The Senate

Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

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 Cannabis Agency Bill 2018

Purpose	This bill seeks to establish an Australian Cannabis Agency with responsibility for issuing recreational cannabis and distribution licenses in certain areas
Sponsor	Senator Richard Di Natale
Introduced	Senate on 27 November 2018

Broad discretionary power[1]

1.2 The bill seeks to establish an Australian Cannabis Agency (the Agency) which would be responsible for regulating the production and distribution of cannabis in certain areas. Clauses 43 and 48 provides for the grant or refusal by the Agency of cannabis production and distribution licences. Subclauses 43(2) and 48(2) provide that the Agency must not grant a licence unless it is satisfied that the applicant is a fit and proper person to hold a cannabis production or distribution licence. However, the bill does not specify any criteria by which the Agency would make such a determination. The committee notes that this would therefore provide a broad and largely unstructured discretionary power to grant or refuse a licence.

1.3 The committee notes that no explanation is provided in the explanatory materials for these provisions, other than stating what the provisions do.

1.4 In the event that this bill proceeds further through the Parliament, the committee may seek an explanation as to whether more guidance could be included in the bill about how this power is to be exercised, for example by specifying matters that must be considered in determining whether a person is a fit and proper person to hold a cannabis production or distribution licence.

1 Clauses 43 and 48. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

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

Purpose	This bill seeks to amend the *Australian Citizenship Act 2007* to: • remove the requirement that a person be sentenced to six or more years of imprisonment, if convicted of a terrorism offence; and • adjust the threshold for determining dual citizenship by replacing it with a requirement that the Minister is satisfied the person will not become stateless
Portfolio	Home Affairs
Introduced	House of Representatives on 28 November 2018

Broad discretionary power
Trespass on personal rights and liberties[2]

1.5 The bill seeks to amend section 35A of the *Australian Citizenship Act 2007* (Citizenship Act) to remove the current requirement that a person convicted of a terrorism-related offence must also be sentenced to at least six years imprisonment before the minister can remove the person's Australian citizenship. The committee notes that the power to remove citizenship in such circumstances applies to a person who is an Australian citizen regardless of how the person became a citizen (including a person who became a citizen by birth).[3]

1.6 The bill would also allow the minister to remove citizenship if a person is convicted of an offence that is currently not listed: namely, associating with a terrorist organisation.[4] The bill also seeks to remove the current requirement that citizenship can only be removed if the person is a national or citizen of a country other than Australia at the time when the minister makes the determination. This would be replaced with a requirement that the minister be satisfied that the person 'would not become a person who is not a national or citizen of any country'.[5]

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

3 See existing subsections 35A(3)

4 Section 102.8 of Part 5.3 of the *Criminal Code Act 1995*; see Schedule 1, item 1, proposed paragraph (1A)(c).

5 See Schedule 1, item 1, proposed paragraph (1)(b).

1.7 The committee notes that the loss of citizenship is a severe consequence, which may ultimately lead to a person being physically excluded from the Australian community. Consequently, the committee would expect a strong justification for removing the requirement for a minimum sentence to have been imposed before determining the cessation of citizenship. The statement of compatibility states that the purpose of the bill is to 'keep Australians safe from evolving terrorist threats, and to uphold the integrity of Australian citizenship and the privileges that attach to it'.[6] It also states that there have been a number of threats to the Australian community from terrorism, that conviction for a terrorism offence is evidence of very serious conduct 'that demonstrates a person has repudiated their allegiance to Australia', and that it is necessary to allow the minister to determine that a person should not remain an Australian citizen 'to protect Australia and Australian interests from further harmful acts, and to maintain Australia's citizenship framework'.[7]

1.8 However, the committee notes that in providing a basis for removing citizenship that is not based on the length of sentence a person has actually received, the proposed amendments would allow the minister the discretion to remove the citizenship of a person who has been convicted of a 'relevant terrorism offence' but who may have received a very short sentence or no sentence at all. For example, a person may be convicted of providing funds to an overseas organisation and was found to be reckless as to whether the organisation was a terrorist organisation.[8] In those circumstances, while the person may not be given a custodial sentence, the conviction would empower the minister to determine that the person ceases to be a citizen—leading to their possible detention and removal from Australia.

1.9 While the committee notes that the proposed amendments would require the minister to 'have regard to' the severity of the conduct, the degree of threat posed by the person to the Australian community and their age, there is nothing in the legislation that would require the minister to consider the person's family or other connections to Australia or the length of their stay in Australia (noting that this could apply to persons born in Australia and those who have lived in Australia for many years). Removing the length of the sentence imposed on a person gives greater discretion to the minister to remove citizenship, and the committee considers these amendments may inappropriately expand administrative power and may unduly trespass on personal rights and liberties.

1.10 The committee notes that when the Parliamentary Joint Committee on Intelligence and Security reported on the bill that originally introduced section 35A, it recommended that citizenship may only be revoked following conviction for offences

6 Statement of compatibility, p. 7.

7 Statement of compatibility, p. 9.

8 Section 102.6 of the *Criminal Code Act 1995*.

with a sentence of at least six years imprisonment (or multiple sentences totalling at least six years imprisonment). It explained its reasoning on the following basis:

> While limiting the provision to more serious offences is an appropriate measure to better define the scope of conduct leading to revocation, the Committee notes that even following a conviction there will still be degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia. Therefore, the Committee recommends that loss of citizenship under this provision not be triggered unless the person has been given sentences of imprisonment that together total a minimum of six years for offences listed in the Bill.
>
> Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed section 35A to more serious conduct. It was noted that three years is the minimum sentence for which a person is no longer entitled to vote in Australian elections.[9] Loss of citizenship should be attached to more serious conduct and a greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.[10]

1.11 With regard to the proposal to replace the existing requirement that citizenship can only be removed if the person is a national or citizen of another country with a requirement that the minister be satisfied that the person 'would not become a person who is not a national or citizen of any country', the committee notes this could have the consequence that a person could have their citizenship removed while possessing no other citizenship (and perhaps not ever being able to obtain such citizenship in practice), thereby rendering the person stateless. The committee notes that a non-citizen of Australia who does not possess a valid visa[11] may be detained indefinitely in immigration detention if no other country is willing to accept that person. As such, these amendments have the potential to unduly trespass on personal rights and liberties.

1.12 The committee also notes that while the minister's decision would be subject to judicial review, merits review of the decision is not available.[12] The committee notes that the proposed amendments enable citizenship to be removed if the

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

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

11 The committee notes that the statement of compatibility states that a person whose citizenship ceases under these provisions would hold an 'ex-citizen visa', but that this would be subject to mandatory cancellation under the *Migration Act 1958*.

12 See section 52 of the *Australian Citizenship Act 2007* which does not list review of a decision under section 35A as being a decision that may be reviewed by the Administrative Appeals Tribunal.

minister 'is satisfied' that the person would not become a person who is not a national or citizen of any country. Although the exercise of this determination would be subject to a requirement of legal reasonableness, there would be limited scope for the minister's opinion to be reviewed. For this reason, the intensity of permissible judicial review would be considerably lower than is allowable under the current provision, which requires that 'the person *is* a national or citizen of a country other than Australia at the time when the Minister makes the determination'. Under the current provision, the question of whether a person is a national or citizen of another country is a jurisdictional fact that could be reviewed by the court for correctness, rather than merely on the basis of whether the minister's opinion on the question was formed reasonably.

1.13 In light of the comments above, the committee seeks the minister's more detailed justification as to the necessity and appropriateness of expanding the minister's discretionary power to determine that a person ceases to be an Australian citizen.

Retrospective application[13]

1.14 Item 4 of Schedule 1 seeks to ensure that the proposed amendments to section 35A apply to:

- relevant terrorism convictions occurring on or after 12 December 2005; and
- 'relevant other convictions' occurring on or after 12 December 2005 where, if the conviction occurred before 12 December 2015, the person was sentenced to at least to at least 10 years' imprisonment.

The bill would therefore appear to operate retrospectively.

1.15 The statement of compatibility states that the bill proposes to broaden the threshold for retrospective application to individuals with a relevant terrorism conviction, regardless of the length of the sentence imposed, '[i]n order to respond to the evolving threat environment'.[14] The committee notes that this explanation focuses on the general threat of terrorism, without explaining how applying the amendments to persons convicted up to 13 years ago who received a penalty of less than six years imprisonment would 'protect the Australian community'. The committee does not consider that this explanation, without more, to be sufficient to justify the retrospective application of a provision such as this (i.e. a provision which means the serious consequence of loss of citizenship can arise based on convictions that occurred before commencement).

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

14 Statement of compatibility, p. 13.

1.16 In this regard, the committee notes that it is a fundamental principle of the rule of law that the existence of an offence and penalty be established prospectively. In this context, it cannot be concluded that a person could have reasonably expected the loss of citizenship (in addition to any penalty that may lawfully be imposed if their conduct constitutes a crime) prior to the enactment of this bill. The committee emphasises that it will consistently raise scrutiny concerns in circumstances where the law is applied retrospectively, particularly when the consequences for affected individuals are significant (as in this case). In general, individuals should be entitled to rely on the current law to determine their rights and obligations. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for the rule of law and its underlying values.

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

Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to: • include an obligation for persons wishing to nominate as candidates in federal elections to provide information to demonstrate their eligibility to be elected to Parliament under section 44 of the Constitution; and • facilitate electronic lodgement of candidate nominations
Portfolio	Special Minister of State
Introduced	House of Representatives on 29 November 2018

Privacy[15]

1.18 The bill seeks to amend the *Commonwealth Electoral Act 1918* to require any person wishing to nominate as a candidate in a federal election to demonstrate their eligibility to be elected to Parliament under section 44 of the Constitution. In this regard, the bill seeks to make it compulsory for prospective candidates to complete the mandatory elements of a Qualification Checklist (with failure to do so rendering their nomination invalid). Proposed section 181A seeks to provide that the Qualification Checklist and any supporting documents must be published on the Australian Electoral Commission's (AEC) website as soon as practicable after the declaration of nominations for an election, and must remain there until a petition disputing the election can no longer be filed.

