular the justification for the proposed penalty.

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Reversal of evidential burden of proof[54]

1.72 Proposed subsections 26BCC(5), (6), (7), (8) and (9) provide exceptions (offence specific defences) to the strict liability offences relating to the discharge of sewage from a ship in the Antarctic Area and Artic waters.

1.73 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.74 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed section 26BCC has not been addressed in the explanatory materials.

1.75 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[55]

---

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

54 Item 14, subsection 26BCC(6).

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

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Social Security Legislation Amendment (Fair Debt Recovery) Bill 2017

Purpose	This bill seeks to prevent the Department of Human Services from recovering a social security debt or a family tax benefit debt from an individual if the debt is under review
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 13 February 2017

The committee has no comment on this bill.

Treasury Laws Amendment (2017 Measures No. 1) Bill 2017

Purpose	This bill seeks to various Acts in relation to taxation to: • make minor technical changes to the income tax law in relation to the National Innovation and Science Agenda measures; and • allow the Australian Securities and Investments Commission (ASIC) to more readily share confidential information with the Commissioner of Taxation
Portfolio	Treasury
Introduced	House of Representatives on 16 February 2017

Privacy[56]

1.76 Item 1 of Schedule 2 proposes adding to subsection 127(2A) of the *Australian Securities and Investment Commission Act 2001*, the power for ASIC to share confidential information with the Commissioner of Taxation. Currently, section 127 requires ASIC to take all reasonable measures to protect from unauthorised use or disclosure, information given to it in confidence or that is protected information. The explanatory memorandum states that currently the confidential information cannot be shared unless the Chairperson, or their delegate, is satisfied that the information will enable or assist the Commissioner of Taxation to perform or exercise their functions or powers.[57] The proposed amendments would mean that ASIC would be authorised to share the confidential information with the Commissioner of Taxation, without the need to consider whether the sharing of such information is necessary.

1.77 The explanatory memorandum states that these changes provide a simpler process for ASIC to share information with the Commissioner of Taxation (mirroring other existing information sharing provisions) and will enable 'more timely collaboration during investigations into illegal or high risk activities' and enable both ASIC and the Commissioner of Taxation to 'ensure compliance with laws and identify patterns of non-compliance'.[58] Likewise the statement of compatibility states that the amendment will streamline the process and is a 'more efficient mechanism' for

56 Schedule 2, item 1.

57 Explanatory memorandum p. 16.

58 Explanatory memorandum, p. 17.

sharing confidential information and that the information shared will 'remain subject to strict confidential protections'.[59]

1.78 The committee notes that the current law merely requires consideration be given before confidential information is shared that the information will enable or assist the Commissioner of Taxation to perform or exercise their functions or powers. The current approach would appear to allow for the sharing of confidential information in fairly broad terms. It is unclear, based on the explanatory material, how the current law is inefficient and not sufficiently simple.

1.79 The committee considers that enabling all confidential information held by ASIC to be shared with the Commissioner of Taxation, without any need to consider the purpose for the sharing of that information, raises privacy scrutiny concerns.

1.80 The committee requests the Minister's advice as to the steps that must currently be undertaken by ASIC before confidential information is shared with the Commissioner of Taxation (and the specific subsection of the *Australian Securities and Investment Commission Act 2001* which currently provides for this).

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

59 Explanatory memorandum, statement of compatibility, pp 18-19.

Treasury Laws Amendment (GST Low Value Goods) Bill 2017

Purpose	This bill seeks to amend the *A New Tax System (Goods and Services Tax) Act 1999* to ensure that goods and services tax (GST) is payable on certain supplies of goods valued at $ 1,000 or less that are purchased by consumers and are imported into Australia
Portfolio	Treasury
Introduced	House of Representatives on 16 February 2017

The committee has no comment on this bill.

Treasury Laws Amendment (Working Holiday Maker Employer Register) Bill 2017

Purpose	This bill seeks to amend the *A New Tax System (Australian Business Number) Act 1999* and the *Taxation Administration Act 1953* to ensure: • that details of the working holiday maker employer register are not made public; and • the Commissioner of Taxation will only be able to disclose protected information to the Fair Work Ombudsman for an entity that is actually or is reasonably suspected of non-compliance with a taxation law
Portfolio	Treasury
Introduced	House of Representatives on 16 February 2017

The committee has no comment on this bill.

Commentary on amendments and explanatory materials

Criminal Code Amendment (Firearms Trafficking) Bill 2016

[Digest 7/16 – no response required]

1.81 On 13 February 2017 the Senate agreed to five Opposition amendments (two as amended by the Nick Xenophon Team) and the bill was read a third time.

Opposition amendments (1)–(2) on sheet 8036

1.82 These amendments remove three items from the bill which sought to impose a five year mandatory minimum term of imprisonment for firearms trafficking offences.

1.83 **The committee notes that, by removing these provisions from the bill, these amendments address the committee's scrutiny comments in relation to the proposed imposition of mandatory minimum penalties as outlined in the committee's *Alert Digest No. 7 of 2016*.**[1]

Opposition amendments (1)–(3) on sheet 8037 (as amended by the Nick Xenophon Team)

1.84 In *Alert Digest No. 7 of 2016*, the committee also commented on the increase in maximum penalties for firearms trafficking offences proposed in the bill (from 10 years imprisonment or a fine of 2500 penalty units or both to 20 years imprisonment or a fine of 5000 penalty units or both).[2]

1.85 These amendments seek to introduce two categories of firearms trafficking offences—basic offences and aggravated offences. The penalty for the basic offences has been increased further to 30 years imprisonment or a fine of 5000 penalty units or both. The penalty for the new aggravated offences is imprisonment for life or a fine of 7500 penalty units or both. Strict or absolute liability is also applied to certain elements of the offences.

1.86 **The committee notes that these amendments further increase the proposed maximum penalties for firearms trafficking offences, however as the amendments have already been passed by the Senate the committee makes no further comment.**

---

1 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2016*, 12 October 2016, pp 49–53.

2 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2016*, 12 October 2016, pp 46–48.

In the circumstances, the committee makes no further comment on these amendments.

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

[Digest 10/16 – Scrutiny Digest 1/17]

1.87 On 2 March 2017 the House of Representatives agreed to eight Government amendments, the Minister for Veterans' Affairs presented a supplementary explanatory memorandum and the bill was read a third time.

Government amendments (2)–(7)

1.88 In *Scrutiny Digest No. 1 of 2017*, the committee commented on a proposed public interest disclosure power in this bill. At that time, the committee noted that it considered that the disclosure of *any* information obtained in the course of the performance of a Secretary's duties under legislation to *any* person for *any* purpose, is a significant matter that should be appropriately defined or limited in primary legislation. The committee noted that it appreciates that this power has existed for a number of years, but this does not alleviate the committee's scrutiny concerns in this regard. The committee also noted advice from the Minister that if the rules or guidance were to be located in the primary legislation the Minister would be less able to quickly respond to evolving circumstances.

1.89 The committee suggested that it would be appropriate for at least high-level guidance about the exercise of the Secretary's disclosure power to be included in the primary legislation or, at a minimum, that there should be a positive duty on the Minister to make rules regulating the exercise of the Secretary's power.[3]

1.90 The committee welcomes government amendments (2)–(7) which impose a positive duty on the Minister for Veterans' Affairs to make rules regulating the exercise of the public interest disclosure power by the Secretary. However, the committee remains of the view that, from a scrutiny perspective, it would still be appropriate for at least high-level guidance about the exercise of the Secretary's disclosure power to be included in the primary legislation. The committee draws these comments to the attention of Senators and leaves to the Senate as a whole the appropriateness of the Secretary's broad discretionary power to disclose information.

The committee draws Senators' attention to the bill, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

---

3 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 1 of 2017*, 8 February 2017, pp 94–98.

Chapter 2

Commentary on ministerial and other responses

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

2.2 Correspondence relating to these matters is included at **Appendix 1.**

Agriculture and Water Resources Legislation Amendment Bill 2016

Purpose	This bill seeks to amend 13 portfolio Acts to: • cease four redundant statutory bodies; • remove unnecessary regulation; and • make technical amendments The bill also will repeal 12 Acts that are redundant
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 1 December 2016
Bill status	Before Senate
Scrutiny principle	Standing Order 24(1)(a)(v)

2.3 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2017*. The Minister responded to the committee's comments in a letter dated 16 February 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Parliamentary scrutiny—removing requirements to table certain documents[1]

Initial scrutiny – extract

2.4 Part 2 of the bill proposes to remove requirements contained in several Acts for the Minister to table certain documents in Parliament. These documents include:

- funding agreements between the Commonwealth and Australian Livestock Export Corporation Limited and reports on compliance with the funding agreement;[2]

1 Schedule 1, items 58–66.

- the annual report of the Australian Livestock Export Corporation Limited;[3]
- funding contracts between the Commonwealth and Dairy Australia Limited;[4]
- the financial (annual) report of Dairy Australia Limited;[5]
- reports following the annual general meetings of Dairy Australia Limited;[6]
- funding contracts between the Commonwealth and Forest and Wood Products Australia Limited;[7] and
- funding contracts between the Commonwealth and Sugar Research Australia Limited.[8]

2.5 While some of this information may be published online, the bill proposes to remove legislative provisions which *require* that this information be made available to the Parliament (and therefore the public at large).

2.6 Noting the potential impact on parliamentary scrutiny of removing the requirement for certain information to be made available to the Parliament, the committee requests the Minister's advice as to:

- why the requirement for these documents to be tabled in Parliament is proposed to be removed; and
- whether each of the documents referred to above (at paragraph 2.4) will be made available online (including other legislative provisions, if any, which require the publishing of these documents online).

Minister's response

2.7 The Minister advised:

> There are ten industry-owned research and development corporations (RDCs), four of which have varying, additional publication requirements. I consider these additional requirements unnecessary and the proposed amendments will make the requirements consistent for all. Removing these additional requirements will also reduce the costs associated with preparing documents that meet the Australian Parliament's tabling rules.

---

2 See *Australian Meat and Live-stock Industry Act 1997*, sections 68B–68C.

3 See *Australian Meat and Live-stock Industry Act 1997*, sections 68D.

4 See *Dairy Produce Act 1986*, subsections 5(6)–(7).

5 See *Dairy Produce Act 1986*, subsection 13(2).

6 See *Dairy Produce Act 1986*, section 14.

7 See *Forestry Marketing and Research and Development Services Act 2007*, subsections 8(6)–(7).

8 See *Sugar Research and Development Services Act 2013*, subsections 6(6)–(7).

Funding agreements

To promote transparency, all funding agreements signed by the Commonwealth since July 2011 have required the agreement to be available on the RDC's public website.

There are funding agreements between the Commonwealth and every RDC setting terms and conditions for use and management of grower levy funds and Commonwealth matching. Only the legislation relating to Australian Livestock Export Corporation Limited ('LiveCorp'), Dairy Australia Limited, Forest and Wood Products Limited and Sugar Research Australia Limited requires these agreements be tabled.

An example of the funding agreements clause pertaining to disclosure is in the agreement between Meat and Livestock Australia (MLA) and the Commonwealth 2016 to 2020, which requires corporate governance documents to be published ('the publication clause'). These documents are listed at clause 29 'Information on Activities', available on the MLA website.

Given that LiveCorp's current agreement was executed in 2010, it does not include this requirement. The government proposes that LiveCorp's new agreement (currently under negotiation) would be consistent with requirements for all other RDCs in this regard.

Annual Reports

All industry-owned RDCs are required under Chapter 2M of the Corporations Act 2001 to prepare and distribute annual reports to those members who elect to receive them. Only LiveCorp and Dairy Australia Limited are also required to table their annual reports.

Consistent with good corporate practice, RDCs publish annual reports on their public websites. For example, since 2007-08 LiveCorp has published its annual reports on its website. Each annual report includes a compliance report setting out how the corporation has complied with the funding agreement.

To promote a uniform approach, all funding agreements signed by the Commonwealth since October 2016 have required annual reports to be available through an RDC's public website. An example of this clause is in the agreement between Australian Wool Innovation (AWI) and the Commonwealth 2016 to 2020, which requires corporate governance documents to be published. These documents are listed at clause 29 'Information on Activities', available on the AWI website.

Negotiation of new Funding Agreements

The government expects that a new agreement with LiveCorp will be signed before the end of the financial year, which will require the funding agreement and annual report to be published on LiveCorp's public website.

> The Commonwealth is negotiating with Dairy Australia Limited and will begin negotiations with Forest and Wood Products Limited and Sugar Research Australia Limited in February or March 2017. While each of these RDCs already publishes their funding agreements and annual reports, the government will propose consistent publication clauses for each new agreement.
>
> I trust that this information confirms that parliamentary scrutiny will not be impeded by the measures in the Agriculture and Water Resources Legislation Amendment Bill 2016. I expect that amendments will streamline the processes which support public and parliamentary engagement in the RDCs activities.

Committee comment

2.8 The committee thanks the Minister for this response. The committee notes the Minister's advice that the tabling requirements are proposed to be removed in order to reduce costs and make the publication requirements consistent for all research and development corporations (RDCs). The committee also notes the Minister's advice that all funding agreements signed by the Commonwealth since July 2011 have required that the agreement and annual reports be made available on the RDCs public website. The Minister also advised that one current agreement does not include this requirement but the new agreement, which is under negotiation, will include this requirement.

2.9 The committee notes that removing the requirement for certain information to be tabled in Parliament reduces the scope for parliamentary scrutiny. As such, the committee expects there to be appropriate justification for removing a tabling requirement. This is particularly relevant where public funding has been provided to research and development corporations (RDCs), over which there should be appropriate levels of transparency and accountability.

2.10 The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. The committee does not consider the costs involved in tabling the documents to be a sufficient basis for removing the requirement to table in Parliament. The committee notes the Minister's advice that the tabling requirements are proposed to be removed in order to ensure consistency for all RDCs. However, from a scrutiny perspective the committee considers consistency could best be achieved by amending the relevant legislation to require all RDCs to table documents relating to funding agreements and annual reports.

2.11 The committee notes that most (though not all) funding agreements require the agreement and annual report to be published online. However, there appears to be no legislative requirement requiring the publishing of these documents online.

2.12 The committee considers that the interests of parliamentary scrutiny would best be served by removing items 58 to 66 of Schedule 1 from the bill. However, if these items remain, the committee considers it would be appropriate, at a minimum:

- **that there should be a legislative requirement that the relevant documents be published online; and**
- **that a statement be tabled in both Houses of the Parliament drawing attention to the publication of the relevant document online.**

2.13 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of removing the requirement for the Minister to table certain documents in Parliament.

Air Services Amendment Bill 2016

Purpose	This bill seeks to amend the law in relation to air services by: • setting clear requirements for consultation and reporting on the part of Airservices Australia in relation to aircraft noise; and • establishing an independent Aircraft Noise Ombudsman and an independent Community Aviation Advocate
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 28 November 2016
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.14 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2017*. Mr Bandt responded to the committee's comments in a letter dated 15 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Member's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Broad regulation-making power[9]

Initial scrutiny – extract

2.15 Proposed subsection 74B(1) provides that 'the regulations must prescribe a scheme for the establishment of an Aircraft Noise Ombudsman'. As such, this provision is a broad regulation making power which leaves all of the elements of the proposed Aircraft Noise Ombudsman scheme to delegated legislation (which is not subject to the same level of parliamentary scrutiny as primary legislation).

2.16 The committee will generally have scrutiny concerns where an entire regulatory scheme and/or significant matters, such as immunity from civil proceedings,[10] are left to delegated legislation, unless a sound justification for the use of delegated legislation is provided.

2.17 Although proposed subsection 74B(2) sets out functions for the Ombudsman which must be included in the scheme and subsection 74B(3) provides that the scheme must provide for a number of specified matters, there is no information in

9 Schedule 1, item 8, proposed subsection 74B(1) of the *Air Services Act 1995*.

10 See proposed paragraph 74B(3)(i).

the explanatory memorandum as to why the scheme should not be dealt with in the primary legislation.

2.18 The committee requests the Member's advice as to why it is considered necessary to leave the establishment of the proposed Aircraft Noise Ombudsman scheme to delegated legislation (rather than including at least the key elements of the scheme in the primary legislation).

Member's response

2.19 The Member advised:

> The Air Services Amendment Bill 2016 addresses gaps in the laws relating to aircraft noise and its impacts on community amenity. It will ensure that communities affected by aircraft noise will have greater rights and stronger representation.
>
> One outcome of this bill will be to establish an Aircraft Noise Ombudsman that is independent of Airservices Australia. The newly created independent Community Aviation Advocate and the independent Aircraft Noise Ombudsman will provide important representation for communities affected by aircraft noise.
>
> The bill requires that the Aircraft Noise Ombudsman is established through regulations. In doing so, it lays out a number of requirements that must be met by these regulations.
>
> The bill sets out in subsection 74B(2) the functions that must be granted to the Aircraft Noise Ombudsman.
>
> The bill also sets out in subsection 74B(3) requirements that must be provided for in establishing the Aircraft Noise Ombudsman.

Committee comment

2.20 The committee thanks the Member for this response. The committee notes the Member's advice that proposed subsections 74B(2) and 74B(3) set out the functions that must be granted to the Aircraft Noise Ombudsman and the requirements that must be provided for in establishing the Aircraft Noise Ombudsman.

2.21 While these provisions provide some guidance in relation to the functions and potential powers of the proposed Aircraft Noise Ombudsman, the committee notes that the detail of how these powers will be exercised is left entirely to delegated legislation. For example, proposed subsection 74B(3) states that the regulations must provide for several significant matters, including the powers of the Ombudsman to obtain information and documents and the immunity of the Ombudsman from civil proceedings, however no detail in relation to these matters is provided on the face of the bill. As previously noted, the committee will generally have scrutiny concerns where significant matters are left to delegated legislation, unless a sound justification for the use of delegated legislation is provided.

2.22 The committee notes that the Member's response does not directly address the reason why such matters are appropriately left to be determined in the regulations.

2.23 In this instance, the committee leaves to the Senate as a whole the appropriateness leaving significant aspects of the establishment of the proposed Aircraft Noise Ombudsman scheme to delegated (rather than primary) legislation.

Appropriation Bill (No. 4) 2016-2017

Purpose	This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the *Appropriation Act (No. 2) 2016-2017* and the *Supply Act (No. 2) 2016-2017.*
Portfolio/Sponsor	Finance
Introduced	House of Representatives on 9 February 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv) and (v)

2.24 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2017*. The Minister responded to the committee's comments in a letter dated 7 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Parliamentary scrutiny of section 96 grants to the States[11]

Initial scrutiny – extract

2.25 Clause 14 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the States. Section 96 states that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

2.26 Clause 14 delegates this power to the relevant Minister, and in particular, provides the Minister with the power to determine:

- conditions under which payments to the States, the Australian Capital Territory, the Northern Territory and local government may be made;[12] and
- the amounts and timing of those payments.[13]

2.27 Subclause 14(4) provides that determinations made under subclause 14(2) are not legislative instruments. The explanatory memorandum states that this is:

> …because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 14(2) are

11 Clause 14 and Schedules 1 and 2.

12 Paragraph 14(2)(a).

13 Paragraph 14(2)(b).

administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.[14]

2.28 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[15]

2.29 The committee takes this opportunity to reiterate that the power to make grants to the States and to determine terms and conditions attaching to them is *conferred on the Parliament* by section 96 of the Constitution. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their State or Territory. While some information in relation to grants to the States is publicly available, effective parliamentary scrutiny is difficult because the information is only available in disparate sources.

2.30 In relation to appropriations for payments to the States, Territories and local governments in the annual appropriation bills, the committee has previously requested that additional explanatory material be made available to Senators and others, including detailed information about the particular purposes for which money is sought to be appropriated. To ensure clarity and ease of use the committee has stated that this information should deal only with the proposed appropriations in the relevant bill. The committee considers this would significantly assist Senators in scrutinising payments to State, Territory and local governments by ensuring that clear explanatory information in relation to the appropriations proposed in the particular bill is readily available in one stand-alone location.

2.31 Most recently the committee considered this matter in its *Eighth Report of 2016*.[16] The committee sought the Minister's advice as to:

- whether future Budget documentation (such as Budget Paper No. 3 'Federal Financial Relations') could include general information about:
    - the statutory provisions across the Commonwealth statute book which delegate to the Executive the power to determine terms and conditions attaching to grants to the States; and
    - the general nature of terms and conditions attached to these payments (including payments made from standing and other appropriations); and

14 Explanatory memorandum, p. 11.

15 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015* (at pp 511–516), *Ninth Report of 2015* (at pp 611–614) and *Fifth Report of 2016* (at pp 352–357).

16 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, pp 457–460.

- whether the Department of Finance is able to issue guidance advising departments and agencies to include the following information in their portfolio budget statements where they are seeking appropriations for payments to the States, Territories and local government in future appropriation bills:
    - the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory);
    - the specific statutory or other provisions (for example in the *Federal Financial Relations Act 2009*, the *COAG Reform Fund Act 2008*, *Local Government (Financial Assistance) Act 1995* or special legislation or agreements) which detail how the terms and conditions to be attached to the particular payments will be determined; and
    - the nature of the terms and conditions attached to these payments.

2.32 At that time the Minister for Finance advised the committee that he would ask his department, in consultation with the Treasury, to review the current suite of Budget documentation and give consideration to including additional information on payments to the States, Territories and local government in time for the next Budget.[17]

2.33 The committee thanks the Minister for his ongoing engagement with the committee on this matter and seeks the Minister's advice in relation to any progress that has been made in relation to including additional information on payments to the States, Territories and local government in this year's Budget documentation.

2.34 In relation to this bill, the committee draws its comments about the delegation of legislative power in clause 14 to the attention of Senators.

Minister's response

2.35 The Minister advised:

> The Committee has sought my advice on any progress made in relation to the inclusion of additional information on payments to the States, Territories and local government in this year's Budget documentation.
>
> My Department, in consultation with the Treasury, is in the process of reviewing the current suite of Budget documentation in order to give consideration to including additional information on payments to the States, Territories and local government in time this year's Budget.

17 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, p. 460.

Committee comment

2.36 The committee thanks the Minister for this response.

2.37 The committee welcomes the Minister's indication that his department, in consultation with the Treasury, is in the process of reviewing the current suite of Budget documentation in order to give consideration to including additional information on payments to the States, Territories and local government in time for this year's Budget. The committee looks forward to considering the outcome of this review.

2.38 Noting the terms of section 96 of the Constitution and the role of Senators in representing the people of their State or Territory, the committee will continue to draw the issue of parliamentary scrutiny of section 96 grants to the States to the attention of Senators where appropriate in the future.

2.39 In relation to this bill, the committee draws its comments about the delegation of legislative power in clause 14 to the attention of Senators.

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Purpose	This bill seeks to amend a number of Acts relating to the criminal law, law enforcement and background checking to: • ensure Australia can respond to requests from the International Criminal Court and international war crimes tribunals; • amend the provisions on proceeds of crime search warrants, clarify which foreign proceeds of crime orders can be registered in Australia and clarify the roles of judicial officers in domestic proceedings to produce documents or articles for a foreign country, and others of a minor or technical nature; • ensure magistrates, judges and relevant courts have sufficient powers to make orders necessary for the conduct of extradition proceedings; • ensure foreign evidence can be appropriately certified and extend the application of foreign evidence rules to proceedings in the external territories and the Jervis Bay Territory; • amend the vulnerable witness protections in the *Crimes Act 1914*; • clarify the operation of the human trafficking, slavery and slavery-like offences in the *Criminal Code Act 1995*; • amend the reporting arrangements under the *War Crimes Act 1945;* • ensure the Australian Federal Police's alcohol and drug testing program and integrity framework is applied to the entire workforce and clarify processes for resignation in cases of serious misconduct or corruption; • provide additional flexibility regarding the method and timing of reports about outgoing movements of physical currency, allowing travellers departing Australia to report cross-border movements of physical currency electronically; • include the Australian Charities and Not-for-profits Commission in the existing list of designated agencies which have direct access to financial intelligence collected and analysed by AUSTRAC enabling it to access AUSTRAC information; • clarify use of the Australian Crime Commission's prescribed alternative name; and

	• permit the AusCheck scheme to provide for the conduct and coordination of background checks in relation to major national events
Portfolio	Justice
Introduced	House of Representatives on 23 November 2016
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i), (ii) and (iv)

2.40 The committee dealt with this bill in *Alert Digest No. 10 of 2016*. The Minister responded to the committee's comments in a letter dated 22 December 2016. The committee sought further information in the *Scrutiny Digest 1 of 2017* and the Minister responded in a letter received 24 February 2017.

2.41 Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's responses followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Delegation of legislative power—incorporation of external material into the law[18]

Initial scrutiny – extract

2.42 This item amends a regulation making power in the *Australian Federal Police Act 1979* (the AFP Act). The item adds a new subsection 40P(2) which will allow regulations made for the purposes of sections 40LA, 40M and 40N of the AFP Act (relating to drug and alcohol testing of AFP appointees) to incorporate any matter contained in a standard published by, or on behalf of, Standards Australia as in force at a particular time or as in force from time to time.

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

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

18 Schedule 8, item 15, new subsection 40P(2).

2.44 The explanatory memorandum (at p. 179) states that the drug and alcohol testing provisions in sections 40LA, 40M and 40N are applicable only to AFP appointees, and not the general public. Further, the explanatory memorandum notes that the relevant standards as in force from time to time will be available on request to AFP appointees and 'the standards are available to the public for purchase from SAI Global Limited'. Finally, the explanatory memorandum states that allowing the AFP to incorporate the relevant standards for alcohol and drug testing as in force from time to time allows the AFP to keep pace with scientific and technology advances and ensures that it is able to employ the most appropriate procedures for conducting drug testing.

2.45 The committee notes this explanation and welcomes the indication that the relevant standards incorporated into the law will be available to AFP appointees on request. However, the committee has scrutiny concerns where material incorporated into the law is not freely and readily available to all those who may be interested in the law. In this case, for example, potential AFP recruits may be interested in the relevant standards. In any event, as a matter of principle, any member of the public should be able to freely and readily access the terms of the law. As noted above, the committee's scrutiny concerns in relation to the incorporation of external material into the law will be particularly acute where incorporated materials are not freely and readily available and therefore persons interested in or affected by the law may have inadequate access to its terms. In this case, the relevant standards will only be available to members of the public if a fee is paid to SAI Global Ltd.

2.46 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue: *Access to Australian Standards Adopted in Delegated Legislation* (June 2016). This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

2.47 Noting the above comments, the committee requests the Minister's further advice as to whether material incorporated by reference under proposed subsection 40P(2) can be made freely available to all persons interested in the law.

Minister's first response

2.48 The Minister advised:

> Subsection 40P(2) of the *Australian Federal Police Act 1979* (the Act) will allow regulations made for the purposes of section 40LA, 40M and 40N of the Act to incorporate any matter contained in a standard published by, or on behalf of, Standards Australia or Standards Australia/Standards New Zealand as in force at a particular time or as in force from time to time.

The new subsection will ensure the Australian Federal Police (AFP) is able to employ the most up to date standards for its internal alcohol and drug testing applicable to AFP appointees, allowing it to keep pace with scientific and technological advances.

