The Senate

Standing Committee for the Scrutiny of Bills

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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:

- whether it unduly trespasses 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 considered the following bills.

Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

Purpose	This bill seeks to provide for the enforcement of Commonwealth model litigant obligations
Sponsor	Senator David Leyonhjelm
Introduced	Senate on 15 November 2017

The committee has no comment on this bill.

Marriage Amendment (Definition and Religious Freedoms) Bill 2017

Purpose	This bill seeks to amend the *Marriage Act 1961* to: • amend the definition of marriage to allow two people to marry, regardless of sex, sexual orientation, gender identity or intersex status; • recognise foreign same-sex marriages in Australia; • create a new category of 'religious marriage celebrant' for current civil celebrants who wish to be identified as such; and • allow ministers of religion, religious marriage celebrants, chaplains and bodies established for religious purposes to refuse to solemnise or provide facilities, goods and services for marriage on religious grounds
Sponsor	Senator Dean Smith
Introduced	Senate on 15 November 2017

The committee has no comment on this bill.

Nuclear Fuel Cycle (Facilitation) Bill 2017

Purpose	This bill seeks to amend *Australian Radiation Protection and Nuclear Safety Act 1998* and the *Environment Protection and Biodiversity Conservation Act 1999* to remove prohibitions on the construction or operation of certain nuclear installations
Sponsor	Senator Cory Bernardi
Introduced	Senate on 14 November 2017

The committee has no comment on this bill.

Public Governance, Performance and Accountability Amendment (Executive Remuneration) Bill 2017

Purpose	This bill seeks to amend the *Public Governance, Performance and Accountability Act 2013* to establish caps on the remuneration paid to senior executives in the Commonwealth public service as well as annual reporting requirements regarding this remuneration
Sponsor	Senator Peter Whish-Wilson
Introduced	Senate on 15 November 2017

The committee has no comment on this bill.

Chapter 2

Commentary on ministerial responses

2.1 This chapter considers the response of a minister to matters previously raised by the committee.

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

Purpose	This bill seeks to amend the *Migration Act 1958* to prohibit narcotic drugs, mobile phones, SIM cards and other things of concern in relation to persons in immigration detention facilities The bill also amends the search and seizure powers, including the use of detector dogs for screening procedures
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 13 September 2017
Bill status	Before the House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (ii), (iv) and (iv)

2.2 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Minister responded to the committee's comments in a letter dated 2 November 2017. The committee sought further information in *Scrutiny Digest No. 13 of 2017* and the Minister responded in a letter dated 27 November 2017. 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 responses. A copy of the letter is available on the committee's website.[1]

Significant matters in delegated legislation[2]

Initial scrutiny – extract

2.3 Proposed subsection 251A(2) of the bill enables the Minister to make a legislative instrument that can determine that any 'thing' is prohibited in an immigration detention facility. The power can be exercised where the Minister is

1 See correspondence relating to *Scrutiny Digest No. 14 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

2 Item 2, proposed subsection 251A(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

satisfied that possession of the thing is prohibited by law or possession or use of the thing in the detention facility 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.[3] There is otherwise no limit on the type of 'things' that the Minister may prescribe as being prohibited.

2.4 The committee's view is that significant matters, such as what is prohibited in immigration detention facilities, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case the explanatory memorandum states that the instrument will give the Minister flexibility to respond quickly if operational requirements change and, as a result, the things determined by the Minister and the things to be prohibited need to be amended'.[4] The explanatory memorandum also provides that it is currently intended to determine that narcotic drugs and child pornography will be prohibited using the power to prohibit unlawful things, and that the broader power to prohibit any thing that the Minister is satisfied might pose a risk is clarified by the note in the bill that gives examples of the things that might be considered to pose a risk. However, the committee notes that the bill does not directly prohibit any things; the actual things that are to be prohibited are left to be determined in delegated legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

2.5 Generally the committee expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions. In this case the question of what is appropriate to be prohibited in an immigration detention facility would appear to differ depending on the risk factor posed by the individual detainee. As noted above, the risk posed by a person seeking asylum or a tourist having overstayed their visa, in possessing things such as mobile phones, is likely to be much lower than the risk posed by those with serious criminal records (who have had their visa cancelled on character grounds). As such, any decision to determine that certain things are to be prohibited for possession by *all* immigration detainees appears to be an important policy consideration. From a scrutiny perspective, the committee considers that giving this power to the Minister delegates important policy, as opposed to operational, decisions, which has not been appropriately justified in the explanatory materials.