1.19 It appears to the committee that a completed Qualification Checklist could contain a great deal of personal information relating not only to the applicant seeking nomination, but also to the citizenship and birth places of the applicant's parents, grandparents (including biological or adoptive parents or grandparents) and former or current spouses or similar partners.[16] Consequently, it appears that personal information relating to third parties could be included on a public website without those parties' consent.

1.20 The committee also notes that proposed section 181C would provide that a number of Australian Privacy Principles in the *Privacy Act 1988* do not apply to personal information included in a Qualifications Checklist or supporting documents.

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

16 See Schedule 1, item 83, proposed Form DB.

Additionally, the bill does not appear to include any process by which a person could apply to the AEC to have personal information removed from the website, or seek merits review of a decision not to remove the information.

1.21 In light of these matters, the committee considers that the requirements relating to Qualification Checklists and supporting documents have the potential to unduly trespass on personal rights and liberties, in particular the right to privacy. The committee is also concerned that potential nominees for federal elections may decide not to nominate, given the implications for personal privacy. This could have an impact on the rights of persons to participate in a democratic society. The committee would therefore expect the explanatory materials to include a detailed justification for the need to publish the information in the Qualification Checklist and supporting documents, as well as an explanation of the safeguards in place to protect individuals' right to privacy—particularly the privacy of those who have not consented to relevant information being made public.

1.22 The explanatory memorandum states that the purpose of publishing the Qualification Checklist and supporting documents is to increase transparency regarding candidates' eligibility and to reassure Australians that persons nominating for elections are qualified to sit or be chosen under section 44 of the Constitution. It further states that making this information public encourages prospective candidates to seriously consider their eligibility before nominating.[17] However, it is not clear to the committee why these objectives could not be achieved by requiring the information to be made available to the Electoral Commissioner prior to nomination, without the need for publication on the internet. In this respect, the committee notes that if the bill is enacted the legislative requirements imposed on all nominees would be able to provide reassurance for Australians that eligibility requirements are in place, and that relevant information will be considered by a competent authority.

1.23 The statement of compatibility acknowledges a risk that publication of the Qualification Checklist and supporting documents could cause third party personal information to be publicly released, and states that the bill contains a number of measures to mitigate this risk.[18] In particular, it states that the questions in the Qualification Checklist are designed to elicit general information without asking for specific personal details. However, the statement of compatibility also notes that the relevant privacy risk is with respect to the information a person provides in a supporting document or in response to a voluntary question.[19]

1.24 The statement of compatibility also states that proposed subsection 170B(3) allows prospective candidates to redact, omit or delete any information from a

17 Explanatory memorandum, p. 34.

18 Statement of compatibility, p. 12.

19 Statement of compatibility, p. 12.

document they do not wish to be published, and that this allows prospective candidates to safeguard the privacy of their own and others' personal information.[20] However, the committee notes that this would require the prospective candidate, not the AEC, to safeguard the privacy of third parties. As such, it does not appear to the committee that proposed subsection 170B(3) would be a sufficient safeguard, given that it leaves the protection of personal privacy to the candidate's discretion.

1.25 The statement of compatibility further states that the bill would give the Electoral Commissioner the discretion to omit, redact or delete any information from the Qualifications Checklist or supporting documents, or decide not to publish a document, if the Commissioner is satisfied on reasonable grounds that the information is 'unacceptable, inappropriate, offensive or unreasonable'.[21] However, the committee notes that the relevant provisions would not require the Commissioner to consider the privacy of third parties, and would rely on the Commissioner to consider all nominations in detail to determine whether information needs to be removed, which, as set out below, is unlikely to occur in practice.

1.26 The committee considers that, if personal information of third parties is to be published on the internet, it would be appropriate to contact affected persons to seek their consent before publication, or at least to give them a hearing as to whether the information could be published. However, the committee notes that the statement of compatibility states:

> The AEC cannot control what information prospective candidates include in the Qualification Checklist and any supporting documents. Vetting the Qualification Checklists and any additional documents for third party information and notifying affected persons of matters such as the purpose of the collection, prior to publication, would impose a significant additional administrative burden on the AEC during the election period – the peak of the electoral cycle for the AEC. There were 1,625 candidates in the 2016 federal election. Given the time constraints, notification is impractical.[22]

1.27 While noting this explanation, the committee does not consider administrative burden to be a sufficient justification for the potentially significant infringement on individual privacy that may result from the requirements in the bill. Further, given the Australian Electoral Commission would be unable to verify what information is contained in the Qualification Checklist and supporting documents, it is not apparent to the committee that the proposed amendments would, in practice, achieve their intended purpose.

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20 Statement of compatibility, p. 12.

21 See Schedule 1, item 29, proposed subsection 170B(6); and item 54, proposed section 181A(3).

22 Statement of compatibility, pp. 12-13.

1.28 The committee seeks the minister's detailed justification as to why it is necessary to publish on the internet the personal details of people who have, or have had, a connection to a nominee for election, noting that it would be possible to require the information be provided to the Electoral Commissioner without the corresponding requirement that all such information be published.

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

Equal Pay Standard Bill 2018

Purpose	This bill seeks to establish a stand-alone scheme for equal pay certification that will operate in addition to all current statutory requirements
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 26 November 2018

Significant matters in delegated legislation[23]

1.30 Subclause 6(1) of the bill seeks to require the minister, by legislative instrument, to make a standard ('equal pay standard') that includes requirements relating to equal pay. Subclause 6(2) sets out specific matters that must be included in the equal pay standard, while subclause 6(3) provides that the minister must not make the equal pay standard without proper consultation.

1.31 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the bill seeks to leave a central element of the equal pay certification framework proposed by the bill to delegated legislation. The explanatory memorandum provides no justification, merely restating the operation and effect of the relevant provisions.[24]

1.32 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of leaving a central element of the equal pay certification scheme to delegated legislation.

23 Subclause 6(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

24 Explanatory memorandum, p. 2.

Future Drought Fund Bill 2018

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

Broad discretionary powers[25]

1.33 Clause 21 of the bill seeks to allow the Agriculture Minister (the minister), on behalf of the Commonwealth, to make arrangements with, and grants of financial assistance to, a person or body for a number of specified purposes related to drought resilience.[26] The minister would be able to begin providing grants and making arrangements on or after 1 July 2020.

1.34 The committee's view is that, where it is proposed to allow the expenditure of a potentially substantial amount of Commonwealth money,[27] the expenditure should be subject to at least some level of parliamentary scrutiny. In this regard, the committee is concerned that the bill contains no guidance on its face as to the terms and conditions that would attach to the financial assistance granted in accordance with clause 21, beyond requiring that any such terms and conditions are to be set out in a written agreement between the Commonwealth and the relevant grant recipient.[28] The explanatory memorandum provides no explanation as to why it is considered necessary and appropriate to confer on the minister a broad power to provide financial assistance with regard to drought resilience, without specifying any terms and conditions to which the provision of assistance would be subject.

1.35 The committee also notes that clause 26 (which seeks to set constitutional limits on the provision of financial assistance) would provide that the minister may grant financial assistance to a state or territory. The explanatory memorandum

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

26 The purposes for which grants may be made, and arrangements may be entered into, are specified in proposed paragraphs 21(1)(c) to (h).

27 In this respect, the explanatory memorandum states that $3.9 billion in uncommitted funds would be transferred from the Building Australia Fund (which is to be dissolved following the enactment of the bill) to the Future Drought Fund on its establishment. The explanatory statement further states that the Future Drought Fund is expected to grow to $5 billion over the next 10 years.

28 Clause 22.

indicates that assistance to the states may be used to incentivise resource management activities and to restore native vegetation for soil and water regeneration.[29] In this respect, the committee notes that section 96 of the Constitution confers on the *Parliament* the power to make grants to the states and to determine the terms and conditions attaching to them.[30] Where the Parliament delegates this power, the committee considers that it is appropriate that the exercise of the power be subject to at least some level of parliamentary scrutiny. However, as noted above, the bill does not appear to contain any guidance as to the terms and conditions on which financial assistance may be granted including to the states and territories.

1.36 The committee acknowledges that the bill seeks to allow the minister, by legislative instrument, to determine a plan (Drought Relief Funding Plan) for ensuring that a coherent and consistent approach is adopted in relation to the making of grants and arrangements, and that minister must comply with this plan when making a grant of financial assistance. However, as outlined below at [1.44] to [1.57], this plan would not be subject to disallowance.

1.37 In light of the discussion above, the committee is concerned that the level of parliamentary scrutiny afforded to grants of financial assistance made in accordance with clause 22 would be very limited, given that the bill does not contain on its face any guidance as to the terms and conditions attaching to such grants, and that the Drought Relief Funding Plan would not be subject to disallowance.

1.38 The committee requests the minister's advice as to why it is considered necessary and appropriate to confer on the Agriculture Minister a broad power to make grants of financial assistance, in the absence of any guidance on the face of the bill as to how this power is to be exercised.

1.39 The committee also requests the minister's advice as to the appropriateness of amending the bill to include (at least high-level) guidance as to the terms and conditions on which financial assistance may be granted.

Merits review[31]

1.40 As outlined above, clause 21 seeks to allow the minister to make an arrangement with, or make a grant of financial assistance to, a person or body for

29 Explanatory memorandum, p. 15.

30 Section 96 of the Constitution provides that: '…the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

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

certain prescribed purposes relating to drought resilience. In relation to the persons and bodies to whom grants may be made, the explanatory memorandum states that:

> Under [clause 21] arrangements could…be made with, and grants provided to, individuals, incorporated or unincorporated bodies, not-for-profit organisations, education institutions (such as a university), State and Territory governments, and local government bodies. This list should not be considered exhaustive.[32]

1.41 It appears to the committee that the provision of grants and the making of arrangements pursuant to clause 21 may involve discretionary decisions on the part of the minister. Moreover, such decisions may have the potential to affect the interests of the persons and entities to which grants may be provided and arrangements made. Consequently, it appears that decisions made under clause 21 may be suitable for independent merits review. However, the committee notes that neither the bill nor the explanatory memorandum indicates whether merits review would be available.