The standards in question will be made freely and readily available to all persons directly affected by the law, being AFP appointees. All such persons will have full access to the current drug testing standard via an online portal accessible on the AFP intranet. However, the standards will not be made freely and readily available to the public at large, in light of copyright restrictions.

As noted by the Committee, concerns arise when external materials 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. However, any detriment caused by incorporated material not being freely and readily available to the public at large must be balanced against the benefit gained from utilising that incorporated material. The proposed amendment strikes an appropriate balance.

Copyright restrictions

The relevant standard is copyright protected by Standards Australia, which has provided SAI Global with exclusive distributor rights. The current AFP subscription agreement with SAI Global allows it to use and access the relevant standard for internal business purposes only. The AFP is not permitted to copy, distribute or allow access to any third party. These terms and conditions are not unique to the AFP's agreement, as they are incorporated into all subscriptions. As a result of the proprietary rights of Standards Australia, Standards Australia/New Zealand and SAI Global, the AFP is not permitted to make the drug testing standard freely and readily available to the general public.

The benefit of incorporating the relevant standard

The ability for regulations to incorporate relevant aspects of standards published by Standards Australia or Standards Australia/Standards New Zealand is vital to ensuring the AFP applies best practice in its approach to alcohol and drug testing.

There is an expectation from employees that drug tests will be carried out pursuant to current industry standards. Standards Australia and Standards Australia/Standards New Zealand produce standards that are based on sound industrial, scientific and consumer experience and are regularly reviewed to ensure they keep pace with new technologies.

The Standards include highly technical scientific procedures, particularly relating to testing methods, apparatus and calculations. These procedures are carried out by trained technicians from an independent company, on behalf of the APP, in accordance with Schedule 1A of the AFP Regulations.

> The incorporation of the most current standard supports the integrity of the results and ensures there is no discrepancy between the procedures and testing methods used by the company contracted to conduct drug tests and the standard referenced in the AFP Regulations.
>
> *The effect of the standard not being made freely available to the public at large*
>
> The drug and alcohol testing provisions in section 40LA, 40M and 40N are applicable only to AFP appointees, and not the general public. That is, the incorporation of the standard does not impact the general public. Moreover, the incorporation of the standard does not create obligations with which AFP appointees must comply. Rather, it ensures that collection procedures and testing methods utilised by the AFP accord with industry best practice.
>
> As noted, the relevant standard will be made freely and readily available to the only persons directly affected by the law. Any detriment caused by the standard not being freely and readily available to the public at large is thereby minimised.
>
> *The proposed amendments strike an appropriate balance*
>
> The benefit of incorporating standards published by Standards Australia and Standards Australia/Standards New Zealand into the law is clear; it ensures the AFP applies robust, best-practice alcohol and drug testing procedures to its appointees. Imposing a different standard, one that may be freely and readily available to the public at large, may require departing from the industry accepted best-practice encompassed within standards published by Standards Australia and Standards Australia/Standards New Zealand.
>
> The Government considers that the benefit gained from ensuring best-practice testing procedures are used outweighs the minimal detriment caused by the standard not being freely and readily available to persons not directly affected by the law.

Committee's first comment

2.49 The committee thanks the Minister for this detailed response. The committee notes the information provided by the Minister in relation to the benefits of incorporating alcohol and drug-testing standards into the AFP Regulations.

2.50 The committee welcomes the indication that the relevant standards will be made freely and readily available to AFP appointees through an online portal accessible on the AFP intranet.

2.51 The committee also notes the Minister's advice that the standards will not be made freely and readily available to the public at large as the relevant standard is copyright protected by Standards Australia, which has provided SAI Global Ltd with exclusive distributor rights. The committee also notes the advice that under the current AFP subscription agreement with SAI Global the AFP is not permitted to copy,

distribute or allow access to any third party and that these terms and conditions are not unique to the AFP's agreement, as they are incorporated into all subscriptions. As a result, the relevant standards will only be available to members of the public if a fee is paid to SAI Global.

2.52 The committee thanks the Minister for providing this detailed explanation of the restrictions imposed by subscription agreements with SAI Global which assists the committee in understanding the difficulties associated with providing relevant standards to the public at large.

2.53 The committee takes this opportunity to reiterate that it is 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.

2.54 The committee also takes this opportunity to highlight the expectations of the Senate Standing Committee on Regulations and Ordinances that delegated legislation which applies, adopts or incorporates any matter contained in an instrument or other writing should:

- clearly state the manner in which the documents are incorporated—that is, whether the material is being incorporated as in force or existing from time to time or as in force or existing at the commencement of the legislative instrument. This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material (see also section 14 of the *Legislation Act 2003*); and
- contain a description of the documents and indicate how they may be obtained (see paragraph 15J(2)(c) of the *Legislation Act 2003*).

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

2.56 Noting the above comments, the committee also requests the Minister's advice as to whether the bill can be amended to insert a statutory requirement that the relevant standards will be made freely and readily available to all AFP appointees.

Minister's further response

2.57 The Minister advised:

> The Committee has requested my advice as to whether the Bill can be amended to insert a statutory requirement that alcohol and drug testing standards be made freely and readily available to all Australian Federal Police (AFP) appointees.
>
> I can advise that I have requested the Attorney-General's Department to work urgently with the AFP on the amendment requested by the Committee. Should that work conclude that such an amendment is appropriate, and subject to necessary policy approvals, I will seek to introduce the amendment into the Bill.
>
> The Committee has also requested that information I previously provided to the Committee in December 2016 in relation to the Bill be included in the Bill's explanatory memorandum. I am pleased to confirm that I will table an addendum to the explanatory memorandum for the Bill, incorporating the key information requested by the Committee.

Committee's further comment

2.58 The committee thanks the Minister for this response. The committee notes the Minister's advice that he has requested the Attorney-General's Department to work urgently with the AFP in relation to an amendment requested by the committee which would insert a statutory requirement that alcohol and drug testing standards be made freely and readily available to all Australian Federal Police (AFP) appointees. The Minister advised that 'should that work conclude that such an amendment is appropriate, and subject to necessary policy approvals, I will seek to introduce the amendment into the Bill.'

2.59 The committee also notes the Minister's advice that he will table an addendum to the explanatory memorandum for the bill, incorporating the key information requested by the committee.

2.60 The committee welcomes these undertakings by the Minister and will consider any amendments and additional explanatory material in a future Scrutiny Digest.

2.61 The committee also takes this opportunity to reiterate its general comments in relation to the incorporation of external material into the law and the expectations of Senate Standing Committee on Regulations and Ordinances in relation to delegated legislation which applies, adopts or incorporates any matter contained in an instrument or other writing as detailed at paragraphs [2.53] to [2.54] above.

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Purpose	This bill amends the *Criminal Code Act 1995* to establish a scheme for the continuing detention of high risk terrorist offenders at the conclusion of their custodial sentence
Portfolio	Attorney-General
Introduced	Senate on 15 September 2016
Bill status	Received Royal Assent on 7 December 2016
Scrutiny principle	Standing Order 24(1)(a)(i) and (ii)

2.62 The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Attorney-General responded to the committee's comments in a letter dated 27 November 2016. The committee sought further information in the *Tenth Report of 2016* and the Attorney-General responded in a letter dated 16 February 2017.

2.63 Set out below are extracts from the committee's initial scrutiny of the bill and the Attorney-General's responses followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Trespass on personal rights and liberties[19]

Initial scrutiny – extract

2.64 Proposed subsection 105A.4(1) provides that a terrorist offender that is subject to a continuing detention order must be treated in a way appropriate to their status as a person who is not serving a sentence of imprisonment. However, paragraphs (a) to (c) of that subsection provide for exceptions to that principle. In particular, the principle may be subverted on the basis of 'reasonable requirements necessary to maintain':

- the management, security or good order of the prison;
- the safe custody or welfare of the offender or any prisoners; and
- the safety and protection of the community.

2.65 Proposed subsection 105A.4(2) provides that the offender must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment. This general principle is subject to similar exceptions as in the case of proposed subsection

19 Item 1, proposed subsections 105A.4(1) and (2).

105A.4(1), along with further exceptions relating to rehabilitation, treatment, work, education, general socialisation or other group activity or where an offender elects to be accommodated or detained with the general prison population.

2.66 If the purpose of continuing detention orders is preventative rather than punitive, it is unclear why the general principles articulated in subsections 105A.4(1) and (2) should be subject to all of the broad exceptions provided for in the bill, particularly those potentially based on reasons of efficiency. It is suggested that it is not possible to interpret the overall scheme as non-punitive unless the detention regime is kept entirely separate and where appropriate modifications to the normal conditions of incarceration for convicted offenders are made. If prison conditions remain the same the punitive/protective distinction appears to be rendered meaningless in its application. These exceptions exacerbate the general scrutiny concerns identified above. It must be emphasised, however, that removing these exceptions would not ameliorate those general concerns.

2.67 In addition some of the exceptions in proposed section 105A.4 are very broad. In particular, the ambit of reasonable requirements necessary to maintain the 'management, security and good order' of the prison is unclear.

2.68 The committee considers that these provisions allowing for a terrorist offender to ultimately be treated and detained in the same manner and in the same area as persons serving prison sentences appear to undermine the stated non-punitive nature of the scheme. The committee seeks the Attorney-General's advice as to what are the likely conditions of detention for a terrorist offender in a prison under a continuing detention order and what is the justification for having such broad exceptions to the general principle that the person must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment.

Attorney-General's first response

2.69 The Attorney-General advised:

> The Committee has sought advice about the likely conditions of detention for a terrorist offender in a prison under a continuing detention order and the justification for having exceptions to the general principle that the person must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment.
>
> Subsections 105A.4(1) and (2) have been drafted to make it clear that the default position is for offenders under a continuing detention order to be treated and accommodated differently to those offenders who are serving a sentence of imprisonment. However, the provisions also recognise that there may be limited situations where this is either not reasonable given the risk the offender may present to the community or other offenders, or in the best interest of the offender.

> For example, one exception is when the offender elects to be accommodated or detained in an area or unit of the prison with other offenders who are serving sentences of imprisonment. This promotes the rights of the offender by providing them with greater opportunity to participate in decisions relevant to their accommodation. Other exceptions are focused on promoting the offender's wellbeing, such as through participation in group activities, rehabilitation or education programs. In relation to the exceptions relevant to ensuring the security or good order of the prison, or the safety and protection of the community, there would need to be reasonable grounds to justify the use of these exceptions.
>
> Accordingly, the conditions the offender under the continuing detention order will be subject to will vary, depending upon the particular circumstances of the case. My Department has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme, including the housing of offenders under the regime. In particular, the Working Group will consider developing 'Management Standards' that would provide a minimum standard all correction authorities should meet, ensuring that conditions in correction facilitates are appropriate and proportionate.

Committee's first comment

2.70 The committee thanks the Attorney-General for this response.

2.71 The committee notes the Attorney-General's advice that the default position is that offenders under a continuing detention order (CDO) will be treated and accommodated differently to those serving a sentence of imprisonment but that there may be 'limited situations' where this is not reasonable or in the best interests of the offender. The committee also notes the Attorney General's advice that there would need to be reasonable grounds to justify the use of the exceptions based on the security or good order of the prison or the safety or protection of the community. The committee also notes the advice that consideration will be given to developing 'Management Standards' that provide a minimum standard that all correction authorities should meet.

2.72 Despite the Attorney-General's advice that there are 'limited' situations where it may not be reasonable to treat or accommodate an offender subject to a CDO in a way that is appropriate to their status as a person not serving a term of imprisonment, the committee considers that the provisions, as drafted, allow for a broad exception to this general principle. In particular, the committee considers that paragraph 105A.4(1)(a), which provides an exception in relation to reasonable requirements necessary to maintain the 'management, security or good order of the prison' is overly broad. While the committee agrees that there is a requirement that the exception be a 'reasonable requirement', because the phrase 'management, security or good order of the prison' is so broad and ultimately the view of prison

officials, it would be difficult to challenge a decision to this effect. For example, as the provision is drafted, it is conceivable that prison authorities may decide to treat a person subject to a CDO in the same way as those serving sentences of imprisonment, because to do otherwise may cause resentment amongst other prisoners and affect the good order of the prison.

2.73 The committee's scrutiny concerns also apply in relation to proposed paragraph 105A.4(2)(b) which provides that an offender must not be accommodated or detained in the same area of the prison as those serving terms of imprisonment unless 'it is necessary for the security or good order of the prison'. In this instance, the committee notes that the requirement is that it is 'necessary' for the security or good order of the prison and not that it is 'reasonably necessary'. This appears to impose a subjective approach to where the person is to be accommodated, based on what prison authorities consider necessary for the good order of the prison.

2.74 It is also not clear, based on the Attorney-General's response, as to what are the likely conditions of detention for a terrorist offender in a prison under a CDO. The committee welcomes the development of 'Management Standards' that would provide a minimum standard all correction authorities should meet. However, the committee notes that such standards are not required by the legislation and they would not be subject to parliamentary scrutiny. Furthermore, without these standards being included in the primary legislation it is not possible to evaluate the extent to which they may address the scrutiny concerns identified by the committee.

2.75 The committee therefore seeks the Attorney-General's further advice as to:

- whether it is possible to include these standards in the primary legislation; and
- if this approach is rejected, whether the bill could be amended to require the making of such standards by a legislative instrument, which would be subject to parliamentary scrutiny and the disallowance process.

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

2.77 The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the exceptions to treating an offender subject to a CDO differently to those serving terms of imprisonment to the consideration of the Senate as a whole.

Attorney-General's further response

2.78 The Attorney-General advised

> The Committee has sought further advice about the likely conditions of detention for a terrorist offender in a prison under a continuing detention

order. More specifically it has requested further information about the development of 'Management Standards', and the possibility of including such standards in the primary legislation; or if this is not possible, by making them a legislative instrument, which would be subject to parliamentary scrutiny and the disallowance process. The Committee has also requested that the key inf01mation from this advice be included in the Explanatory Memorandum.

Subsections 105A.4(1) and (2) were drafted to make it clear that the default position is for offenders under a continuing detention order to be treated and accommodated differently to those offenders who are serving a sentence of imprisonment, subject to certain exceptions.

The High Risk Terrorist Offender Implementation Working Group, comprised of legal, corrections and law enforcement representatives from each jurisdiction was convened to progress outstanding issues relating to the post-sentence preventative detention scheme. It has prioritised the consideration of housing these offenders and the development of management standards. Management standards provide a minimum standard all correction authorities should meet, ensuring that conditions in correction facilitates are appropriate and proportionate. Similar national uniform guidelines have been developed between jurisdictions, for example the Standard Guidelines for Corrections in Australia.

It is not my intention to include any management standards in the primary legislation or in a legislative instrument. Additional information about management standards for the treatment and housing of terrorist offenders subject to the continuing detention order regime is provided in the High Risk Terrorist Offenders Implementation Plan 2016.

The PJCIS completed its inquiry and report on the Bill on 4 November 2016. The Government accepted the PJCIS recommendation to provide it with a clear development and implementation plan that includes timeframes to assist detailed consideration of the Bill prior to the second reading debate in the Senate (PJCIS Recommendation 22). The Implementation Plan was provided to the PJCIS on 25 November 2016 and is available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Implementation_Plan>>.

The Government also accepted the PJCIS Recommendation 23 to provide the Committee with a timetable for implementation of any outstanding matters being considered by the Implementation Working Group by 30 June 2017. The report will include information about conditions of detention, including any agreements reached with States and Territories on housing arrangements.

Committee's further comment

2.79 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that it is not the intention to include any management standards in the primary legislation or in a legislative instrument.

2.80 The committee considers it would have been appropriate if the proposed Management Standards were subject to parliamentary scrutiny, however, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Rights and liberties unduly dependent upon insufficiently defined administrative powers[20]

Initial scrutiny – extract

2.81 Proposed section 105A.8 sets out mandatory relevant considerations which the court must consider in determining whether to make a continuing detention order. The explanatory material merely repeats the listed considerations without explaining their relevance given the purpose of the legislation and the legal tests to be applied. For example, it is not clear from the explanatory material accompanying the bill why the general criminal history of an offender is relevant given the purposes of the legislation. Nor is it clear how 'any other information as to risk of the offender committing a serious Part 5.3 offence' is to be understood.

2.82 The committee requests a detailed justification from the Attorney-General for the basis for the relevance of these matters and more specificity about the type of information and factors which should legitimately form part of the decision-making process.

Attorney-General's first response

2.83 The Attorney-General advised:

> The Committee has sought a detailed justification for the basis for the relevance of the matters set out in section 105A.8 and more specificity about the type of information and factors which should legitimately form part of the decision-making process.
>
> Section 105A.8 provides a list of matters the Court must consider when determining whether to make a continuing detention order. These matters have been largely modelled on similar requirements in State and Territory post-sentence detention schemes. It is a matter for the Court as to the weight it places on each of these matters when considering whether to make a continuing detention order.

---

20 Proposed section 105A.8.

> Proposed section 105A.8 assists the Court by outlining matters which are directly relevant to an assessment of the offender's risk to the community. For example, in determining whether to make an order, the Court is required to consider the safety and protection of the community, any expert reports relevant to the offender's risk, and any treatment or rehabilitation programs in which the offender has participated and the level of the offender's participation in those programs. These matters are relevant to the offender's risk to the community.
>
> The Committee asked, in particular, about the requirement under paragraph 105A.8(g) for the Court to have regard to the offender's general criminal history. I propose to move Government amendments in the Senate that will appropriately confine this requirement so that the Court will only have to have regard to the offender's prior convictions for any offences that fall within the categories listed in paragraph 105A.3(1)(a).
>
> The Committee also asked how paragraph 105A.8(i) should be understood. Paragraph 105A.8(i) requires the Court to consider any other information as to the risk of the offender committing a serious Part 5.3 offence. This enables the Court to consider matters that are not captured by the other paragraphs in the section, but are relevant to the risk of the offender committing a serious Part 5.3 offence. For example, this could include admissible evidence from police or other agencies, that will assist the Court in considering the risk of the offender committing a serious Part 5.3 offence. Section 105A.8 is designed to provide the Court with an appropriate degree of flexibility. Importantly, the rules of evidence and procedure for civil matters apply when the Court has regard to the matters in section 105A.8 (see section 105A.13).

Committee's first comment

2.84 The committee thanks the Attorney-General for this response.

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

2.86 In light of the information provided, the committee leaves the appropriateness of the relevant mandatory considerations the court must have regard to in making a continuing detention order to the consideration of the Senate as a whole.

Attorney-General's further response

2.87 The Attorney-General advised

> The Committee noted my intention to move Government amendments to confine the Court's consideration of the offender's criminal history to prior convictions for relevant terrorist offences (and not their criminal history

more broadly), and requested that the key information from my advice of27 November 2016 be included in the Explanatory Memorandum.

On 1 December 2016 I moved Government amendments 24, 25 and 26 which amended Schedule 1, item 1, subsection 105A.8(1) to confine the Court's consideration of the offender's criminal history to prior convictions for relevant terrorist offences listed in paragraph 105A.3(1)(a). Paragraph 168 of the Revised Explanatory Memorandum reflects this amendment.

I agree with the Committee on the importance of the extrinsic material as a point of access to understanding the law, and I note that paragraphs 168-170 of the Revised Explanatory Memorandum were updated to include key information about the Government amendments relating to section I05A.8.

Committee's further comment

2.88 The committee thanks the Attorney-General for this response.

2.89 The committee welcomes the Attorney-General's advice that amendments were made to the bill in relation to certain mandatory considerations the court must have regard to, and that the explanatory memorandum was updated accordingly.

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

Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017

Purpose	This bill seeks to amend the *Criminal Code Act 1995* to make it an offence to wear full face coverings in a public place under Commonwealth jurisdiction
Sponsor	Senator Jacqui Lambie
Introduced	Senate on 8 February 2017
Bill status	Before Senate
Scrutiny principle	Standing Order 24(1)(a)(i)

2.91 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2017*. Senator Lambie responded to the committee's comments in a letter dated 16 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Senator's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Significant matters in delegated legislation[21]

Initial scrutiny – extract

2.92 The bill proposes making it an offence to wear, or compel a person to wear, a full face covering in public when a terrorism threat declaration is in place. Proposed section 395.2 sets out how such a terrorism threat declaration is to be made. It provides that the Minister must, by legislative instrument, make such a declaration if the national terrorism threat level is higher than 'possible', as set by the National Terrorism Threat Advisory System. Subsection 395.2(2) states that such a legislative instrument is not subject to disallowance under section 42 of the *Legislation Act 2003*.

2.93 Two scrutiny concerns arise in respect of this provision. The first relates to the exclusion of the legislative instrument from disallowance by the Parliament. The explanatory memorandum explains the basis for the exclusion of the Parliament's normal disallowance power as that it is inappropriate for the Parliament to disallow a determination based on 'national security reasons'. It states that the time period for disallowance is 15 sitting days whereas 'a terrorist threat, or terrorist action, must be

21 Schedule 1, item 1, proposed section 395.2.

dealt with immediately for the safety of the nation and cannot be put on hold for an indefinite period of time'.[22]

2.94 However, the Parliament would not, in disallowing a declaration, be acting against any decision made within the executive government that the terrorist threat level warranted a ban on the wearing of full face coverings. If the National Terrorism Threat Advisory System generates a threat level above 'possible' then the Minister is obliged to make the declaration. Neither the Minister, nor any decision-maker within the National Terrorism Threat Advisory System, will have made a determination about whether a ban of face coverings is required for national security reasons. In addition, while the disallowance period is 15 sitting days, the process under the *Legislation Act 2003* is that the instrument would come into force the day after registration. As such, any concerns regarding the appropriateness of allowing disallowance based on the need to deal with any threat urgently is not affected by the disallowance process. For these reasons it is difficult to see why a disallowance power is inappropriate.

2.95 The second scrutiny issue relates to the fact that an element of the offence depends on a ministerial declaration being in force. From a scrutiny perspective, it is desirable for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear so those who are subject to the offence may readily ascertain their obligations. The way this offence is structured means that those who wish, for religious or other reasons, to wear face coverings are required to check whether a ministerial declaration is in force.

2.96 The committee draws the above scrutiny concerns relating to proposed section 395.2 to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding the instrument from disallowance and making an element of an offence dependent on a ministerial declaration being in force.

Reversal of evidential burden of proof[23]

Initial scrutiny – extract

2.97 Proposed section 395.3 introduces an offence of wearing a full face covering in a public place, or compelling another person to do so, if a terrorism threat declaration is in force. Subsection 395.3(4) provides that the offence provisions do not apply in certain specified circumstances.

2.98 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

---

22 Explanatory memorandum p. 3.

23 Schedule 1, item 1, proposed subsection 395.3(4).

2.99 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

2.100 As neither the statement of compatibility nor the explanatory memorandum addresses this issue, the committee requests the Senator's advice as to why offence-specific defences (which reverse the evidential burden of proof) have been used in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[24]

Senator's response

2.101 The Senator advised:

> After deliberation I agree with the comments listed under significant matters in delegated legislation and the reversal of evidential burden of proof and I will be making amendments to the legislation to reflect this.

Committee comment

2.102 The committee thanks the Senator for this response.

2.103 The committee welcomes the Senator's advice that she proposes to make amendments to the bill in light of the committee's comments about the inclusion of significant matters in delegated legislation and the reversal of the evidential burden of proof.

2.104 The committee will consider any amendments made to the bill in a future Scrutiny Digest.

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

Customs and Other Legislation Amendment Bill 2016

Purpose	This bill seeks to amend various Acts relating to customs, trade descriptions and maritime powers to: • allow for the exemption from paying import declaration processing charge; • extend the circumstances in which an application can be made to move, alter or interfere with goods for export that are subject to customs control; • clarify and simplify the provisions concerning the making of tariff concession orders for made-to-order capital equipment; • remove unnecessary and outdated provisions; • provide that the *Commerce (Imports) Regulations 1940* may prescribe penalties for offences against those regulations; confirm that the powers under the *Maritime Powers Act 2013* are able to be exercised in the course of passage through or above the waters of another country in a manner consistent with the *United Nations Convention on the Law of the Sea*
Portfolio/Sponsor	Immigration and Border Protection
Introduced	House of Representatives on 30 November 2016
Bill status	Before Senate
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.105 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2017*. The Minister responded to the committee's comments in a letter dated 3 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Penalties in regulations[25]

Initial scrutiny – extract

2.106 Item 4 of Schedule 7 proposes to amend section 17 of the *Commerce (Trade Descriptions) Act 1905* to enable regulations made under the Act to prescribe penalties, not exceeding 50 penalty units, for offences against the regulations. This

25 Schedule 7, item 4, proposed subsection 17(2) of the *Commerce (Trade Descriptions) Act 1905.*

item represents a significant delegation of legislative power in that it allows regulations (which are not subject to the same level of parliamentary scrutiny as primary legislation) to impose a penalty. The committee's view is that significant matters, such as the imposition of penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.107 While the committee notes that this proposed provision conforms with the guidance in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that 'regulations should not be authorised to impose fines exceeding 50 penalty units',[26] the committee still expects that any provisions which allow regulations to impose a penalty of any level will be justified in the explanatory memorandum.

2.108 The committee requests the Minister's advice as to why the bill proposes enabling penalties to be prescribed by regulation.

Minister's response

2.109 The Minister advised:

> The *Commerce (Trade Descriptions) Act 1905* (CTDA) and the *Commerce (Imports) Regulations 1940* (the Regulations) together set out the legal framework in relation to labelling requirements for goods imported into Australia, with the bulk of this framework set out in the Regulations.
>
> Section 7 of the CTDA provides that the regulations may prohibit the importation into Australia of any goods without a prescribed trade description. The Regulations set out these matters including import prohibitions and prescribed trade description requirements.
>
> The *Commerce (Trade Descriptions) Regulation 2016* will replace the Regulations on 1 April 2017 as a result of the repeal of the Regulations on that date as part of the sunsetting regime. The new regulation, however, is substantially the same in structure as the existing Regulation, in that it also includes the import prohibition and trade description requirements.
>
> In this circumstance, I consider that it is appropriate that the Regulations (and the new regulation), and not the CTDA, create offences and impose penalties for offences against the Regulations. If new subsection 17(2) is not enacted, the CTDA would need to be amended each time a requirement was included in the Regulations where it was proposed to impose a penalty for failure to comply. By allowing for the imposition of penalties in the Regulations, the penalty can be imposed in a timely manner and the amount of the penalty can be tailored to each offence on a case by case basis within the penalty cap set in subsection 17(2).

---

26 See Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* (September 2011), pp 44–45.

> Proposed subsection 17(2) is similar to subsection 270(2) of the *Customs Act 1901* (the Customs Act), which provides a head of power to prescribe penalties for contravention of regulations under the Customs Act.
>
> Any regulation that proposes the imposition of a penalty would be subject to Parliamentary scrutiny and possible disallowance, as it is a disallowable instrument.
>
> In the future, any provisions that propose to allow regulations to impose a penalty will be justified in the explanatory memorandum.

Committee comment

2.110 The committee thanks the Minister for this response. The committee notes the Minister's advice that the existing regulations are due to sunset shortly and in the circumstances it is appropriate that the regulations, and not the Act, create offences and impose penalties for offences against the Regulations. The committee notes the Minister's advice that if this power were not included, the Act would need to be amended each time a penalty for failure to comply is proposed to be imposed, and including this in the regulations means the penalty can be imposed in a timely manner and the amount of the penalty can be tailored to each offence on a case by case basis within the penalty cap.