2.6 In addition, where the Parliament delegates its legislative power in relation to significant matters 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

3 See item 2, proposed section 251A.

4 Explanatory memorandum, p. 6.

validity of the legislative instrument. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.[5]

2.7 The committee's scrutiny view is that significant matters, such as the type of things that are prohibited within an immigration detention facility, 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 detailed advice as to:

- why it is considered necessary and appropriate to delegate to the Minister the decision as to what items are to be prohibited in immigration detention facilities, particularly where such prohibitions will apply to all detainees regardless of their risk level; and
- the type of consultation that it is envisaged will be conducted prior to the making of the instrument and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Minister's first response

2.8 The Minister advised:

> The list of lawful things which are prohibited things within the context of an IDF has not been included in the primary legislation. The things to be captured in the list are items which are not covered by the definition of 'prohibited thing' in proposed subsection 251A(1)(a)(i) and may be lawful in Australian community, but present a risk to the health, safety, security of detainees and visitors to IDFs or order of IDFs
>
> It is necessary and appropriate for the Minister to determine things to be prohibited things by legislative instrument, as this will enable the Minister to respond quickly and flexibly to emerging threats to the health, safety or security of all persons in an IDF or the order of these facilities. This will also allow the Minister to amend the list at short notice to remove things that are no longer considered to be a risk. If the list of prohibited things was

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

included in the primary legislation this would undermine the ability of the Minister to quickly respond to emerging threats across IDFs.

Proposed subsection 251A(2) of the Bill includes a note which lists of the kind of things which are the most common things currently being used to facilitate violence and anti-social behaviour and to disrupt the order within IDFs. This note has been included in the Bill to provide guidance as to the type of things the Department is seeking to prevent in IDFs in addition to things which are prohibited because of a law of the Commonwealth, or a State or Territory in which the person is detained.

The legislative instrument containing the list of prohibited things will be tabled in both Houses of Parliament for scrutiny; however, as the instrument will fall within the exemptions under the Legislation (Exemptions and Other Matters) Regulation 2015, it will not be disallowable.

Ongoing assessment will be undertaken in order to update this list to remove things which are no longer considered to be a threat or to add things which have become a risk, based on changing operational requirements within IDFs.

I will consult with my Department in order to determine those items to be included in the list of prohibited things. Due to the nature of the subject matter, I do not consider that it is appropriate that specific consultation obligations be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Committee's first comment

2.9 The committee thanks the Minister for this response. The committee notes the Minister's advice that determining things to be prohibited via legislative instrument will enable the Minister to respond quickly and flexibly to emerging threats and also allow the Minister to amend the list at short notice to remove things that are no longer considered to be a risk. The committee also notes the Minister's advice that the instrument will fall within the exemptions under the Legislation (Exemptions and Other Matters) Regulation 2015 and so will not be disallowable. The committee also notes the Minister's advice that he will consult within the Department of Immigration and Border Protection to determine the items to be included in the list of prohibited things but that the Minister does not consider it appropriate to include specific consultation obligations in the legislation, because of the nature of the subject matter.

2.10 The committee has particular scrutiny concerns that the Minister will be able to prohibit any 'thing' in an immigration detention facility and the list of things to be prohibited will not be subject to disallowance by the Parliament. As such, if the Parliament were to delegate such significant matters to the Minister it would lose any oversight as to what type of 'things' are appropriate to be prohibited, and searched for, in immigration detention facilities. The committee notes that the explanatory materials accompanying the bill do not state that the legislative

instrument prescribing such things is exempt from disallowance. The committee has consistently taken the view that removing parliamentary oversight is a serious matter and any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The committee notes that the Minister's response does not provide any justification as to why such a legislative instrument should be exempt from disallowance.

2.11 The committee reiterates that it generally expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions. In this case the question of what is appropriate to be prohibited in an immigration detention facility would appear to differ depending on the risk factor posed by the individual detainee. As noted above, the risk posed by a person seeking asylum or a tourist having overstayed their visa, in possessing things such as mobile phones, is likely to be much lower than the risk posed by those with serious criminal records (who have had their visa cancelled on character grounds). As such, any decision to determine that certain things are to be prohibited for possession by *all* immigration detainees appears to be an important policy consideration. From a scrutiny perspective, the committee reiterates that giving this power to the Minister delegates important policy, as opposed to operational, decisions, which has not been appropriately justified in the explanatory materials.