1.42 Additionally, it is unclear to the committee exactly how grants would be made, and arrangements entered into, under clause 21 of the bill (once enacted). The committee notes that neither the bill nor the explanatory memorandum set out any particular processes (for example, an application process) to be followed by persons seeking to obtain a grant or enter into an arrangement. Information regarding how grants are to be awarded and how arrangements are to be entered into would assist the committee in determining whether relevant decisions would be suitable for independent merits review.

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

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

Significant matters in non-disallowable legislative instruments[33]

1.44 Clause 31 of the bill would require the minister to determine a Drought Resilience Funding Plan (DRFP) for ensuring that a 'coherent and consistent approach' is adopted in relation to the making of grants and entering into

32 Explanatory memorandum, p. 12.

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

agreements in relation to the provision of financial assistance. When making a grant or entering into an agreement, the minister would be required to comply with the DRFP that is in force.[34] The Regional Investment Corporation Board (RIC) would also be required to comply with the DRFP in force when giving advice to the minister about grants and agreements.[35] Subclause 31(7) provides that a DRFP would be a legislative instrument, but would not be disallowable.

1.45 Clause 41 would permit the responsible ministers (that is, the Treasurer and the Finance Minister) to give the Future Fund Board (FFB) written directions about the performance of its investment functions relating to the Future Drought Fund. Directions given by the responsible ministers make up the Fund's 'investment mandate'. Because the directions making up the investment mandate are given by a minister to a Commonwealth entity, they will not be subject to disallowance or sunsetting. This is because the directions will be covered by an exemption under the Legislation (Exemptions and Other Matters) Regulation 2015.[36]

1.46 The committee's consistent view is that significant matters relating to a legislative scheme, such as how grants and agreements under the relevant scheme are to be administered, should be included in primary legislation (or at least in legislative instruments subject to parliamentary disallowance and sunsetting) unless a sound justification for using non-disallowable delegated legislation is provided.

1.47 In this instance, the explanatory memorandum provides no information as to why it is considered necessary and appropriate to leave significant elements of the drought resilience funding scheme proposed by the bill to delegated legislation (that is, to the DRFP and the directions comprising the investment mandate). In relation to why the DRFP would not be disallowable, the explanatory memorandum states that:

> making the plan not disallowable recognises that the plan is operational and nature and will enable a coherent and consistent approach to be adopted in making arrangements or grants.[37]

1.48 The committee does not consider the fact that the DRFP would be 'operational in nature', on its own, to be sufficient justification for not subjecting the DRFP to disallowance.

1.49 In relation to why the directions comprising the investment mandate would not be subject to disallowance or sunsetting, the explanatory memorandum states:

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34 Clause 25.

35 Clause 29. Clause 28 requires the Agriculture Minister to request advice from the RIC, and to consider this advice, before making a grant or entering into an arrangement.

36 See section 9, item 2, and section 11, item 3 of the Legislation (Exemptions and Other Matters) Regulation 2015.

37 Explanatory memorandum, p. 18.

> Exemption from disallowance together with consultation would give the Future Fund Board necessary certainty when investing through the Future Drought Fund. While it would be possible to provide that a direction…does not come into effect until disallowance periods have expired, this approach would significantly impede the ability of Government to make urgent changes to the Future Drought Fund Investment Mandate in the national interest.
>
> …The process for setting the Future Drought Fund Investment Mandate has been designed to ensure the mandate remains relevant over the long term, subject to appropriate revisions to take into account changing circumstances. This process means the Future Drought Fund Investment Mandate may comprise of multiple directions issued at different times. Not being subject to sunsetting would ensure that directions comprising the Future Drought Fund Investment Mandate remain coherent, regardless of when specific directions were issued.[38]

1.50 While noting this explanation, the committee does not consider operational certainty alone to be sufficient justification for leaving significant elements of the drought resilience funding scheme in the bill to non-disallowable instruments. Further, while the committee appreciates the importance of ensuring certainty and coherence for the FFB in relation to the performance of its functions, the committee considers that there may be other methods available to deliver certainty to the FRB while maintaining an appropriate level of parliamentary oversight. For example, the committee considers that it would be possible to provide that instruments making up the investment mandate are generally disallowable, with an exception provided for emergency circumstances.

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

- **why it is considered appropriate to leave significant elements of the drought resilience funding scheme proposed by the bill to delegated legislation; and**
- **why the relevant legislative instruments (that is, the Drought Relief Funding Plan and directions making up the Future Drought Fund's investment mandate) would not be subject to disallowance.**

1.52 In relation to directions making up the Future Drought Fund's investment mandate, the committee also requests the minister's advice as to the appropriateness of amending the bill to provide that the directions are subject to disallowance but only come into force once the disallowance period has expired, unless the minister certifies that there is an urgent need to make changes and it is in the national interest that a specified direction not be subject to disallowance.

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38 Explanatory memorandum, p. 23.

Broad delegation of administrative powers[39]

1.53 Proposed paragraph 63(1)(c) provides that the minister may, in writing, delegate any or all of the their powers under Division 2 of Part 3 to a person who is an official of a Commonwealth entity, and who is not covered by proposed paragraphs 63(1)(a) or (b). Noting that proposed paragraphs 63(1)(a) and (b) would permit the minister to delegate powers to the secretary and to SES employees within the department, it appears that the power of delegation in proposed paragraph 63(1)(c) would extend to any APS employee.

1.54 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 the powers that might be delegated, or on the categories of persons to whom delegations are permitted. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation as to why such delegations are necessary and appropriate should be included in the explanatory memorandum. In this instance, the explanatory memorandum states that:

> This broad delegation power is required to enable grants made under clause 21 to be administered by Commonwealth officials employed in the Australian Government Community Grants Hub, managed by the Commonwealth Department of Social Services.[40]

1.55 While noting this explanation, the committee does not consider administrative flexibility (that is, ensuring that grants can be administered by particular Commonwealth officials) to be sufficient justification for enabling the delegation of the minister's powers to any official of a Commonwealth entity. The committee also notes that the bill does not appear to set any limits on the level to which powers may be delegated, or require that delegates possess expertise appropriate to the delegated powers.

1.56 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to permit the Agriculture Minister to delegate their powers to any official of a Commonwealth entity.

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

40 Explanatory memorandum, p. 30.

1.57 The committee also requests the minister's advice as to the appropriateness of amending the bill to; at a minimum, require that persons exercising delegated powers possess the expertise appropriate to the relevant delegation.

No requirement to table or publish review report[41]

1.58 Clause 65 of the bill seeks to require the responsible ministers to cause a review of the operation of the Act to be undertaken before the tenth anniversary of its commencement. The explanatory memorandum states that the review:

> is intended to provide the opportunity to consider whether the Bill is providing the outcomes envisaged. It is envisaged that this 10-year review would be used to consider the appropriateness of continuing to provide annual transfers of $100 million from the Future Drought Fund to the Agriculture Future Drought Resilience Special Account. Over 10 years, the balance of the fund is expected to grow to $5 billion, which would, potentially, support a higher annual disbursement.[42]

1.59 However, the bill would not require any documents associated with the review (for example, terms of reference or a final report) to be tabled in Parliament. The bill also does not appear to require that documents associated with the review be made available online.

1.60 Tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of the documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Making documents associated with review processes available online promotes transparency and accountability. Consequently, where a bill does not require documents associated with a significant legislative review to be tabled or made available online, the committee would expect an appropriate justification to be included in the explanatory memorandum.

1.61 In this instance, the explanatory memorandum does not provide any explanation as to why documents associated with the review would not be tabled in Parliament or made available online. It only explains the purpose of the review, as set out at [1.58] above.

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

42 Explanatory memorandum, p. 31.

1.62 Noting that there may be impacts on parliamentary scrutiny where documents associated with a significant review are not available to the Parliament, the committee requests the minister's advice as to why it is not proposed to require documents associated with the operational review of the Act to be tabled in Parliament and made available online.

Halal Certification Transitional Authority Bill 2018

Purpose	This bill seeks to establish a Halal Certification Transitional Authority to operate for five years
Sponsor	Senator Cory Bernardi
Introduced	Senate on 28 November 2018

Broad delegation of administrative powers[43]

1.63 The bill seeks to establish a Halal Certification Transitional Authority (the Authority) which would be authorised to grant certificates relating to the labelling of food. Clause 26 seeks to provide the Director of the Authority with the power to delegate any of their functions under this Act to any staff member of the Authority.

1.64 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.

1.65 The explanatory materials provide no information about why these powers are proposed to be delegated to any staff member of the Authority. In particular, the committee notes that Part 5 of the Act triggers the investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014*. This provides the Director with a number of significant powers and functions in relation to monitoring and investigation that could be delegated by the Director to any staff member of the Authority.

1.66 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including the ability for the Director to delegate their functions to *any* staff member of the Halal Certification Transitional Authority, including in relation to monitoring and investigation powers.

43 Clause 26. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

Intelligence Services Amendment Bill 2018

Purpose	This bill seeks to amend the *Intelligence Services Act 2001* to: • enable the minister to specify additional persons outside Australia who may be protected by an ASIS staff member or agent; and • provide that an ASIS staff member or agent performing specified activities outside Australia will be able to use reasonable and necessary force in the performance of an ASIS function
Portfolio	Foreign Affairs
Introduced	House of Representatives on 29 November 2018

Use of force[44]

1.67 Section 6 of the *Intelligence Services Act 2001* (IS Act) sets out the functions of the Australian Secret Intelligence Service (ASIS). Subsection 6(4) provides that, in performing its functions, ASIS must not plan for, or undertake, activities that involve paramilitary activities, violence against the person or the use of weapons. Item 1 of the bill seeks to insert a new subsection 6(5A) into the IS Act. This provision would provide that the prohibitions in subsection 6(4) do not prevent ASIS officers from using force, or threatening the use of force, against persons in the course of operations undertaken by ASIS outside Australia, so long as the use of force or the threat of the use of force is in accordance with Schedule 3.