2.111 The committee is not clear why the fact that new regulations are being introduced following the sunsetting of existing regulations, is a circumstance that makes it necessary to amend the Act to allow the regulations to prescribe penalties. The committee reiterates that this represents a significant delegation of legislative power in that it allows regulations (which are not subject to the same level of parliamentary scrutiny as primary legislation) to impose a penalty. The committee's view is that significant matters, such as the imposition of penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The fact that the primary legislation would require amendment to include new penalties does not appear, in itself, to be a sufficient reason to allow the regulations the power to impose penalties.

2.112 While the committee notes that any penalties prescribed by the regulations will not be able to exceed 50 penalty units and any regulation that proposes the imposition of a penalty would be subject to parliamentary scrutiny and possible disallowance, the committee still draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing penalties to be prescribed in the regulations.

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

Customs Tariff Amendment Bill 2016

Purpose	This bill seeks to amend the *Customs Tariff Act 1995* (the Act) to: • repeal Schedule 1 to the Act; • repeal Section 16A of the Act; • insert additional notes into Schedule 3 of the Act, to clarify the classification of certain fruits, vegetables and pastas; and • amend the text of Item 44 of Schedule 4 to the Act, to provide for an end date for the Item
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 30 November 2016
Bill status	Before the Senate
Scrutiny principle	Standing Order 24(1)(a)(iv) and (v)

2.114 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2017*. The Minister responded to the committee's comments in a letter received 2 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Significant matters in delegated legislation[27]

Initial scrutiny – extract

2.115 Schedule 1 to the *Customs Tariff Act 1995* (the Tariff Act) lists the countries and places for which preferential rates of customs duty for certain goods apply.

2.116 Item 11 of this bill proposes to repeal this Schedule and items 1–5 and 8–10 would allow the current content of the repealed Schedule to instead be included in Customs Tariff Regulations. As a result, changes to the list of countries entitled to receive preferential rates of customs duty will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

2.117 The explanatory memorandum merely states that this proposed change will enable 'countries and places to be more easily updated when required'.[28] The committee's view is that significant matters, such as matters relating to the

27 Schedule 1, items 1–5 and 8–11, repeal of Schedule 1 to the *Customs Tariff Act 1995*.

28 Explanatory memorandum, p. 6.

imposition of customs duty, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.118 The committee requests the Assistant Minister's advice as to why the content of Schedule 1 to the Tariff Act is proposed to be moved to the regulations, particularly addressing the impact that this change will have on parliamentary scrutiny.

Minister's response

2.119 The Minister advised:

> Specifically, the Committee has requested my advice as to why the content of Schedule 1 to the *Customs Tariff Act 1995* is proposed to be moved to the *Customs Tariff Regulations 2004,* particularly addressing the impact this change will have on Parliamentary scrutiny.
>
> Schedule 1 to the *Customs Tariff Act 1995* currently consists of five parts, each providing lists of countries and places that are granted various forms of non-reciprocal preferential customs duty treatment.
>
> The countries and places listed in Parts 1 and 2 are determined by the membership of the South Pacific Trade and Economic Co-operation Agreement and the list of Least Developed Countries developed and reviewed by the United Nations Economic and Social Council respectively.
>
> Parts 3, 4 and 5 list countries and places that have self-nominated to the World Trade Organization as 'Developing Countries'. The determination of what countries and territories are listed in each of these parts has been historically set by successive governments with reference to the level of economic development of each country or place.
>
> Changes to the countries and places included in each of the five Parts are not required frequently. The review of the United Nations' Least Developed Country list occurs every three years; other changes to Schedule 1 occur on a more ad hoc basis.
>
> However, when required, there is often a significant amount of time between the need to amend Schedule 1 and the time when the change occurs.
>
> The cause of this delay is two-fold. Firstly, as the amendments are typically made one country at a time as required, it is not efficient to make them a standalone amendment bill. Therefore, they must wait until there is an appropriate bill for them to be added to. Secondly, the size and complexity of Parliament's legislative work schedules has often meant it is difficult to get resources allocated to minor amendments.
>
> These delays create uncertainty for Australian businesses seeking to engage in trade with the country in question.
>
> Moving Schedule 1 to the Regulations would decrease the Parliamentary legislative workload and enable these changes to be made in a more

> timely manner, thus providing certainty for Australian businesses. I consider that this provides a sound reason for including these matters in delegated legislation in this instance.
>
> In addition, moving Schedule 1 to the Regulations would not reduce Parliament's scrutiny of the imposition of customs duty.
>
> Section 14 of the Act outlines the application of preferential rates of duty in relation to countries and places. Schedule 3 of the Act specifies the preferential customs duty rates applied to different categories of developing countries.
>
> The Bill would not affect Parliament's oversight of these vital elements of the Act - the principle of preferential duty rates being available for certain developing countries, and the preferential duty rates themselves. Moving Schedule 1 to the Regulations would not affect the amount of customs duty that is imposed.

Committee comment

2.120 The committee thanks the Assistant Minister for this response. The committee notes the Minister's advice that when changes are required to the list of countries in Schedule 1 there is often a significant amount of time between the need to amend and the time when the change occurs, and that these delays create uncertainty for Australian businesses seeking to engage in trade with the country in question. The committee notes the Assistant Minister's advice that moving Schedule 1 to the Regulations would enable these changes to be made in a more timely manner, thus providing certainty for Australian businesses.

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

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

Independent Parliamentary Expenses Authority Bill 2017

Purpose	This bill seeks to establish the Independent Parliamentary Expenses Authority as an independent statutory authority with responsibilities relating to work expenses of parliamentarians and their staff
Portfolio	Finance
Introduced	House of Representatives on 9 February 2017
Bill status	This bill received Royal Assent on 22 February 2017
Scrutiny principle	Standing Order 24(1)(a)(v)

2.123 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2017*. The Minister responded to the committee's comments in a letter dated 16 February 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Parliamentary scrutiny[29]

Initial scrutiny – extract

2.124 One of the functions of the proposed Independent Parliamentary Expenses Authority is to produce regular public reports on parliamentarians' and MOPS staff[30] travel expenditure (and other related reports as the Authority considers appropriate).[31]

2.125 Clause 60 provides that certain sensitive information must not be included in these public reports. Paragraphs 60(1)(a) and (b) provide that where the Authority or the Attorney-General is of the opinion that disclosure of certain information would be contrary to the public interest because it would prejudice the security, defence, or international relations of the Commonwealth, this information must not be included by the Authority in a public report.

2.126 Additionally, paragraph 60(1)(c) provides that information must not be included in a public report if the Authority is of the opinion that disclosure of the

29 Subclause 60(2).

30 MOPS staff is defined as a person employed under Parts III or IV of the *Members of Parliament (Staff) Act 1984*, see explanatory memorandum, p. 28.

31 Paragraphs 12(1)(d), 12(1)(e), 12(1)(s) and 12(1)(t).

information would be likely to result in serious harm to the individual, or any of the individuals, to whom the information relates. 'Harm' is defined as having 'the same meaning as in the Dictionary to the *Criminal Code*', that is, physical or mental harm (whether temporary or permanent).[32] The explanatory memorandum notes that:

> This paragraph is intended to protect individuals from threats to their personal safety that fall short of national security matters covered by paragraphs (a) and (b). It might, for example, be necessary to protect an MP who has suffered family violence, or who is being stalked by a member of the public.[33]

2.127 Subclause 60(2) provides that where such a determination in relation to the non-disclosure of sensitive information has been made, the Authority also cannot disclose that information to Parliament, a member of Parliament or a parliamentary committee. The explanatory memorandum notes that this provision is modelled on subsection 37(3) of the *Auditor-General Act 1997*. Therefore, it is intended 'to act as a declaration for the purposes of section 49 of the Constitution'; that is, it is intended to affect the scope of the powers, privileges and immunities of Parliament. The explanatory memorandum suggests that this limitation is necessary:

> …given the highly sensitive nature of information that would be covered by a determination under subclause 60(1). It is also consistent with existing concepts of public interest immunity. The Government guidelines for official witnesses before Parliamentary Committees and related matters, February 2015, notes that public interest immunity claims may be made in relation to information the disclosure of which would, or might reasonably be expected to, 'damage Australia's national security, defence or international relations', or 'endanger the life or physical safety of any person' (at paragraph 4.6.1).[34]

2.128 In seeking to make a declaration for the purposes of section 49 of the Constitution, subclause 60(2) represents a significant intrusion on the powers, privileges and immunities of the Parliament. It is therefore important that the Parliament is very clear about the necessity and rationale for such a provision before it legislates to place limitations on its own powers.

2.129 It is unclear to the committee in what instances the inclusion of historical travel information in public reports may prejudice the security, defence or international relations of the Commonwealth. The committee notes that regular reports on travel expenditure are currently released by the Department of Finance every six months. It is proposed that over time the Authority will shift to quarterly

32 Clause 4.

33 Explanatory memorandum, p. 25.

34 Explanatory memorandum, p. 25.

and then monthly reporting,[35] although there is no suggestion that public reporting will occur in real-time or before the relevant travel has been undertaken. There is also no indication as to how the content of the public reporting by the Authority will differ from the content of current public reporting by the Department of Finance. The committee notes the current public reporting does not go to the level of detail as to the specific addresses stayed at by the parliamentarian or staff member. The explanatory memorandum suggests that 'it is not anticipated clause 60 would be used frequently'.[36]

2.130 The committee notes that even if it is considered necessary to limit the ability of the Authority to include particular information in a public report, it is not clear that the Parliament should take the significant step of legislating to pre-emptively limit its own powers to require the production of information. The committee notes that there are existing processes in place that provide a basis for parliamentary committees to handle sensitive information.[37]

2.131 In addition, the committee notes that the current drafting of clause 60 provides that information must not be included in a public report or released to Parliament on the basis that either the Authority or the Attorney-General is 'of the opinion' that the disclosure could cause prejudice or harm. The committee notes that this does not require the Authority or Attorney-General to 'reasonably' hold this opinion and, as such, any review of such a decision would be extremely difficult to challenge.

2.132 In order to further understand the necessity of proposed clause 60 in light of the existing public reporting regime of historical travel information, the committee requests that the Minister provide examples of how the public release of historical information relating to parliamentarians' travel expenditure by the Authority could prejudice the security, defence, or international relations of the Commonwealth or cause harm to an individual (if the information published does not include specific addresses).

---

35 Explanatory memorandum, p. 9.

36 Explanatory memorandum, p. 25. In 2010 the Auditor-General advised the Privileges Committee that the equivalent provision in s 37(3) of the *Auditor-General Act 1997* had only been used once since its inception: Mr Ian McPhee, Auditor-General, Submission No 9 to the Senate Committee of Privileges, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*, June 2010, p. 2.

37 For example, the Senate Committee of Privileges has noted that the standing orders, privilege resolutions and the resolution of the Senate relating to public interest immunity claims all provide a sound structure for committees to either handle sensitive information and retain it on an in-camera basis or, in cases where a claim of public interest immunity has been made out, to decide to not receive the information at all. Senate Committee of Privileges, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*, June 2010, p. 30.

2.133 The committee also seeks the Minister's advice as to why the provision is drafted so that the information must not be disclosed on the basis only of the Authority or Attorney-General's 'opinion' that the disclosure could cause prejudice or harm, rather than their 'reasonable belief'.

Minister's response

2.134 The Minister advised:

> The purpose of the sensitive information provisions in clause 60 is to ensure that an appropriate balance is struck between the crucial goals of accountability and transparency, and the safety of members of Parliament and their staff. The Bill therefore establishes a default rule of transparency, while allowing information not to be disclosed where necessary.
>
> *In order to further understand the necessity of proposed clause 60 in light of the existing public reporting regime of historical travel information, the committee requests that the Minister provide examples of how the public release of historical information relating to parliamentarians' travel expenditure by the Authority could prejudice the security, defence, or international relations of the Commonwealth or cause harm to an individual (if the information published does not include specific addresses).*
>
> It is important to note that the sensitive information regime that would be provided by section 60 relates to any public reports made by the Authority, defined broadly in subsection 60(5) to mean any reports published on the Authority's website. Although the most common such reports would be regular reporting on travel expenses, the Government anticipates that the Authority would from time to time report on other work expense matters, and on matters arising from the exercise of its audit function. As a result, a much broader range of information is potentially involved than that currently contained in historical travel reports. This could include a range of contextual information around the specific purposes of travel, exact locations travelled to and from (including addresses), events that took place in conjunction with the travel, and the persons with whom a member met.
>
> This could give rise to a circumstance in which reporting could prejudice national security, defence or international relations, or raise a risk of serious harm to an individual. Further, because the Authority will be independent in the exercise of its functions, it cannot be assumed that future reporting will be limited to the same scope as current reporting.
>
> Without comprehensively setting out possible examples, relevant instances might include:
>
> - More frequent reporting of historical travel information that may allow analysis of travel records and thereby patterns in a member's movements.

- Detailed information about the movements of Ministers, such as the Defence Minister or the Minister for Foreign Affairs, may touch on defence or international relations by allowing inferences to be drawn about international issues or negotiations, or, in relation to audit reports, by providing highly detailed information about the circumstances of travel. In many cases, detailed information may be required to adequately assess compliance of travel with entitlements, particularly under a future regime, but it may not be appropriate in some circumstances to release that supporting information.

However, it is not possible to predict the possible circumstances in which such issues may arise. As noted in the Explanatory Memorandum, it is not anticipated that this power would be used frequently.

The committee also seeks the Minister's advice as to why the provision is drafted so that the information must not be disclosed on the basis only of the Authority or Attorney-General's 'opinion' that the disclosure could cause prejudice or harm, rather than their 'reasonable belief.

Clause 60 has been closely modelled on section 37 of the *Auditor-General Act 1997,* which provides a similar (but broader) regime relating to sensitive information that could be potentially included in audit reports. Subsection 37(1) of that Act similarly uses a test of opinion, rather than reasonable belief. It is the Government's view that limiting this provision to security, defence or international relations sufficiently limits the scope of this power.

In relation to the serious harm provision, the Government has sought to limit the application by requiring the possibility of serious physical or psychological harm. Accordingly, the mere possibility of harm would not be sufficient to trigger the application of this provision.

Committee comment

2.135 The committee thanks the Minister for this response. The committee notes the Minister's advice that public reports by the Authority may potentially include a broader range of information than that currently contained in historical travel reports. This could include a range of contextual information around the specific purposes of travel, exact locations travelled to and from (including addresses), events that took place in conjunction with the travel, and the persons with whom a parliamentarian met. As a result, the Minister advised that the release of such information could give rise to a circumstance in which reporting could prejudice national security, defence or international relations, or raise a risk of serious harm to an individual.

2.136 The committee also notes the Minister's advice that the non-disclosure provision, which specifies that information must not be disclosed on the basis only of the Authority or Attorney-General's 'opinion' that the disclosure could cause prejudice or harm (rather than their 'reasonable belief), is appropriately limited because it is limited to information which could prejudice the security, defence or

international relations of the Commonwealth or where disclosure would lead to the possibility of serious physical or psychological harm.

2.137 The committee thanks the Minister for providing this further information and notes that it would have been useful had this information been included in the explanatory memorandum.

2.138 The committee reiterates its view that even if it is considered necessary to limit the ability of the Authority to include particular information in a public report, there is a separate question in cases such as these as to whether the Parliament should take the significant step of legislating to pre-emptively limit its own powers to require the production of information.

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

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Purpose	This bill seeks to amend the *Migration Act 1958* (the Act) to: • harmonise and streamline Part 5 and Part 7 of the Act relating to merits review of certain decisions; • make amendments to certain provisions in Part 5 of the Act to clarify the operation of those provisions; • clarify the requirements relating to notification of oral review decisions; and • make technical amendments to Part 7AA of the Act
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 30 November 2016
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)

2.140 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2017*. The Minister responded to the committee's comments in a letter dated 3 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Limitation on merits review[38]

Initial scrutiny – extract

2.141 Item 34 seeks to insert a new section 338A into the Migration Act. The proposed section contains a definition of 'reviewable refugee decision'. This new section largely mirrors the provisions contained in existing section 411 of the Act.

2.142 Proposed subsection 338A(2) defines what is a 'reviewable refugee decision', which includes a decision to refuse to grant or to cancel a protection visa. However, a decision to refuse to grant or to cancel a protection visa is not classified as a reviewable decision if it was made on a number of specified grounds, relating to criminal convictions or security risk assessments. As such, decisions made on such grounds are not reviewable by the Administrative Appeals Tribunal (AAT). In addition, subsection 338A(1) provides that a number of reviewable refugee decisions are excluded from review on specified grounds:

38 Schedule 1, item 34, proposed section 338A of the *Migration Act 1958*.

- that the Minister has issued a conclusive certificate in relation to the decision, on the basis that the Minister believes it would be contrary to the national interest to change or review the decision;
- that the decision to cancel a protection visa was made by the Minister personally;
- the decision is made in relation to a non-citizen who is not physically present in the migration zone when the decision is made; or
- that the decision is a fast track decision. A 'fast track decision' is a decision to refuse to grant a protection visa to certain applicants,[39] for which a very limited form of review is available under Part 7AA of the Act.

2.143 As such, there are a wide number of decisions relating to the grant or cancellation of protection visas that are either not subject to any merits review or which are subject to very limited review (in the case of fast track decisions).

2.144 Although the committee notes that this provision largely mirrors an existing provision of the Act, the committee still expects that any provisions which have the effect of limiting the availability of merits review will be comprehensively justified in the explanatory memorandum. The committee therefore requests the Minister's detailed justification for the limitation on merits review in proposed subsection 338A.

Minister's response

2.145 The Minister advised:

> New section 338A reflects the current definition of 'Part 7-reviewable decision' in section 411 of the Migration Act, and thus does not introduce any new limitations on the availability of merits review. Section 411 was enacted in 1992 and has since been amended numerous times. These amendments have been passed by both Houses of Parliament and therefore have been subject to the Parliamentary scrutiny processes required for all legislative amendments. It would be inappropriate to revisit the merits of previous amendments that have been passed by Parliament.

Committee comment

2.146 The committee thanks the Minister for this response. The committee notes the Minister's advice that new section 338A reflects the current definition in section 411 of the Migration Act and all amendments to this provision have already been subject to parliamentary scrutiny and so it would be inappropriate to revisit the merits of previous amendments passed by the Parliament.

---

39 These include unauthorised maritime arrivals who entered Australia on or after 13 August 2012 but before 1 January 2014 and who have not been taken to a regional processing country.

2.147 The committee does not consider that it would be inappropriate for this Parliament to fully scrutinise legislation currently before it. The fact that the amendment mirrors an existing provision that previous Parliaments have examined does not prevent this committee from examining the legislation to consider whether it meets its scrutiny principles.

2.148 The committee therefore restates its request for the Minister to provide a detailed justification for the limitation on merits review in proposed subsection 338A.

Access to material by merits review applicants[40]

2.149 Item 61 proposes to repeal section 362A of the *Migration Act 1958* which currently entitles an applicant for review to 'have access to any written material, or a copy of any written material, given or produced to the Tribunal for the purposes of the review'. Its repeal is justified on the basis of other provisions which require or allow the Tribunal to provide information to the applicant which the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review.

2.150 However, it remains the case that the proposed repeal appears to reduce the applicant's access to information which the Tribunal has before it for the purposes of the review. In this regard the committee notes that the common law rule of procedural fairness may require disclosure of adverse information that is relevant, credible and significant even though a decision-maker disavows any reliance on that information as part of the reason for their decision to affirm a decision under review.

2.151 The committee requests further advice from the Minister as to why it is considered necessary to remove an applicant's right to access written material given to the Tribunal, and whether this diminishes an applicant's right to a fair hearing.

Minister's response

2.152 The Minister advised:

> Section 362A of the Migration Act was enacted at a time when there was no other provision in Division 5 of Part 5 of the Migration Act that required the then Immigration Review Tribunal to provide (in the sense of 'make available') to review applicants documents or information that was before the Tribunal.
>
> The Migration Act has changed significantly since the enactment of section 362A, including the enactment of sections 357A (the exhaustive statement of the natural justice hearing rule) and sections 359AA to 359C (which deal exhaustively with the disclosure of adverse material).

---

40 Schedule 1, item 61, proposed repeal of section 362A of the *Migration Act 1958*.

> The Tribunal is already obligated under section 359A to provide information to the applicant that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review and ensure, as far as is reasonably practical, that the applicant understands why it is relevant to the review and the consequences of it being relied on. This provides an applicant with the opportunity to consider, and comment on, information that the Tribunal will rely on in the review, and to be prepared in advance of a hearing.
>
> There is no provision in Part 7 of the Migration Act that is equivalent to section 362A, and Part 7 review applicants have not been hindered in their ability to prepare for and present their case due to the absence of such a provision.
>
> It is noted that the common law hearing rule not only does not require the disclosure of material that is not adverse, it also does not require the disclosure of the full text of adverse material that is relevant, credible and significant to the decision being made; rather, only the substance of such material needs to be put to an applicant.[41]

Committee comment

2.153 The committee thanks the Minister for this response. The committee notes the Minister's advice that the Tribunal is already obligated to provide information to the applicant that the Tribunal considers would be the reason, or part of the reason, for affirming the decision under review. The committee also notes the Minister's advice that there is no equivalent provision in Part 7 of the Act and applicants under this Part 'have not been hindered in their ability to prepare for and present their case' due to the absence of such a provision. However, the committee considers it is not possible to know whether such applicants have been hindered in this way (noting that without a right to access such information they would be unlikely to know if such information exists).

2.154 As the committee previously noted, the common law rule of procedural fairness may require disclosure of adverse information (or the substance of such material) that is relevant, credible and significant even though a decision-maker disavows any reliance on that information as part of the reason for their decision to affirm a decision under review. Yet, in this case, removing the requirement in section 362A entirely would mean an applicant is only entitled to information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision. As the Minister noted, the Migration Act now provides that the provisions in the Act are an exhaustive statement of the requirements of the natural justice hearing rule. So while the common law requirements of procedural fairness require that a person against whom adverse comments have been made must be provided

41 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [29].

with the substance of the allegations and given a right of reply (even if the Tribunal does not intend to take the adverse comments into account),[42] the only requirement in relation to migration decisions is as set out in the Act.

2.155 Thus, removing an entitlement for an applicant to have access to any written material given or produced to the Tribunal, in circumstances where the Act only provides for particulars of information to be given where the Tribunal considers it would be the reason or part of the reason for affirming the decision, reduces the applicant's right to procedural fairness. From a scrutiny perspective, the committee considers it would be more appropriate for section 362A to not be repealed, or, at a minimum, to be amended to ensure all relevant, credible and significant information, or the substance of such information, is made available to the applicant.

2.156 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of repealing an applicant's right to access written material given or produced to the Tribunal for the purposes of the review.

Enforcing notification and reason-giving requirements[43]

2.157 Proposed subsection 368E(2) inserts a requirement for the Tribunal to notify the Secretary of the Department of Immigration and Border Protection after a Tribunal decision is given orally. The Tribunal must, on a request from the applicant or Minister, reduce the oral statement to writing and give a copy to the Secretary and the applicant. Proposed subsection 368E(6) provides that if the Tribunal has made a written statement (after giving an oral decision) the Tribunal must give a copy of that statement to both the Secretary and applicant. However, proposed subsection 368E(8) provides that a failure to comply with the requirements of the section in relation to a decision on a review does not affect the validity of the decision. The result is that a remedy could not issue to quash a decision on the basis that the legal requirements of this provision were breached.

2.158 As judicial review will not be effective to enforce the notification and reason-giving requirements in section 368E, the committee requests the Minister's advice as to how compliance with these important legal requirements will be enforced.

Minister's response

2.159 The Minister advised:

---

42 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

43 Schedule 1, item 77, proposed subsection 368E(8) of the *Migration Act 1958*.

New subsection 368E(2) requires the Tribunal to notify the Secretary after a Tribunal decision is given orally. If, after giving an oral decision, the Tribunal has made a written statement, new subsection 368E(6) requires the Tribunal to give a copy of that statement to both the Secretary and applicant. While the subsections create new requirements, they are consistent with the requirements in relation to written statements of decisions which are not given orally (and which are covered by a provision similar to subsection 368E(8)).

It is noted that the requirements under subsections 368E(2) and (6) are in addition to existing paragraph 368D(2)(a), which requires an oral statement of the Tribunal to, amongst other things, describe the reasons for the decision. Currently there is no requirement that the Tribunal provide either the applicant or the Secretary with a written statement of an oral decision, even on request.

New subsection 368E(8) provides that a failure to comply with section 368E in relation to a decision on a review does not affect the validity of the decision. This wording is standard to provisions that set out notification requirements. The purpose of the provision is not to undermine the importance of the notification process, instead it ensures the validity of the decision should the notification process not be effective in a particular instance. It is noted that new subsection 368E(8) will not prevent judicial scrutiny of the Tribunal's reasons for decision, or judicial commentary on the notification process itself.

Committee comment

2.160 The committee thanks the Minister for this response. The committee notes the Minister's advice that the wording that provides a failure to comply with notification requirements on review does not affect the validity of the decision, is standard to these type of provisions. The committee also notes the advice that the purpose of the provision is to ensure the validity of the decision should the notification process not be effective, and this will not prevent judicial scrutiny of the Tribunal's reasons for decision or 'judicial commentary on the notification process itself'.

2.161 The committee notes that judicial commentary on the notification process, in the absence of any power to enforce the notification requirements, is not a mechanism for ensuring compliance with these important legal requirements.

2.162 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of providing that a failure to comply with notification requirements does not affect the validity of the Tribunal's decision.

Provision of written statements to merits review applicants[44]

2.163 Proposed subsections 368E(3) and (4) provide mechanisms that allow a merits review applicant or the Minister to request that the Tribunal provide a written version of an oral statement. While the committee notes that these provisions are similar to current subsections 368D(4) and (5) (which are proposed to be repealed by item 75), the committee has two related scrutiny concerns in relation to these provisions.

2.164 First, proposed subsection 368E(3) provides than an applicant may only make a request that the Tribunal provide an oral statement in writing 'within the period prescribed by the regulations'. On the other hand, the Minister may make such a request at any time. The explanatory materials do not explain why the time in which an applicant may make the request is limited.

2.165 Second, the explanatory materials do not explain why it is necessary to prescribe in the regulations the time period in which applicants may make a request, rather than including this time period on the face of the primary legislation.

2.166 Noting this proposed delegation of legislative power and the potential impact on the effectiveness of applicants' review rights, the committee requests the Minister's advice as to why:

- the period of time in which an applicant may make a request that the Tribunal provide an oral statement in writing is limited; and
- the relevant time period is to be included in regulations, rather than on the face of the legislation.

Minister's response

2.167 The Minister advised:

> New subsections 368E(3) and (4) reflect current subsections 368D(4) and (5). Specifically, it is noted that current subsection 368D(4) provides for a period prescribed by regulation within which the applicant can request the statement to be provided in writing. The new subsections thus do not introduce any new limitations on applicants seeking a statement to be provided in writing.
>
> Current subsections 368D(4) and (5) have been passed by both Houses of Parliament and therefore have been subject to the Parliamentary scrutiny processes required for all legislative amendments.