2.12 The committee seeks the Minister's detailed justification as to the appropriateness of exempting from the usual parliamentary disallowance process a legislative instrument made by the Minister prohibiting possession of any 'thing' in an immigration detention facility (such as mobile phones or food).

Minister's further response

2.13 The Minister advised:

> The legislative instrument, made under new section 215A to be inserted into the *Migration Act 1958* by the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the Bill), containing the list of prohibited things will be tabled in both Houses of Parliament for scrutiny. However, as the instrument falls within the Migration Act exemptions under the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Regulation), it will not be disallowable.
>
> Section 10, table item 20, of the Regulation provides that an instrument (other than a regulation) made under Part 1, 2 or 9 of the Migration Act is not subject to disallowance. As such, the exemption applies to all instruments made under Part 2 of the Migration Act. New section 215A falls within Part 2 of the Migration Act and is therefore captured by the exemption. As a result of the operation of the Regulation the legislative instrument listing prohibited things will not be disallowable.
>
> As noted in my previous response to the Committee, it is necessary and appropriate for the Minister to determine things to be prohibited by

> legislative instrument as this will enable the Department of Immigration and Border Protection (the Department) to respond quickly and flexibly to emerging threats to the health, safety or security of all persons in an immigration detention facility and maintain the order of these facilities. The satisfaction on the part of the Minister will be informed by intelligence-based briefings from the Department.
>
> The legislative instrument is appropriate and will remain the subject of extensive internal and external scrutiny.
>
> For the reasons set out above, I consider that it is appropriate that the list of prohibited things is set out in a non-disallowable legislative instrument.

Committee further comment

2.14 The committee thanks the Minister for this response. The committee notes the Minister's advice that, because the legislative instrument will be made under Part 2 of the *Migration Act 1958*, it will be subject to the exemptions set out in the Legislation (Exemptions and Other Matters) Regulation 2015 and will therefore not be disallowable. The committee also notes the Minister's advice that it is necessary and appropriate that the Minister determine 'things' to be prohibited by legislative instrument as this will enable the Department of Immigration and Border Protection to respond quickly and flexibly to emerging threats to the health, safety or security of all persons in immigration detention facilities and to maintain order in these facilities.

2.15 The committee reiterates its scrutiny view that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation can be provided. In this instance, the committee remains of the view that giving to the Minister the power to determine the type of 'things' that are to be prohibited within an immigration detention facility appears to delegate a significant policy, as opposed to an operational, decision. The committee reiterates that a legislative instrument, made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

2.16 The committee further notes that as a result of the Legislation (Exemptions and Other Matters) Regulation 2015, any legislative instrument that sets out the 'things' to be prohibited in an immigration detention facility will not be subject to parliamentary disallowance, and therefore, Parliament will have no oversight of what 'things' are to be prohibited in a facility. The committee notes that although the Minister's response explained the process by which the legislative instrument will be exempt from disallowance, it did not address the committee's question as to why such an exemption is justifiable. The committee reiterates that it has consistently taken the view that removing or limiting parliamentary oversight is a significant matter and any exemption of delegated legislation from the usual disallowance process should be fully justified. In relation to other mechanisms available to the Parliament to properly scrutinise non-disallowable instruments, the committee notes

that the Senate Standing Committee on Regulations and Ordinances does not examine non-disallowable instruments and the nature of non-disallowance means that the Senate would have no power to set aside any ministerial determination that it considers to be inappropriate. The committee's scrutiny concerns are heightened where the proposed exemption from disallowance would completely remove a significant policy matter from all parliamentary scrutiny, as would occur in this instance.

2.17 The committee requests that the key information provided by the Minister regarding the fact that the legislative instrument will not be disallowable be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law.

2.18 The committee considers that it would be appropriate for the bill to be amended to include the type of matters that are to be prohibited in immigration detention facilities in the primary legislation, and if matters are to be included in delegated legislation, to ensure the legislative instrument is subject to the usual disallowance processes under section 42 of the *Legislation Act 2003*.

2.19 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing significant policy matters to be dealt with by delegated legislation that will not be subject to disallowance.