1.68 Item 13 of the bill seeks to insert Schedule 3 into the IS Act. Subclause 1(2) of that Schedule would provide that the use of force, or the threat of the use of force, by an ASIS officer against a person is not prevented by subsection 6(4) of the IS Act if the conduct is for the purpose of preventing, mitigating or removing a significant risk to a person's safety, a significant risk to security, or a significant risk to the operational security of ASIS from interference by a foreign person or entity.

1.69 The committee notes that the use of force, and the threat of the use of force, would be confined to circumstances where the relevant conduct is approved by the minister and complies with guidelines made under clause 2 of proposed Schedule 3.[45] The committee also notes that proposed section 6(5B) provides that subsection 6(5A) would not permit conduct by a person that would constitute torture, would subject a person to cruel, inhuman or degrading treatment, would

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

45 Paragraphs 1(2)(c), (d) and (e) of proposed Schedule 3.

involve the commission of a sexual offence, or is likely to cause death or grievous bodily harm (unless it is necessary to protect life or prevent serious injury to another person). However, it appears that ASIS officers would still be able to use force, or threaten to use force, to (at least temporarily) restrain, control or compel a person in situations where the officer believes this to be necessary to prevent the escalation of a potential threat.[46] The committee considers that this has the potential to trespass unduly on personal rights—particularly the right to liberty and security of the person.

1.70 In light of these matters, the committee is concerned about the breadth of the circumstances in which ASIS officers might use or threaten to use force. In particular, the committee is concerned that ASIS officers would be permitted to use force for the purposes of addressing a risk to the 'operational security' of ASIS. The meaning of 'operational security', and the potential breath of this term, is unclear to the committee. The explanatory memorandum does not appear to provide any explanation in this regard (for example, the circumstances in which force might be used to safeguard operational security). It merely indicates that guidelines to be issued by the Director-General will elaborate further on applicable requirements.[47]

1.71 The committee is also concerned that ASIS officers would be permitted to use pre-emptive force or the threat of force to restrain, control or compel a person in certain situations. In this regard, the committee notes that while the explanatory memorandum indicates that pre-emptive force would be used to address *immediate* risks or threats, there does not appear to be anything on the face of the bill that would limit the use of force in this manner.

1.72 The committee requests the minister's advice as to:

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

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46 See explanatory memorandum, p. 2.

47 Explanatory memorandum, pp. 3-4.

Significant matters in non-statutory guidelines[48]

1.73 Clause 2 of proposed Schedule 3 seeks to require the Director-General of ASIS to issue guidelines for the purposes of that Schedule. The guidelines would relate to the use of force, and threats of the use of force, against a person in the course of activities undertaken by ASIS outside Australia. Clause 2(4) of proposed Schedule 3 provides that the guidelines would not be legislative instruments.

1.74 The committee's consistent view is that significant matters, such as the circumstances in which ASIS officers are permitted to use or to threaten to use force, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Where significant matters are left to non-legislative instruments or to non-disallowable legislative instruments, the committee would also expect a sound justification for this approach to be included in the explanatory materials. In this instance, the explanatory memorandum does not provide an explanation as to why the guidelines could not be set out in primary legislation. However, it does indicate that it is intended for the guidelines to be subject to external scrutiny. In this regard, the explanatory memorandum states that:

> guidelines must be provided to the Inspector General of Intelligence and Security and the Inspector General of Intelligence and Security must brief the Parliamentary Joint committee of Intelligence and Security if requested by the committee or if the guidelines change. This is intended to provide an additional layer of external scrutiny to the content and scope of the guidance to ASIS staff members and agents to ensure that such rules for the use of force remain appropriate.[49]

1.75 In relation to why the guidelines would not be legislative instruments, the explanatory memorandum states that the guidelines 'do not alter or determine the law', and that they are 'intended to be merely declaratory of the law'.

1.76 However, the committee notes that, under paragraphs 1(2)(e) of proposed Schedule 3, the use of force or the threat of the use of force against a person by an ASIS officer may only be authorised if (among other matters) the conduct is in compliance with guidelines issued by the Director-General. In this respect, it appears that the guidelines would determine the law as it relates to the use of force by ASIS officers, including by imposing obligations on those officers. Consequently, it appears that the guidelines should be considered to be a legislative instrument within the meaning of the *Legislation Act 2003*[50] (Legislation Act).

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

49 Explanatory memorandum, p. 13.

50 See subsection 8(4) of the *Legislation Act 2003*.

1.77 In light of this matter, and noting that it is intended for the guidelines to be subject to external scrutiny, the committee considers that it may be appropriate for the guidelines to be made by disallowable legislative instrument, if not set out in primary legislation, to provide for appropriate parliamentary scrutiny.

1.78 Additionally, where the Parliament delegates its legislative power in relation to significant matters, the committee generally considers that it is appropriate that specific consultation requirements (beyond those in section 17 of the Legislation Act) are included in the legislation and that compliance with those obligations be a condition of the validity of the relevant guidelines. In this respect, the committee notes that while the explanatory memorandum states that the guidelines would be developed in consultation with the Attorney-General's Department,[51] there is nothing on the face of the bill that would require consultation to be conducted. Further, the explanatory memorandum does not indicate whether any other stakeholders would be consulted during development of the guidelines.

1.79 The committee requests the minister's advice as to:

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

1.80 The committee also seeks the minister's advice as to the appropriateness of amending the bill to:

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

51 Explanatory memorandum, p. 13.

Migration Amendment (Streamlining Visa Processing) Bill 2018

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

Significant matters in non-disallowable legislative instruments[52]
Privacy[53]

1.81 Currently under section 257A of the *Migration Act 1958* (Migration Act) the minister or an immigration officer may, in writing or orally, require a person to provide one or more personal identifiers for the purposes of the Migration Act or the regulations. A 'personal identifier' includes fingerprints, handprints, measurements of a person's height and weight, a photograph or other image of a person's face and shoulders, an audio or video recording of a person, an iris scan, a signature, and any other identifier prescribed by regulations.[54]

1.82 The amendments proposed by this bill would enable the minister, by a legislative instrument, to specify classes of visa applicants who are required to provide specified types of personal identifiers to make a valid visa application.[55] This would require personal identifiers to be provided up front in the visa application process.[56] The explanatory memorandum states that this is intended to update the statutory framework for the collection of personal identifiers, which was introduced by the *Migration Amendment (Strengthening Biometrics Integrity) Act 2015*.[57]

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

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

54 See section 5A of the *Migration Act 1958*.

55 In this respect, proposed subsection 46A(2A) seeks to provide that an application for a visa is invalid if the applicant is included in a class of applicants specified in a determination made under proposed subsection 46(2B), and the applicant has failed to comply with the requirements of the determination.

56 Explanatory memorandum, pp. 2-3.

57 Explanatory memorandum, p. 1.

1.83 Proposed subsection 46(2B) seeks to provide that the minister may, by legislative instrument, determine that visa applicants in a specified class must provide one or more specified types of personal identifiers in one or more specified ways. Proposed subsection 46(2C) sets out that a determination may:

- specify a class of applicants in any way, including by reference to specified circumstances;
- specify different types of personal identifiers that are required to be provided by different classes of visa applicants; and
- specify that a type of identifier must be provided by either or both of an authorisation test carried out by an authorised officer or system, or in another way specified in the determination.

1.84 The committee also notes that, as proposed section 46 would be located in Part 2 of the Migration Act, an instrument (other than a regulation) made under that section would not be subject to disallowance.[58]

1.85 The committee's consistent view is that significant matters, such as the classes of applicants required to provide personal identifiers in order to make a valid visa application, the type of identifiers required and how they are to be provided, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Where significant matters are left to non-disallowable legislative instruments, the committee would also expect a sound justification for this approach to be included in the explanatory materials.

1.86 In this instance, the explanatory memorandum indicates (although it does not state expressly) that leaving significant matters to delegated legislation will increase flexibility in visa processing. It also indicates that this approach will 'more fully enable the Department to contribute to the national security effort' by targeting the personal identifiers scheme to particular events, circumstances or threats.[59] However, the committee has not generally accepted flexibility, or broad statements about national security, to be sufficient justification for leaving significant matters to delegated legislation. The explanatory memorandum also acknowledges that determinations made under proposed subsection 46(2B) would not be subject to disallowance. However, it does not explain why this is considered appropriate.[60]

1.87 Additionally, where the Parliament delegates its legislative power in relation to significant legislative schemes, the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation*

58 See item 20, section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015. See also explanatory memorandum. p. 7.

59 Explanatory memorandum, p. 7.

60 Explanatory memorandum, p. 7.

Act 2003) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity. The committee notes that no such consultation requirements are currently set out in the bill. Further, the explanatory materials do not appear to provide any information regarding the nature of any consultation that would be undertaken before an instrument is made under proposed subsection 46(2B).

1.88 Finally, the committee notes that it raised a number of scrutiny concerns about the Migration Amendment Strengthening Biometrics Integrity) Bill 2015 (2015 Bill) when it was before the Parliament. The committee raised concerns that it left the system, policy and practice associated with the collection of personal identifiers entirely to departmental policy and practice without any legislative oversight.[61] The committee previously noted:

> Given the sensitive nature of personal identifiers and their collection it is suggested that the purposes for which these identifiers need to be collected should be clearly specified in legislation. This approach has a significant advantage from a scrutiny perspective because it enables the Parliament to consider and evaluate the appropriateness of limitations placed on personal rights in the context of identified purposes which are claimed to justify their limitation.[62]

1.89 The committee was particularly concerned that this power could (even if only in limited circumstances) be used to authorise the collection of identifiers by invasive means. The committee also raised concerns that the 2015 Bill proposed to remove certain limitations on the collection of personal identifiers from minors and incapable persons.[63]

1.90 The committee notes that this bill would leave in the Migration Act the existing broad discretionary power to require personal identifiers to be provided and add a broad power to determine by legislative instrument the requirements for the provision of personal identifiers. While the committee acknowledges that the information would at least be set out in a legislative instrument and not purely left to executive discretion, the fact that such an instrument would not be subject to disallowance would result in no parliamentary oversight of the intended applicant classes, the types of personal identifiers required or the manner in which those identifiers are to be provided.