Committee comment

2.168 The committee thanks the Minister for this response. The committee notes the Minister's advice that the relevant provisions reflect the current law, which has been previously subject to parliamentary scrutiny.

---

44 Schedule 1, item 77, proposed subsections 368E(3) and (4) of the *Migration Act 1958*.

2.169 The committee reiterates that the fact that the amendments mirror existing provisions which previous Parliaments have examined does not prevent this committee from examining the legislation to consider whether it meets its scrutiny principles. The committee is concerned to understand the reasons as to why the legislation currently before this Parliament limits the period of time in which an applicant can make a request for written statements and why the relevant time period is to be prescribed in regulations.

2.170 **The committee therefore restates its request for the Minister's advice as to why:**

- **the period of time in which an applicant may make a request that the Tribunal provide an oral statement in writing is limited; and**
- **the relevant time period is to be included in regulations, rather than on the face of the legislation.**

Limitation on judicial review[45]

2.171 Proposed paragraph 476(2)(e) seeks to provide that a decision of the Tribunal to dismiss an application under paragraph 362B(1A)(b) of the Migration Act will not be reviewable by the Federal Circuit Court. Decisions of the Tribunal under section 362B relate to circumstances where an applicant fails to appear before the Tribunal. Where an application is dismissed under paragraph 362B(1A)(b) it is possible for an applicant (within 14 days of receiving the notice of decision) to apply for reinstatement of the application. The Tribunal may then decide to reinstate the application (and it is taken never to have been dismissed) or to confirm the decision to dismiss. If the applicant does not, within 14 days of receiving the notice of decision, apply for reinstatement, the Tribunal must confirm the decision to dismiss the application.

2.172 The explanatory memorandum states that 'it would be an inappropriate use of the Federal Circuit Court's time and resources to determine whether the dismissal decision has been correctly made under paragraph 362(1A)(b) prior to one of the three possible outcomes above' (i.e. prior to possible reinstatement or confirmation to dismiss) and that an applicant may still seek review of the decision to dismiss in the ordinary jurisdiction of the High Court.[46]

2.173 The committee notes this explanation, although it generally does not consider the potential impact of review on a court's time and resources or the fact that the constitutionally entrenched minimal level of judicial review is still available in the High Court, to be sufficient justification for limiting the availability of judicial

---

45 Schedule 1, item 101, proposed paragraph 476(2)(e) of the *Migration Act 1958*.

46 Explanatory memorandum, p. 24.

review in the lower courts (which is more accessible and less costly for review applicants).

2.174 While the committee appreciates it may be inappropriate to provide for review of a decision where the Tribunal may still have a chance to reinstate the application, it is unclear to the committee whether, where the Tribunal confirms a decision to dismiss an application, these changes will mean that such a decision will not be reviewable.

2.175 In order to assist the committee in determining whether this limitation on the availability of judicial review is appropriate, the committee seeks the Minister's advice as to whether judicial review in the Federal Circuit Court will be available where a decision to dismiss an application is confirmed under paragraph 362B(1C)(b) or subsection 362B(1E) of the Migration Act.

Minister's response

2.176 The Minister advised:

> If an applicant fails to appear before the Tribunal, current paragraph 362B(1A)(b) allows the Tribunal to dismiss the application. The applicant may apply for reinstatement of the application within 14 days after receiving the notice of the decision to dismiss. If the applicant fails to apply for reinstatement, or applies for reinstatement and the Tribunal does not consider it appropriate to reinstate the application, subsection 362B(1E) and paragraph 362B(1C)(b) respectively require the Tribunal to confirm the decision to dismiss the application. The effect of this is that the decision under review is taken to be affirmed.
>
> The purpose of new paragraph 476(2)(e) is to ensure that the original decision to dismiss the application {the decision taken under paragraph 362B(1A)(b)) is not reviewable by the Federal Circuit Court. It does not change the jurisdiction of the Federal Circuit Court in relation to a latter decision of the Tribunal to confirm the dismissal. In reviewing the latter decision to confirm the dismissal, the Federal Circuit Court can consider whether there were any errors with the original dismissal decision. This is the case whether or not the applicant applies for reinstatement before the Tribunal confirms the dismissal.

Committee comment

2.177 The committee thanks the Minister for this response. The committee notes the Minister's advice that the purpose of the new paragraph is to ensure the original decision to dismiss the application is not reviewable by the Federal Circuit Court, but that this does not change the jurisdiction of the Court in relation to a latter decision of the Tribunal to confirm the decision to dismiss. The committee notes the Minister's advice that in reviewing this latter decision to confirm the dismissal the Federal Circuit Court can consider whether there were any errors with the original dismissal decision.

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

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

Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017

Purpose	This bill seeks to amend Acts relating to family assistance, social security, paid parental leave, veterans' entitlements, military rehabilitation and compensation and farm household support to: • increase the family tax benefit Part A standard fortnightly rate by $20.02 for each FTB child in the family aged up to 19; • from 1 July 2017 remove the entitlement to Family Tax Benefit Part B for single parent families who are not single parents aged 60 or more or grandparents or great-grandparents, from 1 January of the calendar year their youngest child turns 17; • phase out the family tax benefit Part A supplement for families with an adjusted taxable income of $80,000 a year or less by reducing it to $602.25 a year from 1 July 2016, and to $302.95 a year from 1 July 2017. It will then be withdrawn from 1 July 2018; • introduce a new child care subsidy; • reduce from 26 weeks to six weeks the proportional payments of pensions with unlimited portability outside Australia. After six weeks, payment will be adjusted according to the length of the pensioner's Australian working life residence; • cease pensioner education supplement from the first 1 January or 1 July after the day the Act receives Royal Assent; • cease the education entry payment from the first 1 January or 1 July after the Act receives Royal Assent; • implement the following changes to Australian Government payments: - maintain at level for three years from 1 July of the first financial year beginning on or after the day the bill receives Royal Assent the income free areas for all working age allowances (other than student payments) and for parenting payment single; and - maintain at level for three years from 1 January of the first calendar year beginning on or after the day the bill receives Royal Assent the income free areas and other means test thresholds for student payments, including the student income bank limits; • cease from 20 September the energy supplement payment

	to recipients who were not receiving a welfare payment on 19 September 2016 and close the energy supplement to new welfare recipients from 20 September 2017; • cease payment of pension supplement after six weeks temporary absence overseas and immediately for permanent departures; • enable the Secretary to require income stream providers to transfer a dataset to the Department of Human Services on a regular basis; • provide a social security income test incentive aimed at increasing the number of job seekers who undertake specified seasonal horticultural work; • extend and simplify the ordinary waiting period for working age payments; • provide for young unemployed people aged 22 to 24 to claim youth allowance instead of newstart allowance or sickness allowance until they turn 25 years of age; • introduce a four-week waiting period, for job ready young people who are looking for work, to receive income support payments; • require job seekers who do not have significant barriers to obtaining employment to complete pre-benefit activities during their four-week income support waiting period in order to receive payments; • introduce revised arrangements for the Paid Parental Leave scheme; and • remove the employer paymaster role in administering the Paid Parental Leave scheme
Portfolio	Social Services
Introduced	House of Representatives on 8 February 2017
Bill Status	Before Senate
Scrutiny principle	Standing Order 24(1)(a)(i)

2.180 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2017*. The Minister for Social Services responded to the committee's comments in a letter dated 2 March 2017 and the Minister for Education and Training responded in a letter dated 7 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Ministers' responses followed by the committee's comments on the responses. A copy of the letters is at Appendix 1.

Retrospective application (Schedule 3)[47]

Initial scrutiny – extract

2.181 Item 2 of the bill sets out the commencement provisions for each part of the bill. It provides that Schedule 3, Part 1 commences on 1 July 2016. The explanatory memorandum notes that the Schedule will phase out the Family Tax Benefit Part A supplement for families earning a certain amount from 1 July 2016. No explanation is provided in the explanatory memorandum as to why these provisions are to apply retrospectively, and no information is given as to the effect this retrospective application will have on individuals.

2.182 It is a basic principle of the rule of law that, in general, laws should only operate prospectively (not retrospectively). This is because people should be able to guide their actions on the basis of fair notice about the legal rules and requirements that will apply to them.

2.183 The committee therefore requests the Minister's advice as to why Part 1 of Schedule 3 is intended to commence retrospectively from 1 July 2016 and what effect this will have on individuals.

Minister for Social Services' response

2.184 The Minister advised:

> The schedule relates to the Family Tax Benefit Part A and Family Tax Benefit Part B end of year supplements. Supplement payments related to 2016-17 are not paid until after 1 July 2017. Supplement payments made after 1 July 2017 will be reduced slightly with a further reduction the following year before being completely phased out in 2018-19. This will let families know in advance that the supplements are being removed and allow them time to adjust to the changes. Additionally, from 1 July 2018 the maximum standard fortnightly rate for Family Tax Benefit Part A will be increased by $20.02. This ensures that families will have more timely assistance to help meet their day to day living expenses.

Committee comment

2.185 The committee thanks the Minister for Social Services for this response. The committee notes the Minister's advice that the relevant payments are not paid until after 1 July 2017 and so will not be reduced until after that date.

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

---

47 Item 2 (commencement) provision.

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

Reversal of evidential burden of proof (Schedule 4)[48]

Initial scrutiny – extract

2.188 Proposed section 201A requires a provider to whom a notice is given of a fee reduction decision to pass on the fee reduction amount within 14 days. Subsection (3) makes it an offence to fail to comply with this requirement. Subsection (2) provides an exception (an offence-specific defence) to this stating that this does not apply to a notice that includes a statement to the effect that the Secretary has decided to pay the fee reduction amount directly to the individual.

2.189 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.190 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

2.191 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of provisions which reverse the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.[49]

Minister for Education and Training's response

2.192 The Minister advised:

> I acknowledge the Committee's concerns in relation to the offence-specific defence established by proposed new section 201A of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act), as inserted by item 205 of Part 1 of Schedule 4 to the Bill, and your request for advice as to why an apparent 'reverse evidential burden' is being placed on a provider in this instance.
>
> A brief explanation of the circumstances in which section 201A will operate may assist. Before section 201A applies, providers need to have

48 Schedule 4, item 205, proposed subsection 201A.

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

received a notice of a fee reduction decision (the notice) under proposed section 67CE of the Administration Act. The notice is to contain matters outlined in proposed section 67CD, which relate to the Secretary making entitlement determinations for individuals in respect of Child Care Subsidy (CCS) or Additional Child Care Subsidy (ACCS) payments. Where the Secretary has made a determination that an individual is entitled to be paid an amount of CCS or ACCS, the notice will communicate this fact to the provider and include the exact amount of the individual's entitlement (the fee reduction amount).

The giving of the notice to providers setting out the individual's entitlement and amount of entitlement is a requirement of the Secretary under proposed subsection 67CE(4). Further, it is a requirement for such a notice to contain a statement that tells the provider whether the fee reduction amount has been paid directly to the individual under subsection 67EC(2). It is this type of notice that subsection 201A(2) refers to. Importantly, section 67CE notices will always state whether an amount has been paid directly to an individual because subsection 67CE(6) mandates this. This means the service will always be aware that the requirement to pass on or remit under subsection 201A(1) does not apply in respect of amounts paid directly to an individual, and the Secretary will always know, having issued the notice, that the exception applies prior to any decision to prosecute.

Note 2 to subsection 201A(2) does of course alert the reader to the operation of section 13.3 of the *Criminal Code Act 1995* (the Criminal Code Act), and that it is a standard drafting practice of the Office of Parliamentary Counsel to include such a note where there is an offence-specific defence, as per the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.* It is also important to note that section 13.3 of the Criminal Code Act would still operate in the absence of this note. However, for the section 201 A offence to apply, in practice, I do not consider subsection 13.3(3) of the Criminal Code Act will ever become enlivened, so as to place a reverse evidential burden on the provider. This is because the Secretary will always have access to the notice given to the service, and the contents of that notice will be a critical factor informing the Secretary's decision as to whether or not to prosecute. Where the notice given to the provider contains a statement that the individual has been paid the fee reduction amount directly under subsections 67CE(4) and (6), the Secretary will not prosecute as the section 201A(1) requirements to pass on or remit the fee reduction amount are clearly stated not to apply to the provider in that situation.

Therefore, the provider will not be required to adduce or point to this notice as evidence in the course of any prosecution, as no prosecution will commence. In any event, if there ever was to be a prosecution under section 201A, the Commonwealth would ensure, as a model litigant, that evidence sufficient to discharge the burden is adduced by the prosecution (being a copy of the subsection 67CE notice), effectively relieving the

provider of the evidentiary burden, as referred to in subsection 13.3(4) of the Criminal Code Act.

In summary, if there is a notice containing the statement, no prosecution will commence and therefore the question of the service bearing the evidential burden of producing this notice is unlikely to ever be raised.

Committee comment

2.193 The committee thanks the Minister for Education and Training for this response. The committee notes that proposed subsection 201A(2) provides that the requirement in subsection (1) (to pass on a fee reduction or remit a fee once given a notice) will not apply in relation to a notice which includes a statement that the Secretary has decided to pay the fee reduction amount directly to an individual. The committee notes the Minister's advice that the Secretary will always know, having issued the notice, that the exception applies prior to any decision to prosecute and the Secretary will consider this when deciding whether or not to prosecute. The committee also notes the Minister's advice that the provider will not be required to adduce or point to this notice as evidence, as no prosecution will commence and, even if it were to commence, the Commonwealth would ensure, as a model litigant, that evidence sufficient to discharge the burden is adduced by the prosecution.

2.194 The committee welcomes the Minister's advice that no prosecution would likely take place in circumstances where the Secretary has included a relevant statement in the notice. However, the committee notes that, as the provision is currently drafted, a reverse evidential burden is placed on the defendant in circumstances where it is not appropriate to reverse the burden of proof. The committee also notes that while it welcomes the Minister's advice that the Commonwealth would act as a model litigant, it considers that the model litigant rules are generally not intended to cover the handling of criminal prosecutions, and are not relevant to determining the appropriateness of reversing the burden of proof.

2.195 The committee considers it would be more appropriate for the offence provision to be drafted so that a reverse evidential burden was not placed on the defendant, particularly given it appears there is no basis for, and no intention that, the burden be reversed in this instance.

2.196 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 on proof in these circumstances.

Retrospective application (Schedule 9)[50]

Initial scrutiny – extract

2.197 Schedule 9 closes the payment of the Energy Supplement (ES) to new welfare recipients from 20 September 2017. However, people who received the ES on 19 September 2016 retain access to the supplement for so long as they have continuous entitlement to their ES-attracting payment on and after that date. However, people who start, or who do not have continuous entitlement, to receive their ES-attracting payment between 20 September 2016 and 19 September 2017 are treated differently. The explanatory memorandum is silent on why the provisions apply differently from 19 September 2016 onwards.

2.198 The committee requests the Minister's advice as to:

- why the date of 19 September 2016 is used to determine that some welfare recipients of Energy Supplement will be treated differently to others;
- whether the proposed amendments may be considered to apply with retrospective effect from that date; and
- if this has a retrospective effect, whether this may cause any welfare recipient disadvantage, and any justification for so doing.

Minister for Social Services' response

2.199 The Minister advised:

> On 3 May 2016, I announced that the Turnbull Government would ensure the Commonwealth was able to meet future National Disability Insurance Scheme (NDIS) costs through the deposit of $2.1 billion of 2016-17 Budget savings into the NDIS Savings Fund Special Account once it was established. Savings measures committed to the Savings Fund included closing carbon tax compensation for new welfare recipients from 20 September 2016 *(see* christianporter.dss.gov.au/media-releases/real-money-for-a-real-commitment-to-the-ndis).
>
> Schedule 9 of the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 seeks to implement that 2016-17 Budget measure as closely as possible by making 20 September 2016 the test date for determining which income support recipients will no longer be able to access the Energy Supplement from the commencement date of 20 September 2017 onwards. If the test date were moved forward from 20 September 2016 to 20 September 2017, the savings sought under Schedule 9 would be significantly reduced and less funds would be deposited into the NDIS Special Account.
>
> The intention of the 2016-17 Budget measure as originally announced was that the test date and commencement date of that measure were to be

50 Schedule 9, item 4, proposed section 22; items 67, 76, 89 and 91, 94 and 95.

the same date. However, a number of factors caused the original commencement date of 20 September 2016 to be shifted ahead to 20 September 2017. These include:

- the timing of the election and consequential change to the Parliamentary sitting schedule;
- difficulties in the passage of Schedule 21 of the Budget Savings Omnibus Bill 2016, as initially introduced into Parliament on 31 August 2016; and
- constraints on commencement dates because of the need for the Department of Human Services to schedule and test systems changes.

Notwithstanding the delay to the commencement date, Schedule 9 does not remove or seek to recover any previously paid or accrued entitlement to the Energy Supplement from any income support recipient and therefore does not have a retrospective effect.

The measure in Schedule 9 does not have a retrospective effect.

As my second reading speech indicates, the energy supplement was introduced on 20 March 2013 as part of the Household Assistance Package to compensate people for the introduction of the carbon tax-a tax which no longer exists. The carbon tax was repealed from 1 July 2014. The Government does not consider that it is reasonable to continue to compensate people, in the form of a carbon tax compensation payment, for a tax that no longer exists, particularly people who only started receiving income support after the carbon tax was abolished.

Committee comment

2.200 The committee thanks the Minister for Social Services for this response. The committee notes the Minister's advice regarding why the dates of 19 September 2016 and 20 September 2017 were chosen in relation to closing ongoing access to this payment. The committee also notes the Minister's advice that Schedule 9 does not remove or seek to recover any previously accrued entitlement to the Energy Supplement and therefore does not have a retrospective effect.

2.201 The committee notes that the payment will continue to be paid to all current recipients until the amendments in Schedule 9 (if passed) commence prospectively on 20 September 2017. On that basis, the committee makes no further comment on this matter.

Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016

Purpose	This bill seeks to amend the *Therapeutic Goods Act 1989* to: • enable the making of regulations to establish new priority pathways for faster approval of medicines, medical devices, biologicals and conformity assessment certificates in Australia; • enable the making of regulations to designate Australian notified bodies that would be able to appraise the suitability of the manufacturing process for medical devices manufactured in Australia and to consider whether such medical devices meet relevant minimum standards for safety and performance, as an alternative to the TGA undertaking such assessments; • allow certain unapproved therapeutic goods that are currently accessed by healthcare practitioners through applying to the Secretary for approval to be more easily obtained by practitioners; and • provide review and appeal rights for persons who apply to add new ingredients for use in listed complementary medicines
Portfolio	Health and Aged Care
Introduced	House of Representatives on 1 December 2016
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)

2.202 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2017*. The Minister responded to the committee's comments in a letter dated 2 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Broad delegation of legislative power[51]

Initial scrutiny – extract

2.203 Schedule 1 to the bill seeks to amend the *Therapeutic Goods Act 1989* (the TG Act) to enable sponsors of therapeutic goods to, 'in appropriate circumstances', make changes to information about their goods included in the Australian Register of Therapeutic Goods (the Register) by way of a notification to the Secretary, rather than by applying to seek the Secretary's approval for the variation. The main effect of including goods in the Register is that sponsors of those goods may lawfully import, export, manufacture and supply those goods.[52]

2.204 Items 1, 3 and 5 of Schedule 1 will have the effect that where a sponsor requests a variation to its entry on the Register, and the variation is of a kind specified in the regulations and meets the conditions prescribed in the regulations, then the Secretary must vary the entry on the Register.[53] No further detail is provided as to what kind of variation, or type of conditions, may be prescribed.

2.205 As there is no detail on the face of the bill or in the explanatory memorandum, in order to assess whether these provisions appropriately delegate legislative power the committee requests the Minister's advice as to the kinds of variation and conditions that it is envisaged may be prescribed in regulations made under these proposed provisions.

Minister's response

2.206 The Minister advised:

> The Committee has asked for advice as to the kinds of variations and conditions that it is envisaged may be prescribed in regulations made under the proposed provisions in Schedule 1 of the Bill.
>
> As the Explanatory Memorandum indicates, notifiable variations will be low risk, straightforward changes to product details, which do not impact on the safety of a product–consistent with the Review's recommendation that notifiable variations do not impact on a product's quality, safety or efficacy.
>
> Three examples of such notifiable variations that are anticipated to be prescribed for the purposes of the new products are:
>
> - the removal of a sponsor's nominated manufacturer;
> - a minor change to the container for a medicine, where tests show that the product's quality is not affected by the change;

51 Schedule 1, items 1, 3 and 5, proposed subsections 9D(2C), 9D(3AC), and 9D(3CB).

52 Explanatory memorandum, p. 11.

53 Explanatory memorandum, pp 11–12.

- minor changes to product labels, for example to include the full list of excipient ingredients in a medicine.

It is not expected that any conditions will be prescribed for the purposes of the new provisions, at least initially. As the system of notifiable variations (as opposed to the current system, under which all variations require pre-approval) will be new and untested for Australia, a period of observing the new approach is required before considering this aspect.

Committee comment

2.207 The committee thanks the Minister for this response. The committee notes the Minister's advice as to the type of notifiable variations that are anticipated to be prescribed in regulations.

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

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

Significant matters in delegated legislation[54]

Initial scrutiny – extract

2.210 Schedule 2 to the bill seeks to insert a new Part 4-4A into the TG Act relating to 'Australian conformity assessment bodies'. Conformity assessment is the examination of manufacturing practices and procedures to ensure that medical devices comply with applicable essential principles relating to the safety and performance of medical devices. The measures contained in this Part will allow the Therapeutic Goods Administration (TGA) to designate Australian companies to undertake conformity assessments of medical devices. These conformity assessments will be able to be used when the Secretary decides whether medical devices assessed by such companies can be included in the Register.

2.211 Proposed subsection 41EWA(1) provides that 'the regulations may make provision for and in relation to empowering the Secretary to make conformity assessment body determinations'. As such, this provides a broad regulation-making power which leaves most of the elements of how Australian companies will be able to be designated as 'conformity assessment bodies' to delegated legislation (which is not subject to the same level of parliamentary scrutiny as primary legislation).

54 Schedule 2, item 4, proposed section 41EWA.

Proposed subsection 41EWA(3) notes that the regulations may make provision for, among other things, the following matters:

- applications for conformity assessment body determinations;
- the assessment by the Secretary of whether a conformity assessment body determination should be made in response to an application; and
- application and assessment fees.

2.212 Furthermore, proposed subsection 41EWA(5) enables the regulations to prescribe conditions that may apply to a conformity assessment body determination. Examples of the conditions that may be prescribed in future regulations are provided in proposed subsection 41EWA(6) and include the power to enter, inspect and take recordings of premises and to require the production of information or documents.

2.213 Proposed subsection 41EWA(8) is intended to make it clear that despite the specific powers and activities permitted to be prescribed in new subsections 41EWA(3)–(7), none of these provisions are intended to limit the broad regulation making power in proposed subsection 41EWA(1).[55]

2.214 These provisions raise a number of scrutiny issues. There is no explanation as to why it is considered necessary to leave most of the elements of how Australian companies will be able to be designated as 'conformity assessment bodies' to delegated legislation (which is not subject to the same level of parliamentary scrutiny as primary legislation).

2.215 The committee's view is that significant matters, such as provisions requiring a body to allow entry and inspection of their premises and the production of documents, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's advice as to:

- why it is considered necessary to leave most of the elements of this new scheme to delegated legislation;
- what sanctions it is envisaged may be imposed on bodies that breach conditions of a conformity assessment body determination;
- who it is envisaged may be designated as an 'authorised person' for the purposes of the conditions outlined in proposed subsection 41EWA(6) and whether limits on who may be designated as an 'authorised person' can be included on the face of the bill;
- the type of consultation that it is envisaged will be conducted prior to the making of regulations establishing the 'conformity assessment body determinations' scheme and whether specific consultation obligations

55 Explanatory memorandum, pp 14–15.

(beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument); and

- how it is envisaged that the application and assessment fees will be calculated and whether the bill can be amended to provide greater legislative guidance as to how the fee amount is to be determined (including the method of indexation, if any) and/or to limit the fee that may be imposed by delegated legislation.

Minister's response

2.216 The Minister advised:

> The Committee has asked for advice on a number of aspects of Schedule 2 of the Bill:
>
> ***Delegated legislation***
>
> In relation to why it is considered necessary to leave most of the elements of this new scheme to delegated legislation, this will be a new scheme for Australia which will supplement, rather than replace, the existing pathways. Currently, conformity assessments are undertaken by the TGA and by European bodies with the oversight of their national governments. As such, there is a need to ensure the structure of the scheme is sufficiently flexible to incorporate the ability to respond efficiently to make any changes and refinements that may be needed as the scheme develops and as the TGA, the new Australian bodies and manufacturers gain experience in operating under it. Providing for the details of the new scheme to be set out in regulations is designed to provide this critical flexibility and adaptability, while still ensuring appropriate Parliamentary oversight.
>
> Such an approach would also share similarities with other schemes in Commonwealth legislation that also set out important matters in rules or regulations, such as the Australian trusted trader programme under the *Customs Act 1901* and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006,* and other regulatory schemes such as the *Biosecurity Act 2015* and the *Navigation Act 2012.* This is also how existing requirements of medical device regulation operate, with the Essential Principles for assessing safety, quality and performance, classification rules and conformity assessment procedures detailed in the Therapeutic Goods (Medical Devices) Regulations 2002.
>
> ***Sanctions***
>
> In relation to what sanctions may be imposed on Australian conformity assessment bodies that breach conditions of their determinations, the only such sanction would be the revocation of their conformity assessment body determination. This is consistent with the power in Schedule 2 of the Bill for regulations to make provision for and in relation to empowering the Secretary to vary or revoke a determination.

Any such action would be subject to review and appeal rights for the affected body, and it is envisaged there would also be a requirement for the Secretary to first give notice of any proposal to revoke, and to allow the body to make submissions on the proposed revocation, which the Secretary would have to consider before taking any action.

Authorised persons

In relation to who may be designated as an 'authorised person' for the purposes of the conditions outlined in proposed new subsection 41EW(6) in Schedule 2 of the Bill, this reference relates to the definition of that term in section 7A of the Act, which limits such persons to:

- an officer of the Department of Health, or an officer of another Commonwealth department or authority; or
- an officer of a department or authority of a State or a department or administrative unit or authority of a Territory, which has functions relating to health matters or law enforcement.

As such, there would not appear to be a need for limits on who may be so designated to be included in the Bill.

Consultation

In relation to what type of consultation will be conducted prior to the making of regulations to establish the Australian conformity assessment body determinations scheme, some public consultation on these details has already been undertaken. Documents were released for this purpose on the TGA's website (www.tga.gov.au) on 16 November 2016, and submissions closed on 11 January 2017. Twelve submissions were received, with respondents indicating general support for the initiative and for having criteria for becoming such a body that are aligned with the approach for equivalent bodies in Europe. Consultation outcomes will be published on the TGA's website later this year, along with copies of the submissions for respondents who have agreed to that publication.

This feedback will inform the nature of the scheme to be outlined in regulations in the second half of this year, and the TGA will work closely with stakeholders to conduct further, targeted consultations with potential bodies, and with peak bodies, ahead of those regulations being prepared.