Broad delegation of administrative power[6]

Initial scrutiny – extract

2.20 Proposed section 252BA provides that an authorised officer may, without warrant, conduct a search of a wide range of areas in immigration detention facilities, including of detainees' personal effects and rooms to find out whether certain things, including 'a prohibited thing', are at the facility. Proposed section 252BB provides that an authorised officer may be assisted by other persons in exercising these search powers if that assistance is necessary and reasonable. This is a new general statutory search power. The explanatory memorandum explains that currently common law is relied on to search for prohibited items within an immigration detention facility to ensure the safety and security of people within the facility.[7] Proposed subsection 252BA also effectively gives an authorised officer the power to use force against a person or property, but no more than is reasonably necessary in order to conduct the search.

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6 Item 21, proposed sections 252BA and 252BB. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

7 Explanatory memorandum, p. 14.

2.21 The explanatory memorandum provides no information as to the persons that will be authorised to use these coercive powers. The committee notes that section 5 of the Migration Act defines 'authorised officer' as an officer authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner. An 'officer' is defined in the same section as including any person, or classes of persons, authorised in writing by the Minister to be an officer. There is no requirement that these are to be government employees. In relation to an authorised officer's assistant, there appears to be no legislative guidance as to who these persons are, whether they are to have any particular expertise or training, or how they are to be appointed.

2.22 The committee's consistent scrutiny position is that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to Framing of Commonwealth Offences*[8] indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given relate to the need to appoint technical specialists in the collection of certain sorts of information.

2.23 The committee therefore requests the Minister's advice as to:

- who it is intended will be authorised as an 'authorised officer' and an 'authorised officer's assistant' to carry out coercive searches in immigration detention facilities and whether these will include non-government employees;
- why it is necessary to confer coercive powers on 'other persons' to assist an authorised person and how such a person is to be appointed; and
- what training and qualifications will be required of persons conferred with these powers, and why the bill does not provide any legislative guidance about the appropriate training and qualifications required of authorised persons and assistants.

Minister's first response

2.24 The Minister advised:

> As noted in the Explanatory Memorandum, authorised officers conducting searches will include departmental officers, and Serco officers who are non-government employees.

8 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 73-75.

The term 'authorised officer's assistant' has been included in the Bill to cover people who are sometimes required to assist with a search under section 2528A or 252C or 252CA where assistance is necessary and reasonable. An example of such assistance would be if a locksmith is required on a one-off basis to unlock a door within an IDF in order to facilitate a search of that premises. The Bill does not require that "authorised officer's assistant" be appointed - they will be deployed as and when their skills are required in accordance with new section 25288.

Officers authorised to carry out searches in IDFs will be subject to strict training and qualification requirements whether they are departmental officers or non-government employees.

Under the existing contractual arrangements with Serco (detailed in the Facilities and Detainee Services Provider (FDSP) contract) all Service Provider Personnel who, in the performance of their duties exercise a search or seizure power in relation to detainees and persons entering an IDF must, prior to undertaking those duties successfully complete a training course provided by a Registered Training Organisation and delivered by a level IV accredited trainer. This training covers the proper exercise of these duties and, upon successful completion, the person will be issued with a certificate that demonstrates that the person has the competencies required to perform the power. The FDSP contract also requires a biennial rolling program of refresher training to ensure staff maintain their qualifications in the use of reasonable force.

In addition, all authorised officers must attend regular refresher training on the use of reasonable force in an IDF, the curriculum of which includes:

- legal responsibilities;
- duty of care and human rights;
- cultural awareness;
- occupational health and safety;
- mental health awareness;
- managing conflict through negotiation; and
- de-escalation techniques.

Under Ministerial Direction No. 51 - Strip search of immigration detainees, any individual who is appointed as an authorised officer for the purposes of conducting a strip search under section 252A must satisfy the minimum training and qualification requirements, which include training in the following areas:

- civil rights and liberties;
- cultural awareness;
- the grounds for conducting a strip search;
- the pre-conditions for a strip search;

- the role of officers involved in conducting a strip search;
- the procedures for conducting a strip search;
- the procedures relating to items retained during a strip search;
- record keeping; and
- reporting.

As outlined in the Explanatory Memorandum to the Bill, officers authorised to use dogs for searches under section 252AA and 252A will also be required to undergo specific training in relation to handling dogs to ensure the dog is prevented from touching any person and is kept under control for the duration of the search.

Committee's first comment

2.25 The committee thanks the Minister for this response. The committee notes the Minister's advice that authorised officers conducting searches will include government and non-government employees, and authorised officers' assistants will include any person necessary and reasonable to assist with a search, such as a locksmith; such persons will not be appointed, they will be deployed as and when their skills are required. The committee also notes the Minister's advice that officers authorised to carry out searches will be subject to strict training and qualification requirements, as set out under the existing contractual arrangements with Serco and under a ministerial direction.