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61 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 3 of 2015*, p. 35.

62 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 3 of 2015*, p. 32.

63 Senate Standing Committee for the Scrutiny of Bills, *Report 7 of 2015*, pp. 544-558.

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

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

1.92 The committee also seeks the minister's advice as to the appropriateness of amending the bill to:

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

National Integrity Commission Bill 2018
National Integrity Commission Bill 2018 (No. 2)

Purpose	These bills seek to establish the Australian National Integrity Commission as an independent, broad-based public sector anti-corruption commission for the Commonwealth
Sponsors	Ms Cathy McGowan MP (National Integrity Commission Bill 2018) Senator Waters (National Integrity Commission Bill 2018 (No. 2))
Introduced	House of Representatives on 26 November 2018 (National Integrity Commission Bill 2018) Senate on 29 November 2018 (National Integrity Commission Bill 2018 (No. 2))

1.93 The National Integrity Bill 2018 was introduced by Ms Cathy McGowan MP into the House of Representatives on 26 November 2018. The National Integrity Bill 2018 (No. 2) was introduced by Senator Waters in the Senate on 29 November 2018. It appears to the committee that the key differences between the bills relate to the definitions of 'applicable code of conduct', 'corrupt conduct' and 'national integrity commissioner functions' in clauses 8, 9 and 12. The other operative provisions of the bill appear to be largely identical. Consequently, the bills are dealt with together in this entry.

Fair hearing[64]

1.94 The bill provides that a National Integrity Commissioner (Commissioner) may conduct an investigation into whether a public official has engaged or may engage in corrupt conduct. Clause 64 provides that after completing an investigation the Commissioner must prepare a report of the investigation. The report must set out the Commissioner's findings, the evidence and other material on which those findings are based, any action that the Commissioner has taken or proposes to take, and any recommendations that the Commissioner sees fit to make.[65] Clause 62 provides that the Commissioner must not include in the report an opinion or finding that is critical of a Commonwealth agency or a person unless the Commissioner has first given the head of the agency or the person an opportunity to be heard.

64 Subclause 62(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

65 Subclause 64(2).

1.95 However, subclause 62(2) provides that a hearing is not required if the Commissioner is satisfied that:

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

1.96 In effect, subclause 62(2) attempts to exclude an obligation to give a person the right to be heard prior to the completion of a report. This is despite the fact that subclause 64(3) expressly provides that a report may recommend terminating a person's employment, taking action against a person with a view to having the person charged with an offence, and initiating disciplinary proceedings. This raises questions as to whether subclause 64(2) unduly trespasses on the right to a fair hearing. The committee notes that the explanatory memorandum provides no justification for limiting the right to a fair hearing. It merely sets out the operation and effect of the relevant provisions.[66]

1.97 The committee also notes that while clause 64 would allow the Commissioner to exclude 'sensitive information' from a report, it would not require the Commissioner to do so. Additionally, while sensitive information excluded from a report must be included in a supplementary report, it is only the primary report that must be tabled in Parliament.[67]

1.98 Given the capacity of findings and opinions mentioned in subclause 62(2) to adversely affect a person's reputation,[68] and the characterisation of the right to be heard as a fundamental common law right, the bill may, without further clarification, give rise to considerable interpretive difficulties in the courts. For example, it may be that a court could imply a right to be heard prior to the Prime Minister tabling a report in Parliament in relation to any critical findings or opinions that had not been disclosed pursuant to subclause 62(2) and which was not excluded from the report as 'sensitive' information.

1.99 The committee also notes that, under paragraph 62(7)(b), a person appearing before the Commissioner to make submissions in relation to an adverse finding or opinion may be represented by another person, but only with the Commissioner's permission. This would appear to give the Commissioner the power to refuse to allow a person to be represented—including by their lawyer. Given the nature of the rights and interests at stake and the potential complexity of the issues

66 Explanatory memorandum, pp. 18-19.

67 See clause 233.

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

that may be raised, the committee considers that there may be circumstances in which a person's right to a fair hearing may be compromised if the Commissioner refuses to allow that person to be represented.

1.100 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

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

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

Coercive powers[69]

1.102 Clause 72 of the bill seeks to provide that, for the purposes of investigating a corruption issue, the Commissioner may, by notice in writing, require a person to give information, or produce documents or things, if the Commissioner has reasonable grounds to suspect that the information, documents or things will be relevant to the investigation of a corruption issue. Clause 77 seeks to make if an offence to fail to comply with a notice, punishable by imprisonment for two years.

1.103 Clause 82 also seeks to provide that the Commissioner may summon a person to attend a hearing at a time and place specified in the summons, and to give evidence and produce documents or things, if the Commissioner has reasonable grounds to suspect that the evidence, documents or things will be relevant to the investigation of a corruption issue or the conduct of a public inquiry. Clause 92 seeks to make it an offence to fail to attend a hearing, to answer a question or to produce a document or thing. These offences would be punishable by imprisonment for between 12 months and two years.

1.104 As set out below at [1.123] to [1.132], the bill also provides that a person is not excused from answering a question or producing a document when served with a notice or summoned to attend on the ground it may incriminate the person or

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69 Clauses 72, 82, 84 and 96. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i)

expose them to a penalty. This thereby abrogates the common law privilege against self-incrimination.

1.105 The bill further proposes to allow the Commissioner to take action in circumstances where the Commissioner considers that a person is in contempt of the Commission in relation to a hearing. Clause 93 provides that a person is in contempt of the Commission if (among other matters) the person fails to attend a hearing as required by a summons, refuses or fails to answer a question, or knowingly gives evidence that is false or misleading in a material particular. Clause 94 provides that, if the Commissioner is satisfied that a person is in contempt of the Commission in relation to a hearing, the Commissioner may apply either to the Federal Court the Supreme Court of the State or Territory in which the hearing is held for the person to be dealt with in relation to the contempt.

1.106 Clause 96 provides that, if the Commissioner proposes to make an application under clause 94 in respect of a person, the Commissioner may direct a constable or an authorised officer to detain the person for the purposes of bringing the person before the relevant court. Where a person is detained, the Commissioner must make an application under clause 94 as soon as practicable, and the person must be brought before the relevant court as soon as practicable.

1.107 Where a bill seeks to confer coercive powers on persons or bodies, the committee would expect the explanatory materials to provide a sound justification for the conferral of such powers, by reference to principles set out in the *Guide to Framing Commonwealth Offences*.[70] In this instance, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.[71]

1.108 The committee also notes that, under clause 84, a person appearing at a hearing, but not giving evidence, may be represented by a legal practitioner only if special circumstances exists, and the Commissioner consents to the person being represented. Given the nature of the rights and interests at stake and the potential complexity of the issues that may be raised, the committee considers that there may be circumstances in which a person's right to a fair hearing may be compromised if the Commissioner refuses to allow that person to be represented. The committee notes that the explanatory memorandum does not explain why this provision is considered necessary and appropriate, nor does it provide examples of the 'special circumstances' which might justify legal representation.

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70 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Chapters 7-10.

71 Explanatory memorandum, pp. 19, 23 and 32.

1.109 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

1.110 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of conferring on the National Integrity Commissioner broad coercive powers to require persons to give information, answer questions, and produce documents and things.

Arrest and search warrants[72]

1.111 Clause 105 of the bill seeks to provide that an authorised officer may apply to a judge for a warrant to arrest a person, if the authorised officer believes on reasonable grounds that:

- the person has been ordered to deliver their passport to the Commissioner, and is likely to leave Australia for the purposes of avoiding giving evidence at a hearing before the Commissioner;
- the person has been served with a summons under clause 82, and has absconded, is likely to abscond, or is otherwise attempting, or is likely to attempt, to evade service of the summons; or
- the person has committed an offence under subclause 92(1) (which relates to failures to attend hearings, produce evidence or answer questions), or is likely to commit such an offence.

1.112 Clause 106 seeks to provide that, for the purposes of executing an arrest warrant, the authorised officer may (among other matters) break into and enter relevant premises. This power is subject to a number of limitations, including a prohibition on entering premises during night hours, a requirement to inform the person of the reasons for the arrest, and a prohibition on subjecting the arrestee to greater indignity than is reasonable and necessary in the circumstances.

1.113 Proposed Division 3 of Part 6 further provides for that an authorised officer may apply for a number of different kinds of search warrant. These include warrants to search premises and to conduct an 'ordinary search and frisk or frisk search' of a person.[73] Under such warrants, an authorised officer would be permitted to (among other matters) search premises, vehicles and vessels for evidential material, seize such things as are considered relevant to the investigation, and conduct search and

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72 Clauses 105 and 106; and proposed Division 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

73 Clause 113.

frisk procedures.[74] These powers are subject to the limitation that a search warrant may not authorise a strip search or a search of a person's body cavities.[75]

1.114 Clause 145 provides for the appointment of authorised officers. Under that clause, the Commissioner would be able to appoint as an authorised officer a member of the Australian Federal Police (AFP) or a staff member of the Commission that the Commissioner considers to have suitable qualifications or experience. However, the clause does not specify the qualifications or experience necessary for appointment.