As there is already a detailed consultation programme underway in relation to these measures, it would not appear to be necessary to specify further consultation requirements in the Bill that would apply in addition to those required under section 17 of the *Legislation Act 2003.*

Fees

In relation to how the application and assessment TGA fees will be calculated, as with existing TGA fees and charges provided for in regulations (for example, application fees for the inclusion of medical devices in the Register, and fees relating to varying an entry in the

> Register), these fees will be calculated on a cost recovery basis, in accordance with the Australian Cost Recovery Guidelines (CR Guidelines) - principally, this means the fees will reflect the amount of effort involved in processing applications and in assessing the suitability of applications for determinations for approval. A cost recovery impact statement (CRIS) will be completed and released on our website prior to charging commences. Subsection 59(2) of the Act also requires that any fees prescribed under the Act must not be such as to amount to taxation.
>
> As the TGA will also continue to undertake conformity assessments of medical devices itself after the Bill and the regulations commence, these fees will continue to be set on cost recovery basis.
>
> Any such fees will also be the subject of further, specific consultation with industry before being included in regulations.

Committee comment

2.217 The committee thanks the Minister for this response. The committee notes the Minister's advice that this will be a new scheme for Australia and there is a need to ensure the structure of the scheme is sufficiently flexible to be able to respond efficiently to make any changes and refinements that may be needed as the scheme develops.

2.218 The committee also notes the Minister's advice that the only sanction for bodies that breach conditions of a conformity assessment body determination will be revocation of their determination, and it is envisaged that there would be a requirement for the Secretary to first give notice of a proposal to revoke and allow submissions to be made. The committee notes that while it is 'envisaged' that due process rights will be followed by the Secretary in revoking a determination, there is nothing on the face of the legislation to limit it in this way.

2.219 The committee also notes the Minister's advice that an 'authorised person' under the legislation is an officer of any Commonwealth department or of a State or Territory department, authority or administrative unit with functions relating to health matters or law enforcement. The committee notes this is a very broad range of persons who can be classified as being an 'authorised person' under the scheme.

2.220 The Minister also advised that some public consultation has already been undertaken on the establishment of conformity assessment bodies and further, targeted consultations with potential bodies and peak bodies will be undertaken ahead of the regulations being prepared. The committee notes the Minister's advice that any fees imposed will be calculated on a cost recovery basis and the TG Act requires that any fees prescribed must not be such as to amount to taxation.

2.221 The committee considers that it would be appropriate if more detail regarding the new conformity assessment body determination scheme were included in the primary legislation rather than being left to delegated legislation. While the committee appreciates the need for flexibility to allow the scheme to be

adapted as necessary, it considers it would be appropriate for at least high-level limits to be set on the conditions that a conformity assessment body determination may be subject to.

2.222 The committee also considers it would be appropriate if the procedures to be followed by the Secretary in revoking or varying a conformity body assessment determination were set out in the primary legislation, or at a minimum, required to be included in the regulations.

2.223 The committee notes that proposed section 41EWA enables conditions to be imposed on a body allowing an 'authorised person' to enter premises used by the body. In such circumstances, the committee considers the definition of an 'authorised person', as including any Commonwealth officer, is extremely broad. The committee considers it would be appropriate, at a minimum, that the legislation require that the authorised person have specific qualifications or skills.

2.224 While the committee welcomes the Minister's advice that consultation is being undertaken on the establishment of the scheme in general, the committee reiterates its preference that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

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

2.226 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving most of the elements of how Australian companies will be designated as 'conformity assessment bodies' to delegated legislation.

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

Broad delegation of administrative powers[56]

Initial scrutiny – extract

2.228 Proposed subsection 41EWA(9) is intended to make it clear that while the Secretary is nominated as the person exercising powers or performing functions in connection with the designation of conformity assessment bodies, this does not

56 Schedule 2, item 4, proposed subsection 41EWA(9); Schedule 6, item 1, proposed subsection 25AAA(8); Schedule 12, item 55, proposed subsections 57(8) and (9).

preclude the regulations from allowing any or all of the Secretary's powers or functions to be delegated.[57]

2.229 The committee notes that similar issues arise in relation to:

- proposed subsection 25AAA(8)—delegation of the Secretary's functions and powers relating to therapeutic goods (priority applicant) determinations; and
- proposed subsections 57(8) and 57(9)—delegation of the powers of the Secretary under sections 19A, 32CO and 41HD of the TG Act.[58]

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

2.231 The committee requests the Minister's advice as to why it is considered necessary to allow for the delegation of any or all of the Secretary's functions or powers in these provisions and whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

Minister's response

2.232 The Minister advised:

> The Committee has asked why it is considered necessary to allow for the delegation of any or all the Secretary's functions or powers in relation to a number of provisions in the Bill.
>
> As with the majority of the Secretary's powers and functions under the Act, there is a practical need for appropriate delegations to ensure that decisions can be made in a timely fashion, and to support the objects of the Act which include the timely availability of therapeutic goods in, and exported from, Australia. Allowing for the delegation of the Secretary's functions and powers in the above areas of the Bill reflects these needs. The TGA makes many thousands of delegated decisions each year under the Act and regulations. For example in 2015-16, the TGA received 231 applications for new prescription medicines and extensions of indications

57 Explanatory memorandum, p. 15.

58 These sections relate to 'Exemptions where unavailability of therapeutic goods', 'Approvals where substitutes for biologicals are unavailable' and 'Approvals if substitutes for medical devices are unavailable or in short supply'.

> of medicines, 177 applications for over the counter medicines, 1,832 applications for class 2 medical devices, 344 applications for class 3 medical devices and 49 applications for active implantable medical devices. It is not practical for one or a small number of decision-makers to make these decisions.
>
> Consistent with the Department's overall approach to delegations under the Act and regulations, administrative processes are in place to ensure that the Secretary's powers and functions under the amendments proposed by the Bill will be delegated to officers at an appropriate level of seniority, and to ensure that staff exercise delegations appropriately.
>
> For example, the delegation of the Secretary's current power to approve the importation and supply of unapproved medicines, biologicals and medical devices for which substitutes are unavailable or in short supply is limited under regulations made for the purposes of current paragraphs 57(8)(b) and 57(9)(b) of the Act to two positions at the First Assistant Secretary level, and currently the Principal Medical Adviser, of the Department's Health Products Regulation Group. Any regulations made for the purposes of the proposed new subsections 57(8) and (9) of the Bill would maintain this approach.
>
> As such, it would not appear to be necessary for the Bill to expressly limit the scope of powers that may be delegated or limit the positions to whom these powers may be delegated, as this will be effected through administrative procedures that are already operating effectively in relation to existing powers.

Committee comment

2.233 The committee thanks the Minister for this response. The committee notes the Minister's advice that there is a practical need for appropriate delegations and that administrative processes are in place to ensure the powers will be delegated to officers at an appropriate level of seniority, and it is intended that any new regulations will maintain the approach regarding certain delegations.

2.234 The committee reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, a limit is set on the scope and type of powers that might be delegated. While the committee notes 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 notes that it would be possible to amend the bill to provide that the regulations may only allow for the delegation of the Secretary's powers and functions (or at least certain significant powers and functions) to members of the Senior Executive Service.

2.235 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as

extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.236 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of enabling all of the Secretary's powers and functions to be delegated to any person as set out in regulations.

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

Strict liability offences[59]

Initial scrutiny – extract

2.238 Items 4, 12 and 24 of Schedule 3 introduce three new provisions which make it an offence for a person with certain notification obligations to omit to do an act and that omission breaches those requirements. Each offence is stated to be one of strict liability and subject to 10 penalty units. The explanatory memorandum provides no justification as to why the offences are subject to strict liability.

2.239 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

2.240 The committee requests a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[60]

Minister's response

2.241 The Minister advised:

> The Committee has asked for a justification for each of the proposed strict liability offences at items 4, 12 and 24 of Schedule 3 of the Bill - these offences would apply where a health practitioner who is authorised to supply - respectively - unapproved medicines, biologicals or medical

59 Schedule 3, items 4, 12, and 24, proposed subsections 19(7G), 32CM(7G) and 41HC(6F) of the *Therapeutic Goods Act 1989*.

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

devices, to their patients under the amendments in Schedule 3 fails to notify the Secretary of having done so within 28 days after the supply.

Each of these offences would appear to be consistent with the criteria outlined in the Attorney-General's Department's Guide to Framing Commonwealth Offences in relation to when it is appropriate for st1ict liability offences to apply:

- they are not punishable by imprisonment;
- the maximum penalty is less than 60 penalty units for an individual - for each of the offences, the maximum penalty is only 10 penalty units for an individual;
- the offences will enhance the effectiveness of the scheme by deterring practitioners from failing to notify the TGA of the details it needs to verify compliance and that correct kinds of medicines are being supplied to the kinds of patients they are authorised for under the scheme; and
- without such notifications the TGA will not be able to ensure that the scheme is operating safely for patients.

The legislation already contains a small number of other, long standing strict liability offences with similarly low maximum penalty levels - for example, if a sponsor of a prescription medicine or an over the counter medicine supplies their medicine without consumer medicine information, or if a sponsor of a medicine manufactured using a human embryo does not include certain information with their product when supplying it (regulations 9A and 9B of the Therapeutic Goods Regulations 1990.

In addition, the defence of mistake of fact would also apply, under the Criminal Code, in respect of these strict liability offences.

Committee comment

2.242 The committee thanks the Minister for this response. The committee notes the Minister's advice that the strict liability offences are not punishable by imprisonment and the maximum penalty is less than 60 penalty units for an individual (in this instance, 10 penalty units). The committee also notes the Minister's advice that the offences will enhance the effectiveness of the scheme and without such notifications the TGA will not be able to ensure that the scheme is operating safely for patients.

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

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

Consultation prior to making delegated legislation[61]

Initial scrutiny – extract

2.245 Schedule 4 seeks to repeal subsections 10(4) and 36(3) of the TG Act.

2.246 The repeal of subsection 10(4) would remove the requirement for the Minister to consult with a committee prior to making standards for medicines and other therapeutic goods. In explaining the repeal of this provision, the explanatory memorandum states that a committee known as the Therapeutic Goods Committee 'will cease to exist on 1 January 2017' and that it will be replaced by other statutory committees with functions that include providing advice on a range of matters including standards for relevant types of therapeutic goods. The explanatory memorandum also notes that 'the Minister will have the option of consulting any one or more of the new replacement committees about matters that include standards'.[62]

2.247 Current subsection 10(4) does not refer to a specific committee, but rather states that the Minister must not make a standard for medicines or therapeutic goods 'unless the Minister has consulted with respect to the proposed action with a committee established by the regulations to advise the Minister on standards'. It is therefore not clear why the ceasing of the Therapeutic Goods Committee, given it will be replaced by other committees established by the regulations, necessitates the removal of the consultation requirement in subsection 10(4).

2.248 Additionally, the repeal of subsection 36(3) will remove the reference to the Minister's discretion to obtain advice from a statutory committee before determining principles to be observed in the manufacture of therapeutic goods for use in humans.

2.249 Where the Parliament delegates its legislative power in relation to important matters, such as the making of standards for medicines and therapeutic goods, the committee generally considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the legislation and that compliance with these obligations is a condition of the validity of the legislative instrument.

---

61 Schedule 4, items 1 and 2, repeal of subsection 10(4) and 36(3) of the *Therapeutic Goods Act 1989*.

62 Explanatory memorandum, p. 23

2.250 The committee requests the Minister's advice as to why it is necessary to remove:

- the requirement to consult a committee prior to the making of standards for medicines and therapeutic goods (when it is intended there will be replacement committees for the Therapeutic Goods Committee) (repeal of subsection 10(4)); and
- the reference to the Minister's discretion to obtain advice from a statutory committee before determining principles to be observed in the manufacture of therapeutic goods for use in humans (repeal of subsection 36(3)).

Minister's response

2.251 The Minister advised:

> The Committee has asked why it is necessary to remove the current requirement in subsection 10(4) of the Act for the Minister to consult a committee before making standards for therapeutic goods (other than medical devices), and the current reference in subsection 36(3) to the Minister's discretion to consult a committee before making manufactu1ing principles.
>
> Not all standards or manufacturing principles, or amendments to these instruments, need the technical input of an advisory committee -for example, where a proposed standard has already been the subject of detailed, in-depth consultation with industry, consumers and health practitioners, or where a proposed amendment would mainly update references to international standards that stakeholders are already familiar with and support the adoption of.
>
> Removing the obligation to always consult a committee will streamline the standard–making process, but will still leave the decision-maker the discretion to consult an advisory committee on a proposed standard if there are issues that would benefit from that advice. Removing the reference to consulting a committee in relation to manufacturing principles will avoid confusion as to whether or not this is a necessary step, but will also not preclude decision-makers from first consulting an advisory committee before making these legislative instruments if they wish to do so.
>
> As pointed out by the Committee, under the recent regulation amendments the Therapeutic Goods Committee no longer exists, but the functions of a number of new or continuing advisory committees were amended to incorporate the capacity to provide advice and make recommendations on matters relating to standards (e.g. the Advisory Committee on Medicines, and the Advisory Committee on Complementary Medicines (sections 35A and 39A of the Therapeutic Goods Regulations 1990 refer).

> Such committees will continue to be consulted for significant standards and manufacturing principles, and major changes to such instruments (such as changes to adopt a new set of requirements for sponsors), and the TOA will develop guidelines to explain the process for this consultation.

Committee comment

2.252 The committee thanks the Minister for this response. The committee notes the Minister's advice that not all standards or manufacturing principles need the technical input of an advisory committee and removing the obligation to always consult will streamline the standard-making process, but still leaves a discretion to consult if that is considered beneficial. The Minister also advised that such committees will continue to be consulted for significant standards and manufacturing principles and major changes to such instruments, and that guidance will be developed to explain the process for such consultation.

2.253 The committee appreciates that there may be occasions on which it is not necessary to seek the input of an advisory committee before making or amending certain standards. However, the committee considers that, in light of the proposed removal of the obligation to consult an advisory committee, it would be appropriate for guidance regarding the process for consultation to be contained in a legislative instrument, and that the bill be amended to reflect this.

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

2.255 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of removing the requirement for the Minister to consult with an advisory committee before making standards for medicines and other therapeutic goods.

Fees in delegated legislation[63]

Initial scrutiny – extract

2.256 Schedule 5 to the bill seeks to implement a recommendation of the Expert Panel Review of Medicines and Medical Devices Regulation in relation to providing review and appeal rights for persons who apply to have new ingredients permitted for use in listed complementary medicines. Currently, a person may apply to the

63 Schedule 5, item 2, proposed paragraphs 26BE(2)(d) and 26BE(3)(b) of the *Therapeutic Goods Act 1989*.

Minister for a variation to the permissible ingredients legislative instrument made by the Minister under section 26BB of the TG Act. Items 1 and 2 seek to incorporate a new step for the Secretary to make a recommendation to the Minister about such variations in order to accommodate the provision of review and appeal rights for applicants for new ingredients.

2.257 The committee welcomes the addition of these review and appeal rights.[64] However, the committee notes that the bill provides that both an application and evaluation fee may be prescribed in the regulations. There is no guidance in the legislation as to how the fee amount might be determined, and no explanation has been provided as to why it is necessary to charge a fee for the application plus a fee for the evaluation itself. The committee understands it may be possible to explicitly state on the face of the bill that the amount of fee be limited to cost recovery,[65] to set a maximum limit on the fee that may be imposed, to prescribe a formula by which the fee amount is calculated or, in the case of indexation, to include the method of calculating indexation on the face of the bill. In some legislation a provision is included which provides that 'a fee must not be such as to amount to taxation'. Office of Parliamentary Counsel Drafting Direction 3.6 states that:

> AGS has advised that it is inherent in the concept of a 'fee' that the liability does not amount to taxation. However, it is quite common to put such a provision in any way to avoid confusion and to emphasise the point that we are dealing with fees and not taxes. AGS has expressed the view that such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.[66]

2.258 While the committee notes that the setting of the level of fees is often left to delegated legislation, the committee requests the Minister's advice as to whether consideration has been given to providing greater legislative guidance as to how the fee amount (and the method of indexation, if any) is to be determined. The committee also requests the Minister's advice why it considered necessary to provide for an application *and* an evaluation fee, rather than providing for only a single fee.

Minister's response

2.259 The Minister advised:

> The Committee has asked whether consideration has been given to providing greater legislative guidance on the composition of the

64 In line with principle 1(a)(iii) of the committee's terms of reference.

65 See, for example, subsection 32(4) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* which provides that: 'The amount or rate of a fee must be reasonably related to the expenses incurred or to be incurred by the Commonwealth in relation to the application or notice to which it relates, and must not be such as to amount to taxation'.

66 Office of Parliamentary Counsel, *Drafting Direction 3.6*, October 2012, p. 38.

application and evaluation fees for applications for the approval of new ingredients for use in listed complementary medicines (including the method of indexation), and on why it is necessary to have both such fees .

This was not considered necessary, as TOA fees and charges - including fees relating to requests for new ingredients - are calculated on a cost recovery basis, in accordance with the CR Guidelines. The current evaluation fees for applications for new ingredients for listed complementary medicines - which will remain in place after the Bill-reflect the cost to TGA of evaluating the suitability of a possible new ingredient, including assessing the dossiers of information provided in support of the application.

Further, subsection 59(2) of the Act also requires that any fees prescribed under the Act must not be such as to amount to taxation. This provision would appear to address the concerns raised by the Committee in paragraph 1.77 of its Scrutiny Digest No. 1 of 2017.

There are currently no application fees for these applications. If such fees are proposed in the future, they would be expected to below, and to be based on the cost of the administrative and technical screening of new ingredient applications before an evaluation commences–for example, the processing cost of examining whether an application has been made in accordance with the relevant approved form, and whether it contains enough information to proceed with the evaluation. An evaluation fee would not be required until we are ready to commence evaluation of the application. This meets the cost recovery principles and provides more certainty and transparency to those who pay the fees. This approach is also consistent with the current regulatory requirements for other TGA fees.

The Bill does not refer to the method of indexation, because the TGA consults with industry at bilateral meetings every year on proposed changes to TGA fees and charges for the next financial year. On most occasions, annual increases to TGA fees and charges are based on an indexation formula based on the Australian Bureau of Statistics' Wage Price Index and Consumer Price Index (50 per cent for each), and industry is familiar with this approach.

Committee comment

2.260 The committee thanks the Minister for this response. The committee notes the Minister's advice that all fees and charges are calculated on a cost recovery basis and the TG Act provides that any fees prescribed must not be such as to amount to taxation. The committee also notes the Minister's advice as to why two fees may be necessary.

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

Reversal of evidential burden of proof[67]

Initial scrutiny – extract

2.262 Proposed subsections 41AD(2) and (3) and 41AE(2) and (3) provide exceptions (offence-specific defences) to offences relating to the provision of false or misleading information or documents. These offences carry relatively significant penalties—imprisonment for 12 months or 1,000 penalty units, or both.

2.263 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.264 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

2.265 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[68]

Minister's response

2.266 The Minister advised:

> Schedule 12 of the Bill introduces a new power for the Secretary to require information and documents from holders of manufacturing licences, including for example in relation to the batch numbers and expiry dates of goods they have manufactured.
>
> The Committee has asked why it is proposed to include offences for the provision of false or misleading information or documents in response to such a request that place an evidential burden on the manufacturer to point to some evidence that the information or documents was not false or misleading, if relying on the exceptions to those offences in subsections 41AD(2) or (3), or 41AE(2) or (3).
>
> These offences place this evidential burden on the manufacturer principally because such evidence - i.e. some reason why the material was

67 Schedule 12, item 34, proposed subsections 41AD(2) and (3) and 41AE(2) and (3) of the *Therapeutic Goods Act 1989*.

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

not false or misleading - would likely be peculiarly within the knowledge of the manufacturer, and not known to the TGA.

These offences would also appear to be consistent with the Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, as they only impose an evidential burden, not a legal burden, on defendant manufacturers - the Guide notes that an evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden).

The offences would also be consistent with existing offences in the Act for providing false or misleading information or documents about goods that are exempt from registration or listing (subsections 31D(2) and 31E(2) of the Act refer), and with existing offences in the Act that provide a defence of reasonable excuse for a defendant (subsections 31(4A), 32JB(1A) and 41JB(3A) of the Act refer).

Committee comment

2.267 The committee thanks the Minister for this response. The committee notes the Minister's advice that the relevant information would likely be peculiarly within the knowledge of the manufacturer, and not known to the TGA.

2.268 It is not clear to the committee why the relevant information would likely be peculiarly within the knowledge of the manufacturer. The offences in question largely arise where a person gives information or a document to the Secretary and does so knowing that it is false or misleading (or omits something without which the information is misleading). However, this does not apply if the defendant raises evidence that demonstrates that the information or document is not false or misleading. Whether information or a document is false or misleading would appear to be an objective fact (which the prosecution would generally need to prove) rather than something only within the knowledge of the defendant. The exception would also appear to be central to the question of culpability for the offence. The committee notes that the *Guide to Framing Commonwealth Offences* states that creating a defence is more readily justifiable where the matter in question is not central to the question of culpability.[69]

2.269 In light of this, 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 these instances.

---

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

Privilege against self-incrimination[70]

Initial scrutiny – extract

2.270 Proposed section 41AG provides that a person is not excused from giving information or producing a document under a section 41AB notice on the ground that the giving of the information or the production of the document would tend to incriminate the person or expose the person to a penalty. This provision therefore overrides the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.[71]

2.271 A use and derivative use immunity is included in proposed subsection 41AG(2) as it provides that the information or documents produced, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings. Although the committee welcomes the inclusion of the use and derivative use immunity, the committee expects that the explanatory memorandum should provide a justification for removing the privilege against self-incrimination.

2.272 The committee requests the Minister's advice as to why it is proposed in the bill to abrogate the privilege against self-incrimination, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[72]

Minister's response

2.273 The Minister advised:

> The Bill would also provide, in new section 41AG, that a manufacturer is not excused from providing information or a document to the Secretary on the ground that doing so would tend to incriminate them or expose them to a penalty. The Committee has asked why it is proposed to abrogate the privilege against self-incrimination in this provision.
>
> This information is likely to be important to support the effective regulation of the manufacturing of therapeutic goods under licence in Australia and safeguard public health, particularly as it relates to significant matters such as the quality assurance and quality control measures used by a manufacturer, and whether a manufacturer has been observing the manufacturing principles (minimum requirements relating to quality and safety).

---

70 Schedule 12, item 34, proposed section 41AG of the *Therapeutic Goods Act 1989*.

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

72 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 94–99.

> The information may well also be largely uniquely known to the manufacturer, and if the TGA were not to be able to require its provision in light of the privilege, it could be quite difficult for the information to be identified through other means–principally through more frequent audits of manufacturers' premises (this would also be more costly for manufacturers, as fees apply in respect of such audits). Further, if the Secretary were to rely on information that is false or misleading to not suspend or revoke a manufacturing licence, that could potentially have quite serious consequences for public health and safety.
>
> Abrogating the privilege in the manner proposed in section 41AG would also appear consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, in that it applies in respect of persons alleged to have given false or misleading information (or documents), and is constrained by a use and derivative use immunity in that the information or documents will not be admissible in evidence against the person in most proceedings.
>
> The approach in section 41AG is also consistent with existing provisions in the Act that affect the privilege in relation to the provision of false or misleading information about goods that are exempt from registration or listing in the Register (section 31E) or about biologicals that are included in the Register or proposed to be so included (section 32JD) or in relation to medical devices (sections 41JC and 41JJ of the Act refer).

Committee comment

2.274 The committee thanks the Minister for this response. The committee notes the Minister's advice that the information is likely to be important to support the effective regulation of the manufacturing of therapeutic goods and safeguard public health and may be largely uniquely known to the manufacturer. The Minister has also advised that it could be quite difficult for the information to be identified through other means, and there is a use and derivative use immunity available (as the information or documents will not be admissible in evidence against the person in most proceedings).

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

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

Treasury Laws Amendment (2016 Measures No. 1) Bill 2016

Purpose	This bill seeks to amend various Acts relating to insurance, corporations, taxation and financial services to: • clarify that losses attributable to terrorist attacks using chemical or biological means are covered by the terrorism insurance scheme; • make employee share scheme disclosure documents lodged with the Australian Securities and Investments Commission (ASIC) not publicly available for certain start-up companies; • add six organisations as deductible gift recipients; • provide ongoing income tax relief to ex gratia disaster assistance payments to eligible New Zealand special category visa (subclass 444) (SCV) holders; • provide greater protection for retail client money and property held by financial services licensees in relation to over-the-counter derivative products
Portfolio	Treasury
Introduced	House of Representatives on 1 December 2016
Bill status	Before the Senate
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.277 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2017*. The Minister responded to the committee's comments in a letter received 8 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Consultation prior to making delegated legislation[73]

Initial scrutiny – extract

2.278 Proposed subsection 981L(1) provides that ASIC 'must not make a client money reporting rule [delegated legislation] unless ASIC has consulted the public about the proposed rule'. The explanatory memorandum notes that 'this ensures that stakeholders have the opportunity to review and comment on draft rules before

73 Schedule 5, item 14, proposed section 981L of the *Corporations Act 2001*.

they are made'.[74] Proposed subsection 981L(2) does not limit the ways in which ASIC may comply with the consultation obligation, however it provides that ASIC is taken to comply with the obligation if ASIC makes the proposed rule available on its website and invites the public to comment on it.

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

2.280 The committee therefore welcomes the inclusion of the consultation obligation in proposed subsections 981L(1)–(2). However, the committee notes that proposed subsection 981L(3) provides that a failure to comply with the consultation obligation does not invalidate the client money reporting rule. The importance of consultation in this instance is emphasised in the explanatory memorandum, which states that ASIC would be expected to consult the Office of the Australian Information Commissioner where proposed rules potentially involve the handling of personal information that could impact on the privacy of individuals.[75]

2.281 The committee requests the Minister's advice as to why a 'no-invalidity' clause has been included in proposed section 981L of the bill so that a failure to appropriately consult prior to making a client money reporting rule will not invalidate the rule.

Minister's response

2.282 The Minister advised:

> Consultation with industry and consumer representatives is important to the Government, because open and effective discussions with stakeholders are fundamental to successful regulation. The Australian Securities and Investments Commission (ASIC) consults with stakeholders in the formulation of regulatory instruments it proposes to make as a matter of course. This is reflected in the large number of consultation papers available on ASIC's website.
>
> The Government expects that ASIC will consult with stakeholders in developing the client money rules and for this reason has included explicit consultation requirements in the Bill. Proposed section 981L of the Bill is designed to promote certainty among regulated entities by ensuring that a technical failure to comply with the consultation requirements does not affect the validity of the client money rules. It also provides ASIC with the flexibility to use targeted consultation with affected stakeholders in appropriate situations.

74 Explanatory memorandum, p. 80.

75 Explanatory memorandum, p. 80.

> There are additional safeguards to ensure that ASIC undertakes proper consultation, including that the client money rules are disallowable by the Parliament. ASIC is also regularly called to appear before Parliamentary Committees to explain its actions.