2.26 The committee reiterates that its consistent scrutiny position is that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to Framing of Commonwealth Offences*[9] indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required.

2.27 The committee notes that while the Minister states that officers authorised to carry out searches in immigration detention facilities will be subject to strict training and qualification requirements, there is nothing in the bill that would require such training or qualification.

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

9 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 73-75.

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

2.29 The committee considers that, from a scrutiny perspective, it would be appropriate for the bill to be amended to, at a minimum, require that authorised officers and any person assisting possess specified skills, training or experience.

2.30 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of conferring coercive search powers on non-government employees without a legislative requirement that they possess appropriate skills and training.

Minister's further response

2.31 The Minister advised:

> I support the Committee's comments as to the importance of the Explanatory Memorandum as a point of access to understanding the Bill and as a key tool to assist in its interpretation. I consider that the Explanatory Memorandum as tabled on the introduction of the Bill in the House of Representatives on 13 September 2017 adequately and appropriately addresses the key information that I provided to the Committee in my previous letter of response dated 2 November 2017.
>
> As noted in my previous response, authorised officers conducting searches in immigration detention facilities will be subject to strict training and qualification requirements whether they are departmental officers or non-government employees.
>
> As the Committee is aware, under section 5 of the Migration Act to be an authorised officer a person must be authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of the relevant provision. This authorisation process ensures that an appropriate level of control is applied to determine who is an authorised officer. I reassure the Committee that only persons who possess the specified skills, training or experience necessary to perform the duties required under the relevant provisions of the Migration Act will be appointed as authorised officers.
>
> On that basis, I do not consider it necessary to amend the Bill to include this as an express statutory requirement.
>
> For the purpose of the Bill, any person assisting an authorised officer would provide this assistance on the basis that they have specialised skills that the authorised officer does not possess, making this assistance necessary and reasonable. As also noted in my previous response to the Committee, an example of such assistance would be if a locksmith is required on a one-off basis to unlock a door within an immigration detention facility in order to facilitate a search of that premises. The Bill does not require that an "authorised officer's assistant" be appointed - they will be deployed as and when their skills are required in accordance

with new section 252BB. As such I also do not consider it necessary to amend the Bill to require any person assisting an authorised officer to possess specified skills, training or experience.

Committee further comment

2.32 The committee thanks the Minister for this response. The committee notes the Minister's view that the explanatory memorandum as tabled on 13 September 2017 adequately and appropriately addresses the key information provided to the Committee in his letter dated 2 November 2017.

2.33 The committee also notes the Minister's view that it is not necessary to amend the bill to require authorised officers conducting searches in immigration detention facilities to possess specified skills, training or experience because they will be subject to strict training and qualification requirements, and that only persons who possess specified skills, training or experience necessary to perform these duties will be appointed as authorised officers. The committee further notes the Minister's advice that any person assisting an authorised officer would be deployed as required on the basis that they have specialised skills that the authorised officer does not possess and that the bill does not require that they be appointed as an 'authorised officer's assistant'.

2.34 The committee does not consider that the explanatory memorandum contains the full amount of information set out in the Minister's response dated 2 November 2017 relating to the skills, training and qualifications that authorised officers are to be required to possess and the circumstances in which an authorised officer's assistant might be needed. The committee's long-standing view is that an explanatory memorandum should include all necessary information to ensure that parliamentarians, courts and the public are able to understand the intended operation of all provisions of the bill. The committee's strong preference is that all information relevant to understanding how a bill operates should be contained in the one, stand-alone document accompanying the bill. This is particularly relevant in this case as, at the date of tabling, the bill has not yet been presented to the Senate.

2.35 The committee also notes that while the Minister's response restates the view that the bill need not be amended because authorised officers will be subject to strict training and qualification requirements, this would mean there is no legislative, and therefore enforceable, requirement that such officers possess such training and qualifications.

2.36 The committee reiterates its consistent scrutiny position that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation.

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

2.38 The committee also reiterates its view that, from a scrutiny perspective, it would be appropriate for the bill to be amended to, at a minimum, require that authorised officers and any person assisting possess specified skills, training or experience.

2.39 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring coercive search powers on non-government employees without a legislative requirement that they possess appropriate skills and training.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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

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