1.115 Although it may be possible to identify circumstances in which it would be appropriate for a person exercising powers under a warrant *not* to be an AFP officer (for example, if they were a former officer or a member of a State or Territory police force), the committee is concerned that the bill would permit a range of persons who are not police officer to exercise 'police powers'—such as powers to arrest and to conduct personal searches. The explanatory memorandum notes that it is essential that authorised officers are 'experienced, diligent and trustworthy' because they will be exercising power of search and arrest.[76] However, it does not explain why it is necessary or appropriate to allow these powers to be exercised by persons who are not police officers, nor does it explain why it is not possible to specify what constitutes 'suitable qualifications or experience' in the bill, rather than leaving these matters to the discretion of the Commissioner.

1.116 The committee further notes that the *Guide to Framing Commonwealth Offences* indicates that any new powers to search persons require a strong justification.[77] While noting that there may be some circumstances in which the granting of new powers to search persons can be justified, the committee would expect an explanation as to why these powers are considered necessary and appropriate to be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no such explanation, merely restating the operation and effect of the relevant provisions.[78]

1.117 Clause 122 further provides that, in executing a search warrant, an authorised officer may obtain such assistance, and use such force against persons and things, that is necessary and reasonable in the circumstances. Where a person assisting an authorised officer is also an authorised officer or a police constable, that person would be permitted to use such force against persons and things as is

74 Clauses 117 and 118.

75 Clause 119.

76 Explanatory memorandum, p. 47.

77 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 102-103.

78 Explanatory memorandum, pp. 41-42.

reasonable and necessary in the circumstances. Otherwise, the person assisting would be permitted only to use such force against things (not persons).

1.118 The committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion in a bill of any use of force power for the execution of warrants should only be allowed where a need for such powers can be identified. In this regard, it states that a use of force power should be accompanied by an explanation and justification in the explanatory materials, as well as a discussion of proposed accompanying safeguards that the agency intends to implement.[79] In this instance, the explanatory memorandum states that:

> The Authorised Officer is given the discretion to use the necessary force needed which allows for the Authorised Officer to protect him or herself and others assisting in the execution of a warrant. The requirement of having only Authorised Officers or a constable taking part in searches and arrests is to ensure that these procedures are carried out by persons who have been provided with training and fulfilled the requirements to ensure that care, professionalism and diligence is present.[80]

1.119 However, the explanatory memorandum does not appear to explain the circumstances in which it may be necessary to use force (for example, by providing relevant examples). Moreover, it does not appear to discuss any specific safeguards with respect to the use of force.

1.120 The committee further notes that the explanatory memorandum does not explain why it is considered necessary and appropriate for an authorised officer to obtain assistance, nor does it provide any examples of the persons who may be called on to assist or the circumstances in which assistance may be necessary. The committee also notes that the bill does not appear to place any limits on the persons who may assist authorised officers in executing powers under a warrant, or impose any requirements as to those persons' qualifications or expertise.

1.121 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

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

- **allowing persons other than police officers to execute search warrants, which include powers to use force and to conduct personal searches, with no specific requirements as to those persons' qualifications or expertise; and**

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79 Attorney-General's Department *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 80.

80 Explanatory memorandum, p. 42.

- **allowing authorised officers to obtain assistance in the execution of search warrants, with no requirements that persons assisting have appropriate qualifications, experience or expertise.**

Privilege against self-incrimination[81]

1.123 As outlined above, clause 72 seeks to allow the Commissioner to give a written notice to any person, requiring that person to give the Commissioner such information, documents or things as are specified in the notice. Clause 82 seeks to allow the Commissioner to summon a person to attend a hearing, to give evidence, and to produce such documents or things as are specified in the summons. Subclauses 79(1) and 102(1) provide that a person is not excused from complying with a notice or summons on the grounds that to do so would tend to incriminate that person or expose them to a penalty.

1.124 Subclauses 79(1) and 102(1) would therefore override 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 them.[82]

1.125 The committee recognises that there may be certain circumstances in which the privilege against self-incrimination can be overridden. However, abrogating this privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the common law privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss of personal liberty, in light of any relevant information in the explanatory materials.

1.126 In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will also consider the extent to which the abrogation is limited by a 'use' or 'derivative use' immunity. A 'use' immunity generally provides that information or documents produced in response to a statutory requirement will not be admissible in evidence against the person that produced it. A 'derivative use' immunity generally provides that anything obtained as a direct or indirect consequence of the production of the information or documents will not be admissible in evidence against that person.

1.127 In this respect, the committee notes that 'use' immunities are provided in subclauses 79(3) and 102(4). Those subclauses provide that, where a person gives information, answers questions, or provides a document or a thing, pursuant to a

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81 Subclauses 79(1) and 102(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

notice under clause 72 or a summons under clause 82, the information, answers, documents and things are not admissible as evidence against that person. However, 'derivative use' immunities (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person) have not been included.

1.128 In addition, the committee notes that subclauses 79(3) and 102(4) set out a number of proceedings in which the 'use' immunity would not be available. These include proceedings for the confiscation of property, certain criminal proceedings and, where the person is a Commonwealth employee, disciplinary proceedings. The committee further notes that, for the 'use' immunity in subclause 102(4) to apply, the person would have to claim that giving the relevant answer, or producing the document or thing, might tend to incriminate the person or expose them to a penalty before doing so. This has the potential to mean that the 'use' immunity may become unavailable merely because the person has not had adequate legal advice prior to answering a question, or producing a document or thing, and was therefore unaware of the need to make a claim of self-incrimination.

1.129 The committee is also concerned that subclauses 79(2) and 102(3) provide that the relevant 'use' immunities would not apply to the production of a document that is, or forms part of, a record of existing or past business.

1.130 The explanatory memorandum provides no explanation as to why derivative use immunities have not been provided, nor does explain why it is considered necessary or appropriate to abrogate the privilege against self-incrimination. It merely restates the operation and effect of the relevant provisions.[83]

1.131 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

1.132 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination.

Legal professional privilege[84]

1.133 Clause 99 seeks to provide that a person must not refuse or fail to answer a question at a hearing on the ground that the answer would disclose a communication that is subject to legal professional privilege, unless a claim for privilege has been accepted by the Commissioner. Clause 100 similarly seeks to

83 Explanatory memorandum, pp. 21 and 34.

84 Proposed paragraphs 79(4)(c) and 102(5)(c); clauses 99 and 100. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

provide that a person must not refuse or fail to produce a document or thing at a hearing on the ground that the document or thing is subject to legal professional privilege, unless a court has found that the document or thing is subject to privilege, or a claim for privilege over the document or thing is accepted by the Commissioner. A person would commit an offence of strict liability if they refuse or fail to answer a question, or to produce a document or thing, in relation to which the Commissioner has rejected a claim for privilege.[85]

1.134 The provisions identified above would appear to abrogate legal professional privilege. As recognised by the High Court,[86] legal professional privilege is not merely a rule of substantive law but an important common law right which is fundamental to the administration of justice. The committee therefore considers that privilege should only be abrogated or modified in exceptional circumstances. Where a bill seeks to abrogate legal professional privilege, the committee would expect a sound justification for any such abrogation to be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no such justification—merely restating the operation and effect of the relevant provisions.[87]

1.135 Additionally, the committee considers that, where legal professional privilege is abrogated, 'use' and 'derivative use' immunities should ordinarily apply to documents or communications revealing the content of legal advice, in order to minimise harm to the administration of justice and to individual rights. As outlined above at [1.127], 'use' immunities are provided in relation to the information, answers to questions, documents and things given pursuant to a notice or a summons. However, the bill does not contain 'derivative use' immunities. The explanatory memorandum provides no explanation as to why such immunities have not been included.

1.136 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

1.137 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of abrogating legal professional privilege.

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85 Clause 101. The offence would be punishable by imprisonment for 6 months or 10 penalty units.

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

87 Explanatory memorandum, pp. 33-34.

Evidentiary certificate constitutes prima facie evidence[88]

1.138 Clause 94 seeks provide that, if the Commissioner is of the opinion that a person is in contempt of the Commission in relation to a hearing, the Commissioner may apply either to the Federal Court or the Supreme Court of the State or Territory in which the hearing is held for the person to be dealt with in relation to the contempt.

1.139 Subclause 94(3) provides that the application must be accompanied by a certificate that sates the grounds for making the application, and the evidence in support of the application. Subclause 95(3) provides that, in proceedings relating to the application, a certificate under subclause 94(3) is prima facie evidence of the matters specified in the certificate.

1.140 The committee notes that where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceeding. While a person still retains the right to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The use of evidentiary certificates therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common-law right to be presumed innocent until proven guilty. Consequently, the committee would expect a detailed justification for any proposed powers to issue or use evidentiary certificates to be included in the explanatory materials. In this instance, the explanatory memorandum provides no justification for allowing evidentiary certificates to be used in proceedings relating to contempt of the commission, merely restating the operation and effect of the relevant provisions.[89]

1.141 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states, in relation to criminal proceedings, that evidentiary certificates:

> are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.[90]

1.142 The *Guide to Framing Commonwealth Offences* further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.[91]

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88 Subclauses 94(3) and 95(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i)

89 Explanatory memorandum, pp. 30-31.

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

91 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 55.

1.143 In this instance, it appears that the matters that may be included in a certificate given in accordance with subclause 94(4) could cover the entirety of the Commissioner's evidence as to why a person should be held in contempt. Consequently, the committee considers it unlikely that a certificate would cover only formal or technical matters sufficiently removed from the relevant proceedings—such as might make its use appropriate.

1.144 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponent's advice in relation to this matter.

1.145 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing that a certificate provided in accordance with subclause 94(3) is prima facie evidence of the matters specified in the certificate (noting that such a certificate may cover most if not all of the evidence provided by the Commission as to why a person should be held in contempt).

Reversal of evidential burden of proof[92]

1.146 A number of clauses in the bill seek to create offences, and a number of these include offence-specific defences, which reverse the evidential burden of proof.

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

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

1.149 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to raise evidence to positively prove the matter), the committee expects any reversal of the evidential burden of proof to be justified. In these instances, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.