Committee comment

2.283 The committee thanks the Minister for this response. The committee notes the Minister's advice that proposed section 981L of the Bill is designed to promote certainty among regulated entities by ensuring that a technical failure to comply with the consultation requirements does not affect the validity of the client money rules and provides ASIC with the flexibility to use targeted consultation The committee also notes the Minister's advice that there are safeguards to ensure proper consultation, including that the client money rules are disallowable and ASIC may be called before parliamentary committees.

2.284 The committee takes this opportunity to reiterate its general view that where the Parliament delegates its legislative power in relation to significant regulatory schemes it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. Providing that the instrument remains valid and enforceable even if the standards body fails to comply with the consultation requirements undermines including such standards in the legislation.

2.285 While the committee welcomes the safeguards mentioned by the Minister, the committee notes that they do not offer a direct method to enforce the consultation requirements. Although the instrument may be disallowable, it may be difficult for parliamentarians to know whether appropriate consultation has taken place within the timeframe for disallowance. Additionally, a parliamentary committee would not have the power to direct that consultation be undertaken before client money rules are made.

2.286 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding review of any failure by ASIC to appropriately consult before making client money rules.

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

Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017

Purpose	This bill seeks to amend various taxation Acts to: • introduce a new diverted profits tax; • increase the administrative penalties that can be applied by the Commissioner of Taxation to significant global entities; • update the reference to *Organisation for Economic Cooperation and Development* (OECD) transfer pricing guidelines in Australia's transfer pricing rules to include the 2016 OECD amendments to the guidelines
Portfolio	Treasury
Introduced	House of Representatives on 9 February 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)

2.288 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2017*. The Treasurer responded to the committee's comments in a letter dated 6 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Treasurer's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Review rights[76]

Initial scrutiny – extract

2.289 Item 1 of Schedule 1 proposes to exclude merits review before the Administrative Appeals Tribunal (AAT) of decisions made by the Commissioner of Taxation in assessing diverted profits tax (DPT). Item 44 of Schedule 1 proposes to insert a new Part into the *Taxation Administration Act 1953* (TA Act) that sets out that an entity subject to an assessment of DPT can appeal to the Federal Court regarding the assessment.

2.290 The explanatory memorandum explains that the combined effect of these proposed amendments is that in relation to DPT assessments any taxation objection must be an appeal to the Federal Court and not to the AAT.[77] However, in general, taxation legislation provides for its own comprehensive scheme of review of taxation

76 Schedule 1, items 1 and 44.

77 Explanatory memorandum, p. 58.

assessments, enabling taxpayers to object to an assessment by way of an appeal to the AAT or the Federal Court.[78] The general position is that taxpayers may elect whether to pursue their appeal in the AAT or the Federal Court.

2.291 The explanatory materials do not indicate why the taxpayer may not, as is usually the case, elect to take their objection to the AAT.

2.292 The committee seeks the Treasurer's explanation as to why merits review before the AAT is excluded in relation to diverted profits tax assessments and whether the inability to seek review in the AAT may, in any way, change the nature of the substantive outcome or the remedy for a taxpayer who succeeds in proceedings under Part IVC of the TA Act objecting to an assessment.

Minister's response

2.293 The Treasurer advised:

> **The exclusion from merits review before the AAT in relation to diverted profits tax assessments**
>
> The Committee is concerned that items 1 and 44 of Schedule 1 of the Bill have the combined effect of requiring a taxation objection against a diverted profits tax assessment to be an appeal to the Federal Court rather than to the AAT.
>
> The *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) does not apply to decisions relating to taxation assessments. Item 1 of Schedule 1 will add decisions made under Part 3-30 of the *Taxation Administration Act 1953* (TA Act) (inserted by item 44 of Schedule 1 of the Bill) to the classes of decisions to which the ADJR Act does not apply. This ensures that the judicial review processes available for assessments of diverted profits tax are set out in the TA Act, consistent with the approach that generally applies to the review of taxation assessments.
>
> The provisions inserted by item 44 of Schedule 1 provide applicants with an appropriate avenue to object to a diverted profits tax assessment by appealing to the Federal Court (and effectively prevent merits review before the AAT). This is appropriate because arrangements affected by the diverted profit tax are of a very complex nature and taxpayers who enter into such arrangements are large multinational entities. Therefore, it is more appropriate for the review of diverted profits tax assessments to be undertaken by the Federal Court (rather than the AAT). This is not expected to change the nature of the substantive outcome or the remedy for a taxpayer who succeeds in proceedings under Part IVC of the TA Act objecting to an assessment in any way.

78 This scheme is set out in Part IVC of the *Taxation Administration Act 1953.*

Committee comment

2.294 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is more appropriate that appeals regarding diverted profits tax assessments go to the Federal Court than the AAT as the affected arrangements are very complex and the taxpayers who enter into these arrangements are large multinational entities. The committee also notes that generally taxpayers can choose whether to appeal to the AAT or Federal Court and notes the Minister's advice that exclusion of appeals to the AAT is not expected to change the nature of the substantive outcome or the remedy available to a taxpayer.

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

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

Retrospective application[79]

Initial scrutiny – extract

2.297 Schedule 3 of the bill seeks to update Australia's transfer pricing rules to include updated OECD guidance materials. Item 4 provides that the amendments are applied to income years starting on or after 1 July 2016. The explanatory materials do not justify applying this retrospectively, except to note that the measure was announced on 3 May 2016 in the 2016-17 Budget.

2.298 In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for the law and the underlying values of the rule of law.

2.299 However, in outlining scrutiny issues around this matter previously, the committee has been prepared to accept that some amendments may have some retrospective effect when the legislation is introduced if this has been limited to the introduction of a bill within six calendar months after the date of that announcement. In fact, where taxation amendments are not brought before the Parliament within six months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution

79 Item 4, Schedule 3.

No. 44). In this case the amendments proposed by Schedule 3 were announced over six months prior to the bill's introduction.

2.300 The committee seeks the Treasurer's advice as to why the amendments are proposed to apply retrospectively to income years starting on or after 1 July 2016 and whether this will cause detriment to any taxpayer.

Minister's response

2.301 The Treasurer advised:

> **Timing of application of the update to Australia's transfer pricing rules**
>
> The Committee has noted that item 4 of Schedule 3 provides that the provisions in Schedule 3 of the Bill will apply to income years commencing on or after 1 July 2016.
>
> The provisions in Schedule 3 will amend the *Income Tax Assessment Act 1997* to update Australia's transfer pricing rules to include the OECD Base Erosion and Profit Shifting (BEPS) amendments to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the OECD Guidelines). Incorporation of the OECD Guidelines will provide taxpayers with greater clarity on how intellectual property and other intangibles should be priced, and ensure the transfer pricing analysis reflects the economic substance of the transaction rather than just the contractual form.
>
> The measure applies from income years commencing on or after 1 July 2016 as it provides greater certainty to taxpayers in relation to the pricing of cross-border transactions and reinforces Australia's commitment to implementation of the BEPS measures. In this regard, since the release of the OECD BEPS recommendations in October 2015, taxpayers have been expecting the imminent implementation of the proposal. In February 2016, the Government conducted a public consultation process on the proposal. During that consultation the proposal received broad support.
>
> Further, the measure will not have any practical impact until taxpayers lodge income tax returns for the 2016-17 income year. In this regard, the majority of affected taxpayers are large corporate entities that are not required to lodge income tax returns for the 2016-17 income year until early 2018 or later. A deferral on the application date may disadvantage taxpayers that have been preparing for the changes to keep pace with counterparties in other countries that have adopted the latest OECD Guidelines.

Committee comment

2.302 The committee thanks the Minister for this response. The committee notes the Minister's advice that the measure is intended to provide taxpayers with greater clarity on how intellectual property and other intangibles should be priced. The committee also notes the Minister's advice that the majority of affected taxpayers are large corporate entities and that the measure will not have any practical impact

until taxpayers lodge income tax returns for the 2016-17 income years (which for such entities is not required until at least early 2018), and a deferral on the application date may disadvantage taxpayers that have been preparing for the change.

2.303 However, the committee notes that the Treasurer's response did not indicate whether the retrospective application of this measure will cause detriment to any taxpayer.

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

2.305 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the retrospective application of the amendments in Schedule 3 of the bill.

VET Student Loans Bill 2016

Purpose	This bill seeks to introduce a new student loan program to replace the VET FEE-HELP loan scheme from 1 January 2017
Portfolio	Education and Training
Introduced	House of Representatives on 13 October 2016
Bill status	Received Royal Assent on 7 December 2016
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.306 The committee dealt with this bill in the amendments section of *Scrutiny Digest No. 1 of 2017*. The Minister responded to the committee's comments in a letter dated 1 March 2017. Set out below are extracts from the committee's initial scrutiny of the amendments to the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Significant matters in delegated legislation[80]

Initial scrutiny – extract

2.307 Government amendment 15 introduced a new Division into the bill which sets out the mechanism by which an external dispute resolution scheme for approved course providers can be established and enforced. New clause 42A empowers the Minister to specify, by legislative instrument, a scheme that provides for the investigation and resolution of disputes relating to VET student loans and VET FEE-HELP assistance, and compliance by providers with the *VET Student Loans Act 2016* and the *Higher Education Support Act 2003*.

2.308 The supplementary explanatory memorandum notes that rules made under the bill will be able to set out matters that the Minister may or must take into account in specifying an external dispute resolution scheme, including matters such as the accessibility of the scheme to complainants, its independence from approved coursed providers, its fairness to affected parties, transparency of its operations, it efficiency, and its effectiveness at resolving disputes.[81]

2.309 New clause 42C provides that an approved course provider must comply with the external dispute resolution scheme. If a provider does not comply with the scheme administrative sanctions may be imposed on the provider, including

80 Government amendment 15—Introduction of new Division 4A (External dispute resolution).

81 Supplementary explanatory memorandum, p. 3.

suspension of loan payments, or suspension or cancellation of the provider's approval.

2.310 The committee's consistent view is that significant matters, such as the establishment of an external dispute resolution scheme (compliance with which can be enforced through sanctions), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Where significant matters are proposed to be included in delegated legislation the committee prefers that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

2.311 Although the committee notes that the bill has already passed, the committee still requests the Minister's advice as to:

- why the establishment of this external dispute resolution scheme is left to delegated (rather than primary) legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of the rules establishing the external dispute resolution scheme.

Minister's response

2.312 The Minister advised:

> ***Establishment by delegated legislation***
>
> Prior to passage of the *VET Student Loans Act 2016* (VSL Act) on 1 December 2016, amendment (15) of Sheet GX140, moved by the Government, inserted a new Division 4A into Part 4 (Approved Course Providers) of the VET Student Loans Bill 2016 (VSL Bill).
>
> Division 4A sets out the mechanism by which an external dispute resolution (EDR) scheme for approved course providers is established and enforced. Section 42A empowers the Minister to specify, by legislative instrument, a scheme that provides for the investigation and resolution of disputes relating to VET Student Loans and VET FEE-HELP assistance, and compliance by approved providers with the VSL Act, and by VET providers with the *Higher Education Support Act 2003* (HESA). The instrument must specify the operator of the scheme (see paragraph 42B(c)).
>
> The Committee has sought advice as to why the establishment of this EDR scheme is left to delegated (rather than primary) legislation.
>
> As highlighted by the Hon Karen Andrews MP, Assistant Minister for Vocational Education and Skills, and as mentioned during the Parliamentary debate on the various VET Student Loans Bills, the intention has always been to establish a VET Ombudsman and to specify the Ombudsman as the operator of the EDR scheme.
>
> On 16 February 2017 the Government introduced the Education and Other Legislation Amendment Bill (No. 1) 2017 (EOLA Bill). Once passed, Schedule 1 to the EOLA Bill will amend the *Ombudsman Act 1976*

(Ombudsman Act) to insert a new Part IIE to establish the office of the VET Student Loans Ombudsman. Following passage of the EOLA Bill, it is intended that a legislative instrument will be made under section 42A of the VSL Act to specify the VET Student Loans Ombudsman as the operator of the EDR scheme.

Further, the EOLA Bill will amend the VSL Act to insert a new section 42BA which provides that, once that instrument is made, the EDR scheme for the purposes of that Act is taken to be operated by the VET Student Loans Ombudsman, and all approved course providers are taken to be members of the scheme.

At the time of passage of the VSL Bill the exact mechanism for establishing the Ombudsman and consequent amendments to the Ombudsman Act had not been finalised, hence it was left to a disallowable legislative instrument to specify the scheme and its operator. Should it later become desirable to move to an industry-based VET Ombudsman, section 42A of the VSL Act would enable the Minister to make a further disallowable legislative instrument to specify a different operator of the EDR scheme.

While the Committee correctly points out that section 42C of the VSL Act requires approved VSL providers to comply with the requirements of the approved EDR scheme, the VET Student Loans Ombudsman's functions and powers will be set out in Part IIE of the Ombudsman Act.

As mentioned, the key policy intent of amendment 15 was to establish an Ombudsman. Given the EOLA Bill is the mechanism to establish an Ombudsman, and this is subject to Parliamentary scrutiny as part of the primary legislative process, the Committee's concerns about specifying the EDR scheme by legislative instrument should be ameliorated.

Consultation

The Committee has also sought advice on the type of consultation that is envisaged will be conducted prior to the making of the rules establishing the external dispute resolution scheme.

The Government invited vocational education and training (VET) stakeholders to comment and present proposals about an external dispute mechanism to the Department of Education and Training.

Establishing an Ombudsman was considered in the VET FEE-HELP Redesign Discussion Paper (released publicly on 29 April 2016), mentioned in the VET FEE-HELP Redesign Regulatory Impact Statement (2016) and discussed extensively by the Senate Standing Committee on Education and Employment Legislation in November 2016.

The Department of Education and Training has consulted with the VET Student Loans Implementation Advisory Group in relation to the framework of the VET Student Loans Ombudsman. This consultation has included a presentation from the Commonwealth Ombudsman, an overview paper and discussions on this topic as a regular agenda item.

> Similarly, the framework of the VET Student Loans Ombudsman has largely been modelled on the Overseas Students Ombudsman provisions of the Ombudsman Act. This is appropriate given key stakeholders, including students and providers, share similar characteristics with the VET Student Loans program and also given the success to date of the Overseas Students Ombudsman in achieving positive outcomes for students.
>
> Appropriate communication techniques and strategies will be implemented to ensure students and key stakeholders are familiar with the functions and purpose of the VET Student Loans Ombudsman when it is established on 1 July 2017. Further, the VET Student Loans Ombudsman will be driving the development of a code of practice in relation to complaints handling and other matters that arise out of its performance, with extensive consultation and liaison with the relevant stakeholders.

Committee comment

2.313 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is proposed to establish a VET Ombudsman as the operator of the external dispute resolution (EDR) scheme and that consultation has already been undertaken in relation to its establishment.

2.314 The committee notes that the Education and Other Legislation Amendment Bill (No. 1) 2017 (the EOLA Bill), which is currently before the Parliament, is the mechanism by which the proposed VET Student Loans Ombudsman is sought to be established. The committee agrees with the Minister's assessment that the creation of the Ombudsman through primary legislation ameliorates the committee's concerns about establishing the EDR scheme by delegated legislation in this instance.

2.315 However, as the Minister notes, existing section 42A of the *VET Student Loans Act 2016* (the VSL Act) still enables the Minister to make a disallowable legislative instrument in the future to specify a different operator of the EDR scheme. The Minister notes, for example, that it may be desirable to move to an industry-based VET Ombudsman in the future. While the committee's concerns in relation to the establishment of the EDR scheme being left to delegated (rather than primary) legislation are addressed in relation the creation of the VET Student Loans Ombudsman in the EOLA Bill, this does not address the fact that the power to specify an EDR scheme through delegated legislation in the future remains in section 42A of the VSL Act.

2.316 Noting this, and the Minister's advice that any future move to an alternative EDR scheme model would likely require amendments to the primary legislation to amend or repeal Part IIE of the *Ombudsman Act 1976*,[82] it is not clear to the committee why it is necessary to retain section 42A of the VSL Act (i.e. the

82 See paragraph [2.323] below. Part IIE is proposed to be inserted into the *Ombudsman Act 1976* in Schedule 1 to the EOLA Bill.

power to specify an external dispute resolution scheme by delegated legislation). Therefore, noting the apparent need for further primary legislation in the event that an alternative EDR scheme model is proposed in the future, and in order to address the committee's remaining scrutiny concerns and to provide more clarity and certainty, the committee considers that it would be appropriate if the VSL Act were amended:[83]

- **to remove the power of the Minister (in section 42A of the Act) to specify an external dispute resolution scheme by legislative instrument; and**
- **to make it clear that the VET Student Loans Ombudsman (as established by Schedule 1 to the EOLA Bill) is the only EDR scheme for the purposes of the VSL Act.**

2.317 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing future VET external dispute resolution schemes to be established through delegated (rather than primary) legislation.

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

Broad delegation of administrative powers[84]

Initial scrutiny – extract

2.319 Government amendment 24 amended subclause 114(1) of the bill to allow the Secretary to delegate his or her powers under the bill to any APS employee and an officer of an approved external dispute resolution scheme operator.

2.320 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated officers or to members of the Senior Executive Service.

2.321 The supplementary explanatory memorandum notes that while it is not currently proposed to delegate any of the Secretary's powers under the bill to non-APS employees, it might be necessary in the future for the operator of an approved external dispute resolution scheme to require the production of information, or to

---

83 Noting that such amendments could be progressed through the EOLA Bill which is currently before the Parliament (and which already proposes amendments to the VSL Act).

84 Government amendment 24—Delegation of secretary powers to an officer of an approved external dispute resolution scheme.

be involved in reconsideration of reviewable decisions by an approved course provider.[85]

2.322 In the committee's *Ninth Report of 2016* the committee commented on the unamended version of clause 114 which only allowed the delegation of the Secretary's powers to APS employees of any level.[86] The committee notes that this amendment allows the Secretary's power to be delegated even further, i.e. to non-APS employees who are operators of an approved external dispute resolution scheme.

Minister's response

2.323 The Minister advised:

> The Committee has noted that Government amendment 24 allows the Secretary's powers to be delegated under section 114 of the VSL Act to non-APS employees who are operators of an approved EDR scheme.
>
> As mentioned previously, flexibility was inserted into the VSL Act to allow the Government to carefully consider the most appropriate model for a proposed VET Ombudsman and to allow for any discretion that may or may not be required to perform efficient and effective functions expected by Parliament. The response to the Committee's *Ninth Report of 2016* provided examples of where it may be appropriate to delegate powers to employees at any level.[87]
>
> No powers under the VSL Act are currently delegated by the Secretary to the VET Student Loans Ombudsman, and at this time there is no intention to do so. The powers given to the office of the VET Student Loans Ombudsman through the Ombudsman Act are considered sufficient for it to properly discharge its functions. Further, powers will not be delegated to non-APS employees unless it is appropriate and necessary to do so given the circumstances and any necessity to deliver the VSL program. If this situation arises, any delegation would be subject to subsection 114(2) of the VSL Act, which requires the delegate to comply with any direction given by the Secretary. A direction may be imposed to ensure oversight and to further strengthen controls which are in place on the appropriateness of delegations, such as the 'accountability' and other controls mentioned in the initial response to the Committee's *Ninth Report of 2016*.[88]

---

85 Supplementary explanatory memorandum, p. 4.

86 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, 23 November 2016, pp 596–598.

87 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, 23 November 2016, pp 597-598.

88 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, 23 November 2016, pp 597.

> As stated in the supplementary explanatory memorandum to the VSL Bill, any potential move to a future industry-based Ombudsman might benefit from this provision. At the same time, any future move to an alternative model would likely require a legislative process to occur (for example, to amend or repeal Part IIE of the Ombudsman Act) and as such would be subject to the appropriate Parliamentary scrutiny.

Committee comment

2.324 The committee thanks the Minister for this response. The committee notes the Minister's advice that no powers under the VSL Act are currently delegated by the Secretary to the VET Student Loans Ombudsman, and at this time there is no intention to do so. This is because the powers given to the office of the VET Student Loans Ombudsman through the Ombudsman Act are considered sufficient for it to properly discharge its functions.

2.325 The Minister also advised that any potential move to a future industry-based Ombudsman might benefit from paragraph 114(1)(b) of the VSL Act (which allows the Secretary to delegate any or all of his or her powers under the VSL Act to an officer of an approved external dispute resolution scheme operator).

2.326 Noting that there is currently no intention to delegate the Secretary's powers under the VSL Act, and the apparent need for further primary legislation in the event that an alternative EDR scheme model is proposed in the future, the committee considers that it would be preferable for the VSL Act to be amended to remove paragraph 114(1)(b).[89] This would address the committee's scrutiny concerns in relation to the appropriateness of allowing the Secretary to delegate his or her administrative powers to non-APS employees.

2.327 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the Secretary to delegate all of his or her powers under the VSL Act to non-APS employees.

89 Noting that such amendments could be progressed through the EOLA Bill which is currently before the Parliament (and which already proposes amendments to the VSL Act).

Chapter 3

Scrutiny of standing appropriations

3.1 The committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations. 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.

3.2 Further details of the committee's approach to scrutiny of standing appropriations are set out in the committee's *Fourteenth Report of 2005*.

Bills introduced with standing appropriation clauses in the 45th Parliament since the previous Scrutiny Digest was tabled:

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 — Schedule 1, Part 2, item 13

Other relevant appropriation clauses in bills

Nil

Senator Helen Polley (Chair)

Appendix 1
Ministerial and other correspondence

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MS17-000237

16 FEB 2017

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Via email: scrutiny.sen@aph.gov.au

Dear Senator Polley

The Senate Scrutiny of Bills Committee has requested further information about measures in Part 2 of the Agriculture and Water Resources Legislation Amendment Bill 2016 ('the bill') (Scrutiny Digest 1/17 at paragraphs 1.6-1.8).

There are ten industry-owned research and development corporations (RDCs), four of which have varying, additional publication requirements. I consider these additional requirements unnecessary and the proposed amendments will make the requirements consistent for all. Removing these additional requirements will also reduce the costs associated with preparing documents that meet the Australian Parliament's tabling rules.

Funding agreements

To promote transparency, all funding agreements signed by the Commonwealth since July 2011 have required the agreement to be available on the RDC's public website.

There are funding agreements between the Commonwealth and every RDC setting terms and conditions for use and management of grower levy funds and Commonwealth matching . Only the legislation relating to Australian Livestock Export Corporation Limited ('LiveCorp'), Dairy Australia Limited, Forest and Wood Products Limited and Sugar Research Australia Limited requires these agreements be tabled.

An example of the funding agreements clause pertaining to disclosure is in the agreement between Meat and Livestock Australia (MLA) and the Commonwealth 2016 to 2020, which requires corporate governance documents to be published ('the publication clause'). These documents are listed at clause 29 'Information on Activities', available on the MLA website.

Given that LiveCorp's current agreement was executed in 2010, it does not include this requirement. The government proposes that LiveCorp's new agreement (currently under negotiation) would be consistent with requirements for all other RDCs in this regard.

Annual Reports

All industry-owned RDCs are required under Chapter 2M of the *Corporations Act 2001* to prepare and distribute annual reports to those members who elect to receive them. Only LiveCorp and Dairy Australia Limited are also required to table their annual reports.

Consistent with good corporate practice, RDCs publish annual reports on their public websites. For example, since 2007-08 LiveCorp has published its annual reports on its website. Each annual report includes a compliance report setting out how the corporation has complied with the funding agreement.

To promote a uniform approach, all funding agreements signed by the Commonwealth since October 2016 have required annual reports to be available through an RDC's public website. An example of this clause is in the agreement between Australian Wool Innovation (AWI) and the Commonwealth 2016 to 2020, which requires corporate governance documents to be published. These documents are listed at clause 29 'Information on Activities', available on the AWI website.

Negotiation of new Funding Agreements

The government expects that a new agreement with LiveCorp will be signed before the end of the financial year, which will require the funding agreement and annual report to be published on LiveCorp's public website.

The Commonwealth is negotiating with Dairy Australia Limited and will begin negotiations with Forest and Wood Products Limited and Sugar Research Australia Limited in February or March 2017. While each of these RDCs already publishes their funding agreements and annual reports, the government will propose consistent publication clauses for each new agreement.

I trust that this information confirms that parliamentary scrutiny will not be impeded by the measures in the Agriculture and Water Resources Legislation Amendment Bill 2016. I expect that amendments will streamline the processes which support public and parliamentary engagement in the RDCs activities.

ADAM BANDT MP
FEDERAL MEMBER FOR MELBOURNE

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

15 March 2017

Dear Senator Polley,

Thank you for your letter seeking advice in relation to the *Air Services Amendment Bill 2016*.

The *Air Services Amendment Bill 2016* addresses gaps in the laws relating to aircraft noise and its impacts on community amenity. It will ensure that communities affected by aircraft noise will have greater rights and stronger representation.

One outcome of this bill will be to establish an Aircraft Noise Ombudsman that is independent of Airservices Australia. The newly created independent Community Aviation Advocate and the independent Aircraft Noise Ombudsman will provide important representation for communities affected by aircraft noise.

The bill requires that the Aircraft Noise Ombudsman is established through regulations. In doing so, it lays out a number of requirements that must be met by these regulations.

The bill sets out in subsection 74B(2) the functions that must be granted to the Aircraft Noise Ombudsman.

The bill also sets out in subsection 74B(3) requirements that must be provided for in establishing the Aircraft Noise Ombudsman.

Thank you for your comments on this bill.

Yours sincerely,

Adam Bandt
Federal Member for Melbourne

ADAM BANDT MP Federal Member for Melbourne **ADD:** Ground Floor 1, 296 Brunswick Street Fitzroy VIC 3065 **TEL:** (03) 9417 0759
E: adam.bandt.mp@aph.gov.au **TW:** @AdamBandt **FB:** /Adam.Bandt.MP **ADAMBANDT.COM**

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MC17-000673

Senator Helen Polley
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

I refer to the letters of Wednesday 16 February 2017, sent to my senior adviser by Ms Anita Coles, Acting Secretary to the Senate's Standing Committee for the Scrutiny of Bills (the Committee) drawing my attention to matters raised in the Committee's *Scrutiny Digest 2 of 2017*.

The Committee has sought my advice on any progress made in relation to the inclusion of additional information on payments to the States, Territories and local government in this year's Budget documentation.

My Department, in consultation with the Treasury, is in the process of reviewing the current suite of Budget documentation in order to give consideration to including additional information on payments to the States, Territories and local government in time for this year's Budget.

I have copied this response to the Treasurer.

Thank you for bringing the Committee's request for a progress update to my attention.

Mathias Cormann
Minister for Finance

March 2017

Parliament House, Canberra ACT 2600 Telephone: (02) 6277 7400 ~ Facsimile: (02) 6273 4110

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS17-000634

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

I refer to the letter of 9 February 2017 from Ms Anita Coles, Acting Committee Secretary of the Senate Standing Committee for the Scrutiny of Bills, and to the Committee's *Scrutiny Digest No.1 of 2017*, tabled on 8 February 2017, in connection with the Committee's consideration of the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016.

The Committee has requested my advice as to whether the Bill can be amended to insert a statutory requirement that alcohol and drug testing standards be made freely and readily available to all Australian Federal Police (AFP) appointees.

I can advise that I have requested the Attorney-General's Department to work urgently with the AFP on the amendment requested by the Committee. Should that work conclude that such an amendment is appropriate, and subject to necessary policy approvals, I will seek to introduce the amendment into the Bill.

The Committee has also requested that information I previously provided to the Committee in December 2016 in relation to the Bill be included in the Bill's explanatory memorandum.

I am pleased to confirm that I will table an addendum to the explanatory memorandum for the Bill, incorporating the key information requested by the Committee.

Yours sincerely

Michael Keenan

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7290 Facsimile: (02) 6273 7098

ATTORNEY-GENERAL

CANBERRA

16 FEB 2017

MC16-144743

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

I refer to the letter of 1 December 2016 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning the Committee's *Tenth Report of 2016* (the Report) which seeks further advice on the then *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the Bill). I thank the Committee for its further consideration of the Bill and provide the enclosed additional information.

I note the Report drew the Committee's scrutiny concerns to the attention of Senators and ultimately left the appropriateness of the post-sentence preventative detention scheme to the consideration of the Senate as a whole. On 1 December 2016 the Senate passed the Bill which included a significant number of amendments. These amendments enhanced safeguards and improved the efficacy of the post-sentence preventative detention scheme.

The Report acknowledged the Government's enhancements to the Bill and identified a number of further considerations. More specifically it sought further information be included in the Explanatory Memorandum and advice in relation to minimum standards for the detention of a terrorist offender subject to a continuing detention order. I have enclosed a response to the Committee's concerns.

Once again, I thank the Committee for its consideration of the Bill and trust this advice is of assistance.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

Response to the Senate Standing Committee for the Scrutiny of Bills Tenth Report of 2016 (the Report) concerning the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.*

The Senate Standing Committee for the Scrutiny of Bills (the Committee) has requested further advice on the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the Bill).

Trespass on personal rights and liberties - Item 1, proposed subsections 105A.4(1) and (2)

The Committee has sought further advice about the likely conditions of detention for a terrorist offender in a prison under a continuing detention order. More specifically it has requested further information about the development of 'Management Standards', and the possibility of including such standards in the primary legislation; or if this is not possible, by making them a legislative instrument, which would be subject to parliamentary scrutiny and the disallowance process. The Committee has also requested that the key information from this advice be included in the Explanatory Memorandum.

Subsections 105A.4(1) and (2) were drafted to make it clear that the default position is for offenders under a continuing detention order to be treated and accommodated differently to those offenders who are serving a sentence of imprisonment, subject to certain exceptions.

The High Risk Terrorist Offender Implementation Working Group, comprised of legal, corrections and law enforcement representatives from each jurisdiction was convened to progress outstanding issues relating to the post-sentence preventative detention scheme. It has prioritised the consideration of housing these offenders and the development of management standards. Management standards provide a minimum standard all correction authorities should meet, ensuring that conditions in correction facilitates are appropriate and proportionate. Similar national uniform guidelines have been developed between jurisdictions, for example the Standard Guidelines for Corrections in Australia.

It is not my intention to include any management standards in the primary legislation or in a legislative instrument. Additional information about management standards for the treatment and housing of terrorist offenders subject to the continuing detention order regime is provided in the High Risk Terrorist Offenders Implementation Plan 2016.

The PJCIS completed its inquiry and report on the Bill on 4 November 2016. The Government accepted the PJCIS recommendation to provide it with a clear development and implementation plan that includes timeframes to assist detailed consideration of the Bill prior to the second reading debate in the Senate (PJCIS Recommendation 22). The Implementation Plan was provided to the PJCIS on 25 November 2016 and is available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Implementation_Plan>>.

The Government also accepted the PJCIS Recommendation 23 to provide the Committee with a timetable for implementation of any outstanding matters being considered by the Implementation Working Group by 30 June 2017. The report will include information about conditions of detention, including any agreements reached with States and Territories on housing arrangements.

Rights and liberties unduly dependent upon insufficiently defined administrative powers - Proposed section 105A.8

The Committee noted my intention to move Government amendments to confine the Court's consideration of the offender's criminal history to prior convictions for relevant terrorist offences (and not their criminal history more broadly), and requested that the key information from my advice of 27 November 2016 be included in the Explanatory Memorandum.

On 1 December 2016 I moved Government amendments 24, 25 and 26 which amended Schedule 1, item 1, subsection 105A.8(1) to confine the Court's consideration of the offender's criminal history to prior convictions for relevant terrorist offences listed in paragraph 105A.3(1)(a). Paragraph 168 of the Revised Explanatory Memorandum reflects this amendment.

I agree with the Committee on the importance of the extrinsic material as a point of access to understanding the law, and I note that paragraphs 168-170 of the Revised Explanatory Memorandum were updated to include key information about the Government amendments relating to section 105A.8.

AUSTRALIAN SENATE

Senator Jacqui Lambie
Senator for Tasmania

16 March 2017

Chair of Committee
Senator Helen Polley
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600
Email: scrutiny.sen@aph.gov.au

Dear Senator,

Please find my response to the Standing committee for the Scrutiny of Bills request for information about scrutiny issues identified in relation to the Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017.

After deliberation I agree with the comments listed under significant matters in delegated legislation and the reversal of evidential burden of proof and I will be making amendments to the legislation to reflect this.

Thank you for your time.

Kind regards

Senator Jacqui Lambie
Senator for Tasmania

Shop 4/22 Mount Street PO Box 256
Burnie TAS 7320

OFFICE: 03 6431 2233
EMAIL: senator.lambie@aph.gov.au WEB: www.senatorlambie.com.au

FAX: 03 6431 3200
TOLL FREE: 1300 885 041

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-000616

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 9 February 2017 in relation to comments made in the Committee's *Scrutiny Digest 1 of 2017* concerning the following bills in my portfolio:

- Customs and Other Legislation Amendment Bill 2016
- Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Please find my advice in relation to the Committee's comments on the Customs and Other Legislation Amendment Bill 2016 at Attachment A, and in relation to the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 at Attachment B.

Thank you for considering this advice. The contact officer in the Department of Immigration and Border protection is Greg Phillipson, Assistant Secretary, Legislation Branch, who can be contacted on (02) 6264 2594 and greg.phillipson@border.gov.au.

Yours sincerely

PETER DUTTON 03/03/17

ATTACHMENT A

Customs and Other Legislation Amendment Bill 2016

Penalties in regulations

Item 4 of Schedule 7 proposes to amend section 17 of the Commerce (Trade Descriptions) Act 1905 to enable regulations made under the Act to prescribe penalties, not exceeding 50 penalty units, for offences against the regulations. This item represents a significant delegation of legislative power in that it allows regulations (which are not subject to the same level of parliamentary scrutiny as primary legislation) to impose a penalty. The committee's view is that significant matters, such as the imposition of penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

While the committee notes that this proposed provision conforms with the guidance in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers that 'regulations should not be authorised to impose fines exceeding 50 penalty units', the committee still expects that any provisions which allow regulations to impose a penalty of any level will be justified in the explanatory memorandum.

The committee requests the Minister's advice as to why the bill proposes enabling penalties to be prescribed by regulation.

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

The *Commerce (Trade Descriptions) Act 1905* (CTDA) and the *Commerce (Imports) Regulations 1940* (the Regulations) together set out the legal framework in relation to labelling requirements for goods imported into Australia, with the bulk of this framework set out in the Regulations.

Section 7 of the CTDA provides that the regulations may prohibit the importation into Australia of any goods without a prescribed trade description. The Regulations set out these matters including import prohibitions and prescribed trade description requirements.

The *Commerce (Trade Descriptions) Regulation 2016* will replace the Regulations on 1 April 2017 as a result of the repeal of the Regulations on that date as part of the sunsetting regime. The new regulation, however, is substantially the same in structure as the existing Regulation, in that it also includes the import prohibition and trade description requirements.

In this circumstance, I consider that it is appropriate that the Regulations (and the new regulation), and not the CTDA, create offences and impose penalties for offences against the Regulations. If new subsection 17(2) is not enacted, the CTDA would need to be amended each time a requirement was included in the Regulations where it was proposed to impose a penalty for failure to comply. By allowing for the imposition of penalties in the Regulations, the penalty can be imposed in a timely manner and the amount of the penalty can be tailored to each offence on a case by

case basis within the penalty cap set in subsection17(2).

Proposed subsection 17(2) is similar to subsection 270(2) of the *Customs Act 1901* (the Customs Act), which provides a head of power to prescribe penalties for contravention of regulations under the Customs Act.

Any regulation that proposes the imposition of a penalty would be subject to Parliamentary scrutiny and possible disallowance, as it is a disallowable instrument.

In the future, any provisions that propose to allow regulations to impose a penalty will be justified in the explanatory memorandum.

ATTACHMENT B

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Limitation on merits review

Although the committee notes that this provision largely mirrors an existing provision of the Act, the committee still expects that any provisions which have the effect of limiting the availability of merits review will be comprehensively justified in the explanatory memorandum. The committee therefore requests the Minister's detailed justification for the limitation on merits review in proposed subsection 338A.

New section 338A reflects the current definition of 'Part 7-reviewable decision' in section 411 of the Migration Act, and thus does not introduce any new limitations on the availability of merits review. Section 411was enacted in 1992 and has since been amended numerous times. These amendments have been passed by both Houses of Parliament and therefore have been subject to the Parliamentary scrutiny processes required for all legislative amendments. It would be inappropriate to revisit the merits of previous amendments that have been passed by Parliament.

Access to material by merits review applicants

The committee requests further advice from the Minister as to why it is considered necessary to remove an applicant's right to access written material given to the Tribunal, and whether this diminishes an applicant's right to a fair hearing.

Section 362A of the Migration Act was enacted at a time when there was no other provision in Division 5 of Part 5 of the Migration Act that required the then Immigration Review Tribunal to provide (in the sense of 'make available') to review applicants documents or information that was before the Tribunal.

The Migration Act has changed significantly since the enactment of section 362A, including the enactment of sections 357A (the exhaustive statement of the natural justice hearing rule) and sections 359AA to 359C (which deal exhaustively with the disclosure of adverse material).

The Tribunal is already obligated under section 359A to provide information to the applicant that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review and ensure, as far as is reasonably practical, that the applicant understands why it is relevant to the review and the consequences of it being relied on. This provides an applicant with the opportunity to consider, and comment on, information that the Tribunal will rely on in the review, and to be prepared in advance of a hearing.

There is no provision in Part 7 of the Migration Act that is equivalent to section 362A, and Part 7 review applicants have not been hindered in their ability to prepare for and present their case due to the absence of such a provision.

It is noted that the common law hearing rule not only does not require the disclosure of material that is not adverse, it also does not require the disclosure of the full text of

adverse material that is relevant, credible and significant to the decision being made; rather, only the substance of such material needs to be put to an applicant.[1]

Enforcing notification and reason-giving requirements

As judicial review will not be effective to enforce the notification and reason-giving requirements in section 368E, the committee requests the Minister's advice as to how compliance with these important legal requirements will be enforced.

New subsection 368E(2) requires the Tribunal to notify the Secretary after a Tribunal decision is given orally. If, after giving an oral decision, the Tribunal has made a written statement, new subsection 368E(6) requires the Tribunal to give a copy of that statement to both the Secretary and applicant. While the subsections create new requirements, they are consistent with the requirements in relation to written statements of decisions which are not given orally (and which are covered by a provision similar to subsection 368E(8)).

It is noted that the requirements under subsections 368E(2) and (6) are in addition to existing paragraph 368D(2)(a), which requires an oral statement of the Tribunal to, amongst other things, describe the reasons for the decision. Currently there is no requirement that the Tribunal provide either the applicant or the Secretary with a written statement of an oral decision, even on request.

New subsection 368E(8) provides that a failure to comply with section 368E in relation to a decision on a review does not affect the validity of the decision. This wording is standard to provisions that set out notification requirements. The purpose of the provision is not to undermine the importance of the notification process, instead it ensures the validity of the decision should the notification process not be effective in a particular instance. It is noted that new subsection 368E(8) will not prevent judicial scrutiny of the Tribunal's reasons for decision, or judicial commentary on the notification process itself.

Provision of written statements to merits review applicants

Noting this proposed delegation of legislative power and the potential impact on the effectiveness of applicant's review rights, the committee requests the Minister's advice as to why:

- *the period of time in which an applicant may make a request that the Tribunal provide an oral statement in writing is limited; and*
- *the relevant time period is to be included in regulations, rather than on the face of the legislation.*

New subsections 368E(3) and (4) reflect current subsections 368D(4) and (5). Specifically, it is noted that current subsection 368D(4) provides for a period prescribed by regulation within which the applicant can request the statement to be provided in writing. The new subsections thus do not introduce any new limitations on applicants seeking a statement to be provided in writing.

---

[1] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225CLR 88 at [29].

Current subsections 368D(4) and (5) have been passed by both Houses of Parliament and therefore have been subject to the Parliamentary scrutiny processes required for all legislative amendments.

Limitation on judicial review

In order to assist the committee in determining whether this limitation on the availability of judicial review is appropriate, the committee seeks the Minister's advice as to whether judicial review in the Federal Circuit Court will be available where a decision to dismiss an application is confirmed under paragraph 362B(1C)(b) or subsection 362B(1E) of the Migration Act.

If an applicant fails to appear before the Tribunal, current paragraph 362B(1A)(b) allows the Tribunal to dismiss the application. The applicant may apply for reinstatement of the application within 14 days after receiving the notice of the decision to dismiss. If the applicant fails to apply for reinstatement, or applies for reinstatement and the Tribunal does not consider it appropriate to reinstate the application, subsection 362B(1E) and paragraph 362B(1C)(b) respectively require the Tribunal to confirm the decision to dismiss the application. The effect of this is that the decision under review is taken to be affirmed.

The purpose of new paragraph 476(2)(e) is to ensure that the original decision to dismiss the application (the decision taken under paragraph 362B(1A)(b)) is not reviewable by the Federal Circuit Court. It does not change the jurisdiction of the Federal Circuit Court in relation to a latter decision of the Tribunal to confirm the dismissal. In reviewing the latter decision to confirm the dismissal, the Federal Circuit Court can consider whether there were any errors with the original dismissal decision. This is the case whether or not the applicant applies for reinstatement before the Tribunal confirms the dismissal.

THE HON ALEX HAWKE MP
ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-000642

Ms Anita Coles
Acting Committee Secretary
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
CANBERRA ACT 2600

Dear Ms Coles

I refer to the query from the Standing Committee for the Scrutiny of Bills in relation to the Customs Tariff Amendment Bill 2016.

Specifically, the Committee has requested my advice as to why the content of Schedule 1 to the *Customs Tariff Act 1995* is proposed to be moved to the *Customs Tariff Regulations 2004*, particularly addressing the impact this change will have on Parliamentary scrutiny.

Schedule 1 to the *Customs Tariff Act 1995* currently consists of five parts, each providing lists of countries and places that are granted various forms of non-reciprocal preferential customs duty treatment.

The countries and places listed in Parts 1 and 2 are determined by the membership of the South Pacific Trade and Economic Co-operation Agreement and the list of Least Developed Countries developed and reviewed by the United Nations Economic and Social Council respectively.

Parts 3, 4 and 5 list countries and places that have self-nominated to the World Trade Organization as 'Developing Countries'. The determination of what countries and territories are listed in each of these parts has been historically set by successive governments with reference to the level of economic development of each country or place.

Changes to the countries and places included in each of the five Parts are not required frequently. The review of the United Nations' Least Developed Country list occurs every three years; other changes to Schedule 1 occur on a more ad hoc basis.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 4430 Facsimile: (02) 6277 8522

However, when required, there is often a significant amount of time between the need to amend Schedule 1 and the time when the change occurs.

The cause of this delay is two-fold. Firstly, as the amendments are typically made one country at a time as required, it is not efficient to make them a standalone amendment bill. Therefore, they must wait until there is an appropriate bill for them to be added to. Secondly, the size and complexity of Parliament's legislative work schedules has often meant it is difficult to get resources allocated to minor amendments.

These delays create uncertainty for Australian businesses seeking to engage in trade with the country in question.

Moving Schedule 1 to the Regulations would decrease the Parliamentary legislative workload and enable these changes to be made in a more timely manner, thus providing certainty for Australian businesses. I consider that this provides a sound reason for including these matters in delegated legislation in this instance.

In addition, moving Schedule 1 to the Regulations would not reduce Parliament's scrutiny of the imposition of customs duty.

Section 14 of the Act outlines the application of preferential rates of duty in relation to countries and places. Schedule 3 of the Act specifies the preferential customs duty rates applied to different categories of developing countries.

The Bill would not affect Parliament's oversight of these vital elements of the Act – the principle of preferential duty rates being available for certain developing countries, and the preferential duty rates themselves. Moving Schedule 1 to the Regulations would not affect the amount of customs duty that is imposed.

Thank you for bringing this matter to my attention.

Yours sincerely

SENATOR THE HON SCOTT RYAN
Special Minister of State
Minister Assisting the Prime Minister for Cabinet
Senator for Victoria

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Chair, Helen

I refer to the Senate Standing Committee on Scrutiny of Bill's *Scrutiny Digest 2 of 2017*, which requests further information regarding provisions of the Independent Parliamentary Expenses Authority Bill 2017. Thank you for your thoughtful consideration of the Bill. I have provided information in response to each of the Committee's questions below.

The purpose of the sensitive information provisions in clause 60 is to ensure that an appropriate balance is struck between the crucial goals of accountability and transparency, and the safety of members of Parliament and their staff. The Bill therefore establishes a default rule of transparency, while allowing information not to be disclosed where necessary.

In order to further understand the necessity of proposed clause 60 in light of the existing public reporting regime of historical travel information, the committee requests that the Minister provide examples of how the public release of historical information relating to parliamentarians' travel expenditure by the Authority could prejudice the security, defence, or international relations of the Commonwealth or cause harm to an individual (if the information published does not include specific addresses).

It is important to note that the sensitive information regime that would be provided by section 60 relates to any public reports made by the Authority, defined broadly in subsection 60(5) to mean any reports published on the Authority's website. Although the most common such reports would be regular reporting on travel expenses, the Government anticipates that the Authority would from time to time report on other work expense matters, and on matters arising from the exercise of its audit function. As a result, a much broader range of information is potentially involved than that currently contained in historical travel reports. This could include a range of contextual information around the specific purposes of travel, exact locations travelled to and from (including addresses), events that took place in conjunction with the travel, and the persons with whom a member met.

This could give rise to a circumstance in which reporting could prejudice national security, defence or international relations, or raise a risk of serious harm to an individual. Further, because the Authority will be independent in the exercise of its functions, it cannot be assumed that future reporting will be limited to the same scope as current reporting.

Without comprehensively setting out possible examples, relevant instances might include:

- More frequent reporting of historical travel information that may allow analysis of travel records and thereby patterns in a member's movements.
- Detailed information about the movements of Ministers, such as the Defence Minister or the Minister for Foreign Affairs, may touch on defence or international relations by allowing inferences to be drawn about international issues or negotiations, or, in relation to audit reports, by providing highly detailed information about the circumstances of travel. In many cases, detailed information may be required to adequately assess compliance of travel with entitlements, particularly under a future regime, but it may not be appropriate in some circumstances to release that supporting information.

However, it is not possible to predict the possible circumstances in which such issues may arise. As noted in the Explanatory Memorandum, it is not anticipated that this power would be used frequently.

> *The committee also seeks the Minister's advice as to why the provision is drafted so that the information must not be disclosed on the basis only of the Authority or Attorney-General's 'opinion' that the disclosure could cause prejudice or harm, rather than their 'reasonable belief'.*

Clause 60 has been closely modelled on section 37 of the *Auditor-General Act 1997*, which provides a similar (but broader) regime relating to sensitive information that could be potentially included in audit reports. Subsection 37(1) of that Act similarly uses a test of opinion, rather than reasonable belief. It is the Government's view that limiting this provision to security, defence or international relations sufficiently limits the scope of this power.

In relation to the serious harm provision, the Government has sought to limit the application by requiring the possibility of serious physical or psychological harm. Accordingly, the mere possibility of harm would not be sufficient to trigger the application of this provision.

The Hon Christian Porter MP
Minister for Social Services

2 MAR 2017

MC17-003151

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Polley~~ Helen

Thank you for your letter of 16 February 2017 regarding the Standing Committee for the Scrutiny of Bills' consideration of the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017.

I have provided additional information below to address those matters raised by the Committee in sections 1.56 and 1.82 of the *Scrutiny Digest No. 2 of 2017*.
Senator the Hon Simon Birmingham, Minister for Education and Training, will be responding to the Committee separately in relation Schedule 4 (Jobs for Families Child Care Package) of the Bill.

1.56 Retrospective application (Schedule 3)

The schedule relates to the Family Tax Benefit Part A and Family Tax Benefit Part B end of year supplements. Supplement payments related to 2016-17 are not paid until after 1 July 2017. Supplement payments made after 1 July 2017 will be reduced slightly with a further reduction the following year before being completely phased out in 2018-19. This will let families know in advance that the supplements are being removed and allow them time to adjust to the changes. Additionally, from 1 July 2018 the maximum standard fortnightly rate for Family Tax Benefit Part A will be increased by $20.02. This ensures that families will have more timely assistance to help meet their day to day living expenses.

1.82 Retrospective application (Schedule 9)

On 3 May 2016, I announced that the Turnbull Government would ensure the Commonwealth was able to meet future National Disability Insurance Scheme (NDIS) costs through the deposit of $2.1 billion of 2016-17 Budget savings into the NDIS Savings Fund Special Account once it was established. Savings measures committed to the Savings Fund included closing carbon tax compensation for new welfare recipients from 20 September 2016 (*see* christianporter.dss.gov.au/media-releases/real-money-for-a-real-commitment-to-the-ndis).
Schedule 9 of the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 seeks to implement that 2016-17 Budget measure as closely as possible by making 20 September 2016 the test date for determining which income support recipients will no longer be able to access the Energy Supplement from the commencement date of 20 September 2017 onwards. If the test date were moved forward from 20 September 2016 to 20 September 2017, the savings sought under Schedule 9 would be significantly reduced and less funds would be deposited into the NDIS Special Account.

The intention of the 2016-17 Budget measure as originally announced was that the test date and commencement date of that measure were to be the same date. However, a number of factors caused the original commencement date of 20 September 2016 to be shifted ahead to 20 September 2017. These include:

- the timing of the election and consequential change to the Parliamentary sitting schedule;
- difficulties in the passage of Schedule 21 of the Budget Savings Omnibus Bill 2016, as initially introduced into Parliament on 31 August 2016; and
- constraints on commencement dates because of the need for the Department of Human Services to schedule and test systems changes.

Notwithstanding the delay to the commencement date, Schedule 9 does not remove or seek to recover any previously paid or accrued entitlement to the Energy Supplement from any income support recipient and therefore does not have a retrospective effect.

The measure in Schedule 9 does not have a retrospective effect.

As my second reading speech indicates, the energy supplement was introduced on 20 March 2013 as part of the Household Assistance Package to compensate people for the introduction of the carbon tax—a tax which no longer exists. The carbon tax was repealed from 1 July 2014. The Government does not consider that it is reasonable to continue to compensate people, in the form of a carbon tax compensation payment, for a tax that no longer exists, particularly people who only started receiving income support after the carbon tax was abolished.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MS17-000296

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Polley~~ Helen,

Thank you for the comments made by your Committee concerning the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 (the Bill) published in Scrutiny Digest No. 2 of 2017. I am writing to respond to your comments in relation to Schedule 4 of the Bill, while the Hon Christian Porter MP, Minister for Social Services, will write separately in relation to those elements relating to his portfolio responsibilities.

I acknowledge the Committee's concerns in relation to the offence-specific defence established by proposed new section 201A of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act), as inserted by item 205 of Part 1 of Schedule 4 to the Bill, and your request for advice as to why an apparent 'reverse evidential burden' is being placed on a provider in this instance.

A brief explanation of the circumstances in which section 201A will operate may assist. Before section 201A applies, providers need to have received a notice of a fee reduction decision (the notice) under proposed section 67CE of the Administration Act. The notice is to contain matters outlined in proposed section 67CD, which relate to the Secretary making entitlement determinations for individuals in respect of Child Care Subsidy (CCS) or Additional Child Care Subsidy (ACCS) payments. Where the Secretary has made a determination that an individual is entitled to be paid an amount of CCS or ACCS, the notice will communicate this fact to the provider and include the exact amount of the individual's entitlement (the fee reduction amount).

The giving of the notice to providers setting out the individual's entitlement and amount of entitlement is a requirement of the Secretary under proposed subsection 67CE(4). Further, it is a requirement for such a notice to contain a statement that tells the provider whether the fee reduction amount has been paid directly to the individual under subsection 67EC(2). It is this type of notice that subsection 201A(2) refers to. Importantly, section 67CE notices will always state whether an amount has been paid directly to an individual because subsection 67CE(6) mandates this. This means the service will always be aware that the requirement to pass on or remit under subsection 201A(1) does not apply in respect of amounts paid directly to an individual, and the Secretary will always know, having issued the notice, that the exception applies prior to any decision to prosecute.

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644 **Fax** 08 8354 1655

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7350

Note 2 to subsection 201A(2) does of course alert the reader to the operation of section 13.3 of the *Criminal Code Act 1995* (the Criminal Code Act), and that it is a standard drafting practice of the Office of Parliamentary Counsel to include such a note where there is an offence-specific defence, as per the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. It is also important to note that section 13.3 of the Criminal Code Act would still operate in the absence of this note. However, for the section 201A offence to apply, in practice, I do not consider subsection 13.3(3) of the Criminal Code Act will ever become enlivened, so as to place a reverse evidential burden on the provider. This is because the Secretary will always have access to the notice given to the service, and the contents of that notice will be a critical factor informing the Secretary's decision as to whether or not to prosecute. Where the notice given to the provider contains a statement that the individual has been paid the fee reduction amount directly under subsections 67CE(4) and (6), the Secretary will not prosecute as the section 201A(1) requirements to pass on or remit the fee reduction amount are clearly stated not to apply to the provider in that situation.

Therefore, the provider will not be required to adduce or point to this notice as evidence in the course of any prosecution, as no prosecution will commence. In any event, if there ever was to be a prosecution under section 201A, the Commonwealth would ensure, as a model litigant, that evidence sufficient to discharge the burden is adduced by the prosecution (being a copy of the subsection 67CE notice), effectively relieving the provider of the evidentiary burden, as referred to in subsection 13.3(4) of the Criminal Code Act.

In summary, if there is a notice containing the statement, no prosecution will commence and therefore the question of the service bearing the evidential burden of producing this notice is unlikely to ever be raised.

I trust this explanation assists the Committee and I would be happy to provide further detail if this would assist the Committee to understand the effect of this provision, both legally and administratively.

Finally, I also note that the Committee has made comments in relation to other measures under Schedule 4 of the Bill, but no further action is required in relation to these as I have previously responded to the Committee on these measures, including through amendments to the Explanatory Memorandum to the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016.