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92 Proposed subsections 76(2), 76(4), 77(2), 91(2), 91(4), 101(3), 101(5), 104(3) and 238(1), (2), (3) and (5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.150 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

1.151 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including a number of offence-specific defences (which reverse the evidential burden of proof).

Strict liability offence[93]

1.152 Proposed subsection 101(1) would make it an offence for a person who has been served with a summons to attend a hearing or produce a document or thing to refuse or fail to answer a question or produce a document or thing in circumstances where the Commissioner has rejected a claim for legal professional privilege. Proposed subsection 101(2) would make this an offence of strict liability, subject to a penalty of imprisonment for up to 6 months or 10 penalty units.

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

1.154 As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[94] In this instance, the explanatory memorandum provides no such justification, merely restating he operation and effect of the relevant provisions.[95]

1.155 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine

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93 Proposed subsection 101(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

95 Explanatory memorandum, p. 34.

of up to 60 penalty units for an individual.[96] In this instance, the bill proposes applying strict liability to an offence that is subject to up to 6 months imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

1.156 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

1.157 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying strict liability to the offence at clause 101, particularly as it is subject to a custodial penalty.

Investigations and inquiries by Whistleblower Protection Commissioner[97]

1.158 Part 9 of the bill also seeks to provide for whistleblower protection and Division 3 of Part 10 seeks to provide for the appointment of a Whistleblower Protection Commissioner. Section 178 provides that if the Whistleblower Protection Commissioner is investigating or conducting a public inquiry, Parts 5, 6 and 7 of the bill would apply to such an investigation or inquiry as if a reference to the National Integrity Commissioner were a reference to the Whistleblower Protection Commissioner and a reference to a corruption issue were a reference to a whistleblower protection issue.

1.159 As such, all of the committee's scrutiny concerns outlined above regarding the potential for the powers of the National Integrity Commissioner to unduly trespass on personal rights and liberties would apply equally to the powers of the Whistleblower Protection Commissioner.

1.160 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

1.161 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring all of the coercive investigation and inquiry powers outline above on the Whistleblower Protection Commissioner.

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

97 Proposed section 178. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Immunity from civil liability[98]

1.162 Clause 274 seeks to confer immunity from civil liability on certain persons performing functions under or in relation to the bill. These include:

- staff members of the Commission, in relation to actions taken in good faith in the performance or purported performance, or exercise or purported exercise, of the staff member's functions, powers or duties;
- persons whom the Commissioner has requested in writing to assist a staff member of the Commission, in relation to actions taken in good faith for the purpose of assisting the staff member; and
- persons producing information, evidence, documents or things to the Commission.

1.163 These immunities would remove any common-law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown.

1.164 The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve a personal attack on the honesty of the decision maker. As such, the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.165 The committee expects that, if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.[99]

1.166 In the event that this bill progresses further through the Parliament, the committee may request the legislation proponents' advice in relation to this matter.

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

98 Proposed subsection 274(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

99 Explanatory memorandum, p. 81.

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

Purpose	This bill seeks to amend the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to: • provide new means test rules to encourage the take-up of lifetime retirement income products; • amend the Pension Loans Scheme; and • amend the pension work bonus
Portfolio	Families and Social Services
Introduced	House of Representatives on 29 November 2018

Delegated legislation not subject to disallowance[100]

1.168 Item 36 seeks to insert proposed section 1120AB into the *Social Security Act 1991*, which would provide for the value of asset-tested income streams (lifetime) that are not managed investments. This section is largely replicated in proposed section 52BAB of the *Veterans' Entitlements Act 1986*.[101] The proposed sections set out how asset-tested income streams (lifetime) would be valued for the purpose of the assets test, which is a part of the social security means test.

1.169 Proposed subsection 1120AB(8) would allow the secretary to determine a kind of condition of release for the purposes of a person's assessment day for an asset-tested income stream (lifetime)). A determination would be a notifiable instrument. The committee notes that notifiable instruments are not subject to the tabling, disallowance or sunsetting requirements imposed on legislative instruments. As such, there can be no parliamentary scrutiny over a notifiable instrument. Given the impact on parliamentary scrutiny by not making such an instrument a legislative instrument, the committee would expect the explanatory materials to provide a justification for the use of a notifiable instrument. However, the explanatory memorandum provides no such explanation, merely stating what is intended to be determined by a notifiable instrument:

> It is intended that the conditions of release that will be determined in a notifiable instrument under new section 1120AB(7) should mirror the specific conditions of release outlined in sub-regulation 1.06A(3)(a) of the

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

101 Schedule 1, item 77.

> SIS Regulations. These are the conditions of release that determine when payments from an innovative superannuation income stream can commence.[102]

1.170 In addition, proposed subsection 1120AB(11) would allow the secretary to make a notifiable instrument detailing the life expectancy of a man aged 65 for the purpose of step 1 of the method statement for calculating a person's threshold day for an asset-tested stream (lifetime). The secretary would need to be satisfied that the instrument is consistent with the most recent Life Tables published from time to time by the Australian Government Actuary.

1.171 Proposed subsections 52BAB(9) and (12) of the *Veterans' Entitlements Act 1986*[103] largely replicates these provisions (with the Repatriation Commission rather than the secretary able to make the notifiable instrument) and the same explanation is provided in the explanatory memorandum.[104]

1.172 The committee requests the minister's advice as to why it is appropriate to make a number of instruments under the bill notifiable instruments rather than legislative instruments, which are not subject to disallowance or sunsetting.

102 Explanatory memorandum, p. 13.

103 Schedule 1, item 77, proposed subsection 52BAB(9).

104 Explanatory memorandum, p. 27.

Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2018

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

Power for delegated legislation to amend primary legislation (Henry VIII clause)[105]

1.173 Item 3 of Schedule 1 to the bill seeks to insert new subsections 11(3) to (5) into the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act). Proposed subsection 11(3) would allow the rules under the BCIIP Act to modify the application of that Act in relation to the Greater Sunrise special regime area. The Greater Sunrise special regime area is an area of joint jurisdiction between Australia and Timor-Leste for the development, exploitation and management of petroleum in the Greater Sunrise fields.

1.174 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum. In this regard, the explanatory memorandum states:

> This will enable rules to be made to adapt the application of the BCIIP Act in the *Greater Sunrise special regime area*, as necessary, to ensure it applies in a manner consistent with Australia's obligations under the Treaty and to facilitate the cooperative exercise of jurisdiction in the *Greater Sunrise special regime area*.[106]

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

106 Explanatory memorandum p 20.

1.175 While the committee notes this explanation, the committee does not consider that it adequately addresses why it is appropriate that delegated legislation be empowered to amend the primary legislation. For example, the committee notes that it is unclear why the BCIIP Act cannot now be amended by primary legislation to ensure it applies in a manner consistent with Australia's obligations under the treaty, as the treaty has now been made.

1.176 The committee requests the minister's more detailed justification as to why it is proposed to allow rules to modify the application of an Act, noting the committee's scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament.

Bills with no committee comment

1.177 The committee has no comment in relation to the following bills which were introduced into the Parliament between 26 – 29 November 2018:

- Environment Protection and Biodiversity Conservation Amendment (Great Australian Bight) Bill 2018;
- Foreign Influence Transparency Scheme Legislation Amendment Bill 2018;
- Future Drought Fund (Consequential Amendments) Bill 2018;
- Lower Tax Bill 2018;
- Passenger Movement Charge Amendment (Timor Sea Maritime Boundaries Treaty) Bill 2018; and
- Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018.

Commentary on amendments and explanatory materials

Higher Education Support Amendment (VET FEE-HELP Student Protection) Bill 2018 *[Digests 12 & 13/18]*

1.178 On 28 November 2018 the Assistant Minister to the Deputy Prime Minister (Mr Broad) presented an addendum to the explanatory memorandum and the bill was read a third time.

1.179 The committee thanks the assistant minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[107]

Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Bill 2018

Previous citation: Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018

[Digests 5 & 6/18]

1.180 On 28 November 2018 the House of Representatives agreed to 70 Government amendments, the Minister for Families and Social Services (Mr Fletcher) presented an addendum to the explanatory memorandum and a supplementary explanatory memorandum and the bill was read a third time.

1.181 The majority of the government amendments seek to increase or decrease waiting periods in relation to particular social security payments and tax incentives for newly arrived residents. Government amendments 24, 35, 39, 44, 45, 55, 56, 63 and 64 seek to provide that particular waiting periods do not apply to visas determined by the minister by legislative instrument, and to empower the minister to make legislative instruments for this purpose.

1.182 The committee's consistent view is that significant matters, such as the period for which classes of persons must wait to receive social security payments, should be included in primary legislation unless a sound justification for the use of delegated legislation in provided. In this instance, the supplementary explanatory memorandum states that the inclusion of the power to determine additional visas by legislative instrument is to accommodate any changes to the name or subclass of the relevant visa types without requiring further amendments.[108]

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107 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018,* pp. 21-23

108 Supplementary explanatory memorandum, pp. 7-9, 11-13.

1.183 While acknowledging this explanation, the committee notes that it does not generally consider flexibility, on its own, to be a sufficient justification for powers to determine significant matters by legislative instrument. The committee also notes that the bill does not appear to contain any specific limitations on the manner in which the minister's powers may be exercised.

1.184 The committee notes its scrutiny concerns regarding the power for the minister, by legislative instrument, to determine visas to which particular waiting periods for social security payments and tax incentives would not apply.

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

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

- Aboriginal Land Rights (Northern Territory) Amendment Bill 2018;[109]
- Aged Care Quality and Safety Commission Bill 2018;[110]
- Federal Circuit and Family Court of Australia Bill 2018;[111]
- Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018;[112]
- Migration Amendment (Family Violence and Other Measures) Bill 2016;[113]
- Modern Slavery Bill 2018;[114]

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109 On 26 November 2018 the Senate agreed to two Government amendments, the Minister for International Development and the Pacific (Senator Ruston) tabled a supplementary explanatory memorandum to the bill and the bill was read a third time.