I have copied this letter to the Hon Christian Porter MP, Minister for Social Services.

cc. the Hon Christian Porter MP, Minister for Social Services

- 7 MAR 2017

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-003856

Senator the Hon Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

- 2 MAR 2017

Dear Senator Polley

I refer to the request of the Scrutiny of Bills Committee (the Committee) for further information about a number of aspects of the Therapeutic Goods Amendment (2016 Measures No.1) Bill 2016 (the Bill), which amends the *Therapeutic Goods Act 1989* (the Act) to implement a number of recommendations made by the Expert Panel Review of Medicines and Medical Devices Regulation (the Review), and apologise for the delay in responding. The below addresses each of the Committee's questions about the Bill.

Broad delegation of power in relation to notifiable variations (paragraph 1.56, Scrutiny Digest)

The Committee has asked for advice as to the kinds of variations and conditions that it is envisaged may be prescribed in regulations made under the proposed provisions in Schedule 1 of the Bill.

As the Explanatory Memorandum indicates, notifiable variations will be low risk, straightforward changes to product details, which do not impact on the safety of a product – consistent with the Review's recommendation that notifiable variations do not impact on a product's quality, safety or efficacy.

Three examples of such notifiable variations that are anticipated to be prescribed for the purposes of the new products are:

- the removal of a sponsor's nominated manufacturer;
- a minor change to the container for a medicine, where tests show that the product's quality is not affected by the change;
- minor changes to product labels, for example to include the full list of excipient ingredients in a medicine.

It is not expected that any conditions will be prescribed for the purposes of the new provisions, at least initially. As the system of notifiable variations (as opposed to the current system, under which all variations require pre-approval) will be new and untested for Australia, a period of observing the new approach is required before considering this aspect.

Significant matters in delegated legislation in relation to Australian conformity assessment bodies (paragraph 1.62, Scrutiny Digest)
The Committee has asked for advice on a number of aspects of Schedule 2 of the Bill:

Delegated legislation
In relation to why it is considered necessary to leave most of the elements of this new scheme to delegated legislation, this will be a new scheme for Australia which will supplement, rather than replace, the existing pathways. Currently, conformity assessments are undertaken by the TGA and by European bodies with the oversight of their national governments. As such, there is a need to ensure the structure of the scheme is sufficiently flexible to incorporate the ability to respond efficiently to make any changes and refinements that may be needed as the scheme develops and as the TGA, the new Australian bodies and manufacturers gain experience in operating under it. Providing for the details of the new scheme to be set out in regulations is designed to provide this critical flexibility and adaptability, while still ensuring appropriate Parliamentary oversight.

Such an approach would also share similarities with other schemes in Commonwealth legislation that also set out important matters in rules or regulations, such as the Australian trusted trader programme under the *Customs Act 1901* and the *Anti-Money Laundering and Counter – Terrorism Financing Act 2006*, and other regulatory schemes such as the *Biosecurity Act 2015* and the *Navigation Act 2012*. This is also how existing requirements of medical device regulation operate, with the Essential Principles for assessing safety, quality and performance, classification rules and conformity assessment procedures detailed in the Therapeutic Goods (Medical Devices) Regulations 2002.

Sanctions
In relation to what sanctions may be imposed on Australian conformity assessment bodies that breach conditions of their determinations, the only such sanction would be the revocation of their conformity assessment body determination. This is consistent with the power in Schedule 2 of the Bill for regulations to make provision for and in relation to empowering the Secretary to vary or revoke a determination.

Any such action would be subject to review and appeal rights for the affected body, and it is envisaged there would also be a requirement for the Secretary to first give notice of any proposal to revoke, and to allow the body to make submissions on the proposed revocation, which the Secretary would have to consider before taking any action.

Authorised persons
In relation to who may be designated as an 'authorised person' for the purposes of the conditions outlined in proposed new subsection 41EW(6) in Schedule 2 of the Bill, this reference relates to the definition of that term in section 7A of the Act, which limits such persons to:

- an officer of the Department of Health, or an officer of another Commonwealth department or authority; or
- an officer of a department or authority of a State or a department or administrative unit or authority of a Territory, which has functions relating to health matters or law enforcement.

As such, there would not appear to be a need for limits on who may be so designated to be included in the Bill.

Consultation

In relation to what type of consultation will be conducted prior to the making of regulations to establish the Australian conformity assessment body determinations scheme, some public consultation on these details has already been undertaken. Documents were released for this purpose on the TGA's website (www.tga.gov.au) on 16 November 2016, and submissions closed on 11 January 2017. Twelve submissions were received, with respondents indicating general support for the initiative and for having criteria for becoming such a body that are aligned with the approach for equivalent bodies in Europe. Consultation outcomes will be published on the TGA's website later this year, along with copies of the submissions for respondents who have agreed to that publication.

This feedback will inform the nature of the scheme to be outlined in regulations in the second half of this year, and the TGA will work closely with stakeholders to conduct further, targeted consultations with potential bodies, and with peak bodies, ahead of those regulations being prepared.

As there is already a detailed consultation programme underway in relation to these measures, it would not appear to be necessary to specify further consultation requirements in the Bill that would apply in addition to those required under section 17 of the *Legislation Act 2003*.

Fees

In relation to how the application and assessment TGA fees will be calculated, as with existing TGA fees and charges provided for in regulations (for example, application fees for the inclusion of medical devices in the Register, and fees relating to varying an entry in the Register), these fees will be calculated on a cost recovery basis, in accordance with the Australian Cost Recovery Guidelines (CR Guidelines) – principally, this means the fees will reflect the amount of effort involved in processing applications and in assessing the suitability of applications for determinations for approval. A cost recovery impact statement (CRIS) will be completed and released on our website prior to charging commences. Subsection 59(2) of the Act also requires that any fees prescribed under the Act must not be such as to amount to taxation.

As the TGA will also continue to undertake conformity assessments of medical devices itself after the Bill and the regulations commence, these fees will continue to be set on cost recovery basis.

Any such fees will also be the subject of further, specific consultation with industry before being included in regulations.

Broad delegation of administrative powers – Schedules 2, 6 and 12 of the Bill (paragraph 1.66, Scrutiny Digest)

The Committee has asked why it is considered necessary to allow for the delegation of any or all the Secretary's functions or powers in relation to a number of provisions in the Bill.

As with the majority of the Secretary's powers and functions under the Act, there is a practical need for appropriate delegations to ensure that decisions can be made in a timely fashion, and to support the objects of the Act which include the timely availability of therapeutic goods in, and exported from, Australia. Allowing for the delegation of the Secretary's functions and powers in the above areas of the Bill reflects these needs. The TGA makes many thousands of delegated decisions each year under the Act and regulations. For example in 2015-16, the TGA received 231 applications for new prescription medicines and extensions of indications of medicines, 177 applications for over the counter medicines,

1,832 applications for class 2 medical devices, 344 applications for class 3 medical devices and 49 applications for active implantable medical devices. It is not practical for one or a small number of decision-makers to make these decisions.

Consistent with the Department's overall approach to delegations under the Act and regulations, administrative processes are in place to ensure that the Secretary's powers and functions under the amendments proposed by the Bill will be delegated to officers at an appropriate level of seniority, and to ensure that staff exercise delegations appropriately.

For example, the delegation of the Secretary's current power to approve the importation and supply of unapproved medicines, biologicals and medical devices for which substitutes are unavailable or in short supply is limited under regulations made for the purposes of current paragraphs 57(8)(b) and 57(9)(b) of the Act to two positions at the First Assistant Secretary level, and currently the Principal Medical Adviser, of the Department's Health Products Regulation Group. Any regulations made for the purposes of the proposed new subsections 57(8) and (9) of the Bill would maintain this approach.

As such, it would not appear to be necessary for the Bill to expressly limit the scope of powers that may be delegated or limit the positions to whom these powers may be delegated, as this will be effected through administrative procedures that are already operating effectively in relation to existing powers.

Strict liability offences – access to unapproved goods by notification (paragraph 1.69, Scrutiny Digest)

The Committee has asked for a justification for each of the proposed strict liability offences at items 4, 12 and 24 of Schedule 3 of the Bill – these offences would apply where a health practitioner who is authorised to supply – respectively - unapproved medicines, biologicals or medical devices, to their patients under the amendments in Schedule 3 fails to notify the Secretary of having done so within 28 days after the supply.

Each of these offences would appear to be consistent with the criteria outlined in the Attorney-General's Department's Guide to Framing Commonwealth Offences in relation to when it is appropriate for strict liability offences to apply:

- they are not punishable by imprisonment;
- the maximum penalty is less than 60 penalty units for an individual – for each of the offences, the maximum penalty is only 10 penalty units for an individual;
- the offences will enhance the effectiveness of the scheme by deterring practitioners from failing to notify the TGA of the details it needs to verify compliance and that correct kinds of medicines are being supplied to the kinds of patients they are authorised for under the scheme; and
- without such notifications the TGA will not be able to ensure that the scheme is operating safely for patients.

The legislation already contains a small number of other, long standing strict liability offences with similarly low maximum penalty levels - for example, if a sponsor of a prescription medicine or an over the counter medicine supplies their medicine without consumer medicine information, or if a sponsor of a medicine manufactured using a human embryo does not include certain information with their product when supplying it (regulations 9A and 9B of the Therapeutic Goods Regulations 1990.

In addition, the defence of mistake of fact would also apply, under the Criminal Code, in respect of these strict liability offences.

Consultation prior to making delegated legislation – advisory committees (paragraph 1.75, Scrutiny Digest)

The Committee has asked why it is necessary to remove the current requirement in subsection 10(4) of the Act for the Minister to consult a committee before making standards for therapeutic goods (other than medical devices), and the current reference in subsection 36(3) to the Minister's discretion to consult a committee before making manufacturing principles.

Not all standards or manufacturing principles, or amendments to these instruments, need the technical input of an advisory committee –for example, where a proposed standard has already been the subject of detailed, in-depth consultation with industry, consumers and health practitioners, or where a proposed amendment would mainly update references to international standards that stakeholders are already familiar with and support the adoption of.

Removing the obligation to always consult a committee will streamline the standard - making process, but will still leave the decision-maker the discretion to consult an advisory committee on a proposed standard if there are issues that would benefit from that advice. Removing the reference to consulting a committee in relation to manufacturing principles will avoid confusion as to whether or not this is a necessary step, but will also not preclude decision – makers from first consulting an advisory committee before making these legislative instruments if they wish to do so.

As pointed out by the Committee, under the recent regulation amendments the Therapeutic Goods Committee no longer exists, but the functions of a number of new or continuing advisory committees were amended to incorporate the capacity to provide advice and make recommendations on matters relating to standards (e.g. the Advisory Committee on Medicines, and the Advisory Committee on Complementary Medicines (sections 35A and 39A of the Therapeutic Goods Regulations 1990 refer).

Such committees will continue to be consulted for significant standards and manufacturing principles, and major changes to such instruments (such as changes to adopt a new set of requirements for sponsors), and the TGA will develop guidelines to explain the process for this consultation.

Fees in delegated legislation – review and appeal rights for permissible ingredients (paragraph 1.78, Scrutiny Digest)

The Committee has asked whether consideration has been given to providing greater legislative guidance on the composition of the application and evaluation fees for applications for the approval of new ingredients for use in listed complementary medicines (including the method of indexation), and on why it is necessary to have both such fees.

This was not considered necessary, as TGA fees and charges – including fees relating to requests for new ingredients - are calculated on a cost recovery basis, in accordance with the CR Guidelines. The current evaluation fees for applications for new ingredients for listed complementary medicines – which will remain in place after the Bill – reflect the cost to TGA of evaluating the suitability of a possible new ingredient, including assessing the dossiers of information provided in support of the application.

Further, subsection 59(2) of the Act also requires that any fees prescribed under the Act must not be such as to amount to taxation. This provision would appear to address the concerns raised by the Committee in paragraph 1.77 of its Scrutiny Digest No.1 of 2017.

There are currently no application fees for these applications. If such fees are proposed in the future, they would be expected to be low, and to be based on the cost of the administrative and technical screening of new ingredient applications before an evaluation commences – for example, the processing cost of examining whether an application has been made in accordance with the relevant approved form, and whether it contains enough information to proceed with the evaluation. An evaluation fee would not be required until we are ready to commence evaluation of the application. This meets the cost recovery principles and provides more certainty and transparency to those who pay the fees. This approach is also consistent with the current regulatory requirements for other TGA fees.

The Bill does not refer to the method of indexation, because the TGA consults with industry at bilateral meetings every year on proposed changes to TGA fees and charges for the next financial year. On most occasions, annual increases to TGA fees and charges are based on an indexation formula based on the Australian Bureau of Statistics' Wage Price Index and Consumer Price Index (50 per cent for each), and industry is familiar with this approach.

Reversal of evidential burden of proof – providing false or misleading information (paragraph 1.82, Scrutiny Digest)

Schedule 12 of the Bill introduces a new power for the Secretary to require information and documents from holders of manufacturing licences, including for example in relation to the batch numbers and expiry dates of goods they have manufactured.

The Committee has asked why it is proposed to include offences for the provision of false or misleading information or documents in response to such a request that place an evidential burden on the manufacturer to point to some evidence that the information or documents was not false or misleading, if relying on the exceptions to those offences in subsections 41AD(2) or (3), or 41AE(2) or (3).

These offences place this evidential burden on the manufacturer principally because such evidence – i.e. some reason why the material was not false or misleading - would likely be peculiarly within the knowledge of the manufacturer, and not known to the TGA.

These offences would also appear to be consistent with the Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, as they only impose an evidential burden, not a legal burden, on defendant manufacturers – the Guide notes that an evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden).

The offences would also be consistent with existing offences in the Act for providing false or misleading information or documents about goods that are exempt from registration or listing (subsections 31D(2) and 31E(2) of the Act refer), and with existing offences in the Act that provide a defence of reasonable excuse for a defendant (subsections 31(4A), 32JB(1A) and 41JB(3A) of the Act refer).

Privilege against self-incrimination – providing false or misleading information (paragraph 1.85, Scrutiny Digest)

The Bill would also provide, in new section 41AG, that a manufacturer is not excused from providing information or a document to the Secretary on the ground that doing so would tend to incriminate them or expose them to a penalty. The Committee has asked why it is proposed to abrogate the privilege against self-incrimination in this provision.

This information is likely to be important to support the effective regulation of the manufacturing of therapeutic goods under licence in Australia and safeguard public health, particularly as it relates to significant matters such as the quality assurance and quality control measures used by a manufacturer, and whether a manufacturer has been observing the manufacturing principles (minimum requirements relating to quality and safety).

The information may well also be largely uniquely known to the manufacturer, and if the TGA were not to be able to require its provision in light of the privilege, it could be quite difficult for the information to be identified through other means – principally through more frequent audits of manufacturers' premises (this would also be more costly for manufacturers, as fees apply in respect of such audits). Further, if the Secretary were to rely on information that is false or misleading to not suspend or revoke a manufacturing licence, that could potentially have quite serious consequences for public health and safety.

Abrogating the privilege in the manner proposed in section 41AG would also appear consistent with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, in that it applies in respect of persons alleged to have given false or misleading information (or documents), and is constrained by a use and derivative use immunity in that the information or documents will not be admissible in evidence against the person in most proceedings.

The approach in section 41AG is also consistent with existing provisions in the Act that affect the privilege in relation to the provision of false or misleading information about goods that are exempt from registration or listing in the Register (section 31E) or about biologicals that are included in the Register or proposed to be so included (section 32JD) or in relation to medical devices (sections 41JC and 41JJ of the Act refer).

I trust the above information is of assistance.

Yours sincerely

Greg Hunt

Minister for Health
Minister for Sport

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

Ref: MC17-001368

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Polley~~ Helen

Thank you for your correspondence concerning the Treasury Laws Amendment (2016 Measures No. 1) Bill 2016. In its *Scrutiny Digest No. 1 of 2017*, the Scrutiny of Bills Committee requested my advice as to why a 'no-invalidity' clause was included in proposed section 981L pertaining to the client money rules in Schedule 5 to the Bill.

Consultation with industry and consumer representatives is important to the Government, because open and effective discussions with stakeholders are fundamental to successful regulation. The Australian Securities and Investments Commission (ASIC) consults with stakeholders in the formulation of regulatory instruments it proposes to make as a matter of course. This is reflected in the large number of consultation papers available on ASIC's website.

The Government expects that ASIC will consult with stakeholders in developing the client money rules and for this reason has included explicit consultation requirements in the Bill. Proposed section 981L of the Bill is designed to promote certainty among regulated entities by ensuring that a technical failure to comply with the consultation requirements does not affect the validity of the client money rules. It also provides ASIC with the flexibility to use targeted consultation with affected stakeholders in appropriate situations.

There are additional safeguards to ensure that ASIC undertakes proper consultation, including that the client money rules are disallowable by the Parliament. ASIC is also regularly called to appear before Parliamentary Committees to explain its actions.

I trust this information will be of assistance to you.

Yours sincerely

Kelly O'Dwyer

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434

TREASURER

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Thank you for the letter on behalf of the Senate Standing Committee for the Scrutiny of Bills of 16 February 2017 drawing my attention to the Committee's *Scrutiny Digest No 2 of 2017* which seeks my comments on two aspects of the Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017 (Bill).

The Committee has sought my comments on two aspects of the Bill:

- the exclusion from merits review before the Administrative Appeals Tribunal (AAT) in relation to diverted profits tax assessments; and
- the timing of application of the update to Australia's transfer pricing rules to incorporate the latest Organisation for Economic Co-operation and Development (OECD) guidelines.

The exclusion from merits review before the AAT in relation to diverted profits tax assessments

The Committee is concerned that items 1 and 44 of Schedule 1 of the Bill have the combined effect of requiring a taxation objection against a diverted profits tax assessment to be an appeal to the Federal Court rather than to the AAT.

The *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) does not apply to decisions relating to taxation assessments. Item 1 of Schedule 1 will add decisions made under Part 3-30 of the *Taxation Administration Act 1953* (TA Act) (inserted by item 44 of Schedule 1of the Bill) to the classes of decisions to which the ADJR Act does not apply. This ensures that the judicial review processes available for assessments of diverted profits tax are set out in the TA Act, consistent with the approach that generally applies to the review of taxation assessments.

The provisions inserted by item 44 of Schedule 1 provide applicants with an appropriate avenue to object to a diverted profits tax assessment by appealing to the Federal Court (and effectively prevent merits review before the AAT). This is appropriate because arrangements affected by the diverted profit tax are of a very complex nature and taxpayers who enter into such arrangements are large multinational entities. Therefore, it is more appropriate for the review of diverted profits tax assessments to be undertaken by the Federal Court (rather than the AAT). This is not expected to change the nature of the substantive outcome or the remedy for a taxpayer who succeeds in proceedings under Part IVC of the TA Act objecting to an assessment in any way.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

Timing of application of the update to Australia's transfer pricing rules

The Committee has noted that item 4 of Schedule 3 provides that the provisions in Schedule 3 of the Bill will apply to income years commencing on or after 1 July 2016.

The provisions in Schedule 3 will amend the *Income Tax Assessment Act 1997* to update Australia's transfer pricing rules to include the OECD Base Erosion and Profit Shifting (BEPS) amendments to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the OECD Guidelines). Incorporation of the OECD Guidelines will provide taxpayers with greater clarity on how intellectual property and other intangibles should be priced, and ensure the transfer pricing analysis reflects the economic substance of the transaction rather than just the contractual form.

The measure applies from income years commencing on or after 1 July 2016 as it provides greater certainty to taxpayers in relation to the pricing of cross-border transactions and reinforces Australia's commitment to implementation of the BEPS measures. In this regard, since the release of the OECD BEPS recommendations in October 2015, taxpayers have been expecting the imminent implementation of the proposal. In February 2016, the Government conducted a public consultation process on the proposal. During that consultation the proposal received broad support.

Further, the measure will not have any practical impact until taxpayers lodge income tax returns for the 2016-17 income year. In this regard, the majority of affected taxpayers are large corporate entities that are not required to lodge income tax returns for the 2016-17 income year until early 2018 or later. A deferral on the application date may disadvantage taxpayers that have been preparing for the changes to keep pace with counterparties in other countries that have adopted the latest OECD Guidelines.

I appreciate the Committee's consideration of the Bill and I trust this information will be of assistance to the Committee.

Yours sincerely

The Hon Scott Morrison MP

6 / 3 / 2017

Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC17-000488

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ Helen,

I am writing in response to the letter of 9 February 2017 received from Ms Anita Coles, Acting Committee Secretary, which contained comments from the Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest No. 1 of 2017, concerning the VET Student Loans Bill 2016 (the Bill).

The Committee seeks my response to Government amendments to the Bill, particularly in relation to the inclusion of Division 4A in Part 4 of the *VET Student Loans Act 2016*, which allow the Minister to specify an approved external dispute resolution scheme by legislative instrument.

My response is enclosed.

I thank the Committee for raising these issues and providing me with the opportunity to respond.

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7350

Response to Senate Scrutiny of Bills Committee, Digest No. 1 of 2017

VET STUDENT LOANS BILL 2016

Although the committee notes that the bill has already passed, the committee still requests the Minister's advice as to:

- **why the establishment of this external dispute resolution scheme is left to delegated (rather than primary) legislation; and**
- **the type of consultation that is envisaged will be conducted prior to the making of the rules establishing the external dispute resolution scheme.**

Government amendment 15 – Introduction of new Division 4A (External dispute resolution)

Establishment by delegated legislation

Prior to passage of the *VET Student Loans Act 2016* (VSL Act) on 1 December 2016, amendment (15) of Sheet GX140, moved by the Government, inserted a new Division 4A into Part 4 (Approved Course Providers) of the VET Student Loans Bill 2016 (VSL Bill).

Division 4A sets out the mechanism by which an external dispute resolution (EDR) scheme for approved course providers is established and enforced. Section 42A empowers the Minister to specify, by legislative instrument, a scheme that provides for the investigation and resolution of disputes relating to VET Student Loans and VET FEE-HELP assistance, and compliance by approved providers with the VSL Act, and by VET providers with the *Higher Education Support Act 2003* (HESA). The instrument must specify the operator of the scheme (see paragraph 42B(c)).

The Committee has sought advice as to why the establishment of this EDR scheme is left to delegated (rather than primary) legislation.

As highlighted by the Hon Karen Andrews MP, Assistant Minister for Vocational Education and Skills, and as mentioned during the Parliamentary debate on the various VET Student Loans Bills, the intention has always been to establish a VET Ombudsman and to specify the Ombudsman as the operator of the EDR scheme.

On 16 February 2017 the Government introduced the Education and Other Legislation Amendment Bill (No. 1) 2017 (EOLA Bill). Once passed, Schedule 1 to the EOLA Bill will amend the *Ombudsman Act 1976* (Ombudsman Act) to insert a new Part IIE to establish the office of the VET Student Loans Ombudsman. Following passage of the EOLA Bill, it is intended that a legislative instrument will be made under section 42A of the VSL Act to specify the VET Student Loans Ombudsman as the operator of the EDR scheme.

Further, the EOLA Bill will amend the VSL Act to insert a new section 42BA which provides that, once that instrument is made, the EDR scheme for the purposes of that Act is taken to be operated by the VET Student Loans Ombudsman, and all approved course providers are taken to be members of the scheme.

At the time of passage of the VSL Bill the exact mechanism for establishing the Ombudsman and consequent amendments to the Ombudsman Act had not been finalised, hence it was left to a disallowable legislative instrument to specify the scheme and its operator. Should it later become desirable to move to an industry-based VET Ombudsman, section 42A of the VSL Act would enable the Minister to make a further disallowable legislative instrument to specify a different operator of the EDR scheme.

While the Committee correctly points out that section 42C of the VSL Act requires approved VSL providers to comply with the requirements of the approved EDR scheme, the VET Student Loans Ombudsman's functions and powers will be set out in Part IIE of the Ombudsman Act.

As mentioned, the key policy intent of amendment 15 was to establish an Ombudsman. Given the EOLA Bill is the mechanism to establish an Ombudsman, and this is subject to Parliamentary scrutiny as part of the primary legislative process, the Committee's concerns about specifying the EDR scheme by legislative instrument should be ameliorated.

Consultation

The Committee has also sought advice on the type of consultation that is envisaged will be conducted prior to the making of the rules establishing the external dispute resolution scheme.

The Government invited vocational education and training (VET) stakeholders to comment and present proposals about an external dispute mechanism to the Department of Education and Training.

Establishing an Ombudsman was considered in the VET FEE-HELP Redesign Discussion Paper (released publicly on 29 April 2016), mentioned in the VET FEE-HELP Redesign Regulatory Impact Statement (2016) and discussed extensively by the Senate Standing Committee on Education and Employment Legislation in November 2016.

The Department of Education and Training has consulted with the VET Student Loans Implementation Advisory Group in relation to the framework of the VET Student Loans Ombudsman. This consultation has included a presentation from the Commonwealth Ombudsman, an overview paper and discussions on this topic as a regular agenda item.

Similarly, the framework of the VET Student Loans Ombudsman has largely been modelled on the Overseas Students Ombudsman provisions of the Ombudsman Act. This is appropriate given key stakeholders, including students and providers, share similar characteristics with the VET Student Loans program and also given the success to date of the Overseas Students Ombudsman in achieving positive outcomes for students.

Appropriate communication techniques and strategies will be implemented to ensure students and key stakeholders are familiar with the functions and purpose of the VET Student Loans Ombudsman when it is established on 1 July 2017. Further, the VET Student Loans Ombudsman will be driving the development of a code of practice in relation to complaints handling and other matters that arise out of its performance, with extensive consultation and liaison with the relevant stakeholders.

Government amendment 24 – Delegation of secretary powers to an officer of an approved EDR scheme

The Committee has noted that Government amendment 24 allows the Secretary's powers to be delegated under section 114 of the VSL Act to non-APS employees who are operators of an approved EDR scheme.

As mentioned previously, flexibility was inserted into the VSL Act to allow the Government to carefully consider the most appropriate model for a proposed VET Ombudsman and to allow for any discretion that may or may not be required to perform efficient and effective functions expected by Parliament. The response to the Committee's Ninth Report of 2016 provided examples of where it may be appropriate to delegate powers to employees at any level.[1]

No powers under the VSL Act are currently delegated by the Secretary to the VET Student Loans Ombudsman, and at this time there is no intention to do so. The powers given to the office of the VET Student Loans Ombudsman through the Ombudsman Act are considered sufficient for it to properly discharge its functions. Further, powers will not be delegated to non-APS employees unless it is appropriate and necessary to do so given the circumstances and any necessity to deliver the VSL program. If this situation arises, any delegation would be subject to subsection 114(2) of the VSL Act, which requires the delegate to comply with any direction given by the Secretary. A direction may be imposed to ensure oversight and to further strengthen controls which are in place on the appropriateness of delegations, such as the 'accountability' and other controls mentioned in the initial response to the Committee's Ninth Report of 2016. [2]

As stated in the supplementary explanatory memorandum to the VSL Bill, any potential move to a future industry-based Ombudsman might benefit from this provision. At the same time, any future move to an alternative model would likely require a legislative process to occur (for example, to amend or repeal Part IIE of the Ombudsman Act) and as such would be subject to the appropriate Parliamentary scrutiny.

[1] Senate Standing Committee for the Scrutiny of Bills, Ninth Report of 2016, 23 November 2016, pp 597-598.
[2] Senate Standing Committee for the Scrutiny of Bills, Ninth Report of 2016, 23 November 2016, p 597.