110 On 26 November 2018 the Senate agreed to nine Government amendments and the bill was read a third time. On 27 November 2018 the House of Representatives agreed to the Senate amendments, the Minister for Indigenous Health (Mr Wyatt) presented an addendum to the explanatory memorandum to the bill and the bill was passed.

111 On 27 November 2018 the House of Representatives agreed to four Government amendments, the Assistant Treasurer (Mr Robert) presented a supplementary explanatory memorandum to the bill and the bill was read a third time.

112 On 27 November 2018 the House of Representatives agreed to 127 Government amendments, the Assistant Treasurer (Mr Robert) presented a supplementary explanatory memorandum to the bill and the bill was read a third time.

113 On the 27 November 2018 the Senate agreed to two Government amendments. On 28 November 2018 the Senate agreed to another two Government amendments and the bill was read a third time. On 28 November 2018 the House of Representatives agreed to the Senate amendments and the bill was passed.

- Office of National Intelligence Bill 2018 and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018;[115]
- Social Services Legislation Amendment (Housing Affordability) Bill 2017;[116] and
- Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018.[117]

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114 On 28 November 2018 the Senate agreed to eight Government amendments, the Assistant Minister for Home Affairs (Senator Reynolds) tabled a supplementary explanatory memorandum and the bill was read a third time. On 29 November 2018 the House of Representatives agreed to the Senate amendments and the bill was passed.

115 On 27 November 2018 the House of Representatives agreed to four Government amendments to the Office of National Intelligence Bill 2018 and two Government amendments to the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018, the Special Minister of State (Mr Hawke) presented a supplementary explanatory memorandum to the bills and the bills were read a third time.

116 On 28 November 2018 the House of Representatives agreed to 40 Government amendments, the Minister for Families and Social Services (Mr Fletcher) presented a supplementary explanatory memorandum and the bill was read a third time.

117 On 29 November 2018 the House of Representatives agreed to three Government amendments, the Assistant Treasurer (Mr Robert) presented a supplementary explanatory memorandum to the bill and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018

Purpose	This bill seeks to introduce a stronger penalty framework for certain corporate and financial sector misconduct.
Portfolio	Treasury
Introduced	House of Representatives on 24 October 2018
Bill status	Before the Senate

Reversal of evidential burden of proof[1]

2.2 In *Scrutiny Digest 13 of 2018*[2] the committee requested the Treasurer's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in the instances identified. The committee noted its 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*.[3]

Treasurer's response[4]

2.3 The Treasurer advised:

Section 922M

1 Schedule 1, item 82, proposed subsection 922M(2); item 86, proposed section 952E; item 100, proposed subsection 1020A(3); and item 101, proposed subsection 1021E(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

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

4 The Treasurer responded to the committee's comments in a letter 29 November 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 15 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

Proposed subsection 922M(1) makes it an offence to fail to lodge a notice under a notice provision. Proposed subsection 922M(2) provides an offence specific defence for when the offence does not apply.

The Bill does not seek to amend the primary offence or the offence specific defence. Rather, the Bill modernises the drafting of the offence and inserts provisions so that the obligations in section 922M are subject to civil penalties for non-compliance.

A defence is available if the information has already been provided by another licensee. A defendant who wishes to rely on this defence has the burden of adducing evidence in relation to those matters. It is appropriate for the evidential burden to be placed on the defendant because:

- licensees would have knowledge of, and access to, all events and documents relating to the matters in the defence, including those not publicly available;
- licensees are the only ones in the position to tender documents and records that are not publicly available and would assist the defence;
- it is difficult for the prosecution to prove a negative when it cannot be aware of the existence of evidence not publicly available;
- the prosecution would have no reason to consider the matters of the defence exist when it has exhausted investigating the matter;
- it would be highly unlikely that a prosecution would be brought where information about the matters of the defence have been lawfully made available to the public; and
- the defence strikes an appropriate balance in providing defendants a fair trial while not being unduly or unjustly onerous on the prosecution so as to make prosecutions in the public interest impossible.

Sections 952E and 1021E

Proposed subsections 952E(1) and (2) make it an offence for a financial services licensee, or an authorised representative, to give a defective disclosure document or statement. Proposed subsections 952E(3) and (4) provide offence specific defences for when the offences do not apply.

Proposed subsections 1021 E(1) and (2) make it an offence for the preparer of a financial product disclosure document or statement to prepare a defective document or statement. Proposed subsection 1021 E(3) provides an offence specific defence for when these offences do not apply.

The Bill does not seek to amend the primary offences or the offence specific defences. Rather, the Bill modernises the drafting of the offences, removes the offences from being ones of strict liability, and inserts provisions so that the obligations are subject to civil penalties for non-compliance.

Defences are available if reasonable steps were taken to ensure the disclosures would not be defective or, in the case of the offences in proposed section 952E only, the person who made the disclosure was an authorised representative and received defective disclosure documents or statements from the licensee.

A defendant who wishes to rely on these defences has the burden of adducing evidence in relation to those matters. It is appropriate for the evidential burden to be placed on the defendant in the 'reasonable steps' defences because:

- the steps taken to ensure the disclosure would not be defective would be solely and entirely within the knowledge of licensees and their authorised representatives who made the disclosures;
- the prosecution would have no reason to consider the matters of the defence exist when it has exhausted investigating the matter;
- it would be an extremely onerous task for the prosecution to disprove the existence of every combination of reasonable steps that could be taken, especially when these are peculiarly within the knowledge of defendants;
- requiring the prosecution to disprove the existence of every combination of reasonable steps that could be taken would significantly risk successful prosecutions and affect the deterrent effect of the offence; and
- it would be highly unlikely that a prosecution would be brought where information about the matters of the defence are available to the prosecution.

It is appropriate for the evidential burden to be shifted to the defendant in the authorised representatives defence because:

- information relating to the representative's relationship with the licensee, communications with the licensee, and content of any notices given for the representative to publicly disclose would be peculiarly within the knowledge of the representative;
- the prosecution would have no reason to consider the matters of the defence exist when it has exhausted investigating the matter;
- requiring the prosecution to prove matters relating to the relationship between two private parties could risk successful prosecutions and affect the deterrent effect of the offence, especially when the representative has peculiar knowledge of relevant matters; and
- it would be highly unlikely that a prosecution would be brought where information about the matters of the defence are available to the prosecution.

Section 1020A

Proposed subsection 1020A(1) makes it an offence to engage in certain conduct in relation to certain unregistered managed investment schemes. Proposed subsection 1020A(3) provides an offence specific defence for when the offence does not apply.

The Bill does not seek to amend the primary offence or the offence specific defence. Rather, the Bill modernises the drafting of the offence, and inserts provisions so that obligations under section 1020A are subject to civil penalties for non-compliance.

A defence is available in certain situations, such as if prospective clients were aware of certain information, information was not required, consideration was not provided for the financial product, or the client is already associated with the offeror of the product.

A defendant who wishes to rely on this defence has the burden of adducing evidence in relation to those matters. It is appropriate for the evidential burden to be placed on the defendant in these situations because:

- information relevant to each of the situations, and to which a defendant could rely on as a defence, would be peculiarly within the knowledge of the defendant as the matters relevant to the defence include transactions between private parties. Information on these transactions would usually not be made publicly available;
- the prosecution would have no reason to consider the matters of the defence exist when it has exhausted investigating the matter;
- requiring the prosecution to prove matters relating to the relationship between two private parties could risk successful prosecutions and affect the deterrent effect of the offence; and
- it would be highly unlikely that a prosecution would be brought where information about the matters of the defence are available to the prosecution.

Committee comment

2.4 The committee thanks the Treasurer for this comprehensive response. In relation to the offence-specific defence in proposed subsection 922M(2), the committee notes the Treasurer's advice that the defence is only available where relevant information has already been provided by another licensee. The committee also notes the advice that information and documents relevant to establishing the defence would be in the possession of the defendant or another licensee, and that the prosecution may not have access to or even be aware of the relevant information or documents.

2.5 In relation to the 'reasonable steps' defence in proposed subsections 952E(4) and 1021E(3), the committee notes the Treasurer's advice that the steps taken to ensure that a disclosure statement or document is not defective would be solely and

entirely within the knowledge of licensees and their authorised representatives. The committee also notes the advice that requiring the prosecution to prove that reasonable steps were not taken would be an extremely onerous task, and could affect the deterrent value of the associated offence.

2.6 In relation to the 'authorised representatives' defence in proposed subsection 952E(4), the committee notes the Treasurer's advice that information relating to the representative's relationship with the licensee, communications with the licensee, and the content of any notices relating to public disclosure would be peculiarly within the knowledge of the representative. In relation to the defence in proposed subsection 1020A(1), the committee notes the Treasurer's advice that information relevant to each of the circumstances in which the defence applies would be peculiarly within the knowledge of the defendant, as this information relates to transactions between private parties and would not be publicly available. With respect to both of these defences, the committee also notes the Treasurer's advice that requiring the prosecution to prove matters relating to the relationship between two private parties could risk successful prosecutions and affect the deterrent value of the relevant offence.

2.7 Finally, the committee notes the Treasurer's advice that the bill does not seek to amend the relevant offences or their associated offence-specific defences. However, the bill does seek to *remake* those provisions. As the offence-specific defences appear on the face of the bill, the committee would expect a justification for the associated reversal of the evidential burden of proof to be included in the explanatory memorandum.

2.8 The committee requests that the key information provided by the Treasurer 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*).

2.9 In light of the detailed information provided in the Treasurer's response the committee makes no further comment on this matter.

Chapter 3

Scrutiny of standing appropriations

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

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

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.[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 draws the following bills to the attention of senators:

- **Future Drought Fund Bill 2018**—clauses 13 and 33;
- **National Integrity Commission Bill 2018**—clause 184; and
- **National Integrity Commission Bill 2018 [No. 2]**—clause 184.

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*.