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

Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019

Purpose	This bill seeks to amend the *Australian Crime Commission Act 2002* to confirm the validity of current and former special Australian Crime Commission operations and special and special investigations determinations The bill also seeks to amend the *Australian Crime Commission Act 2002* to amend the process for the Australian Criminal Intelligence Board to make special operations and special investigation determinations
Portfolio	Home Affairs
Introduced	House of Representatives 27 November 2019

Broad discretionary power[1]

1.2 Currently, subsection 7C(2) of the *Australian Crime Commission Act 2002* (the ACC Act) provides that the Board of the Australian Crime Commission (the Board) may determine that an intelligence operation is a special operation. Before doing so, the Board must consider whether methods of collecting the criminal information and intelligence that do not involve the use of powers in the Act have been effective at understanding, disrupting or preventing the federally relevant criminal activity to which the intelligence operation relates.

1.3 Current subsection 7C(3) of the ACC Act provides that the Board may determine that an investigation into matters relating to federally relevant criminal activity is a special investigation. Before doing so, the Board must consider whether ordinary police methods of investigation into the matters are likely to be effective at understanding, disrupting or preventing the federally relevant criminal activity.

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

1.4 Where the Board determines that an operation or investigation is a special operation or special investigation, officers will be able to use the extensive examination powers outlined in Division 2 of Part 2 of the ACC Act.

1.5 Item 15 of the bill seeks to amend subsections 7C(2) and 7C(3) to simply provide that the Board may make a determination authorising a special operation or special investigation to occur. Proposed subsection 7C(4A) provides that the only condition for the exercise of the Board's power to authorise a special operation or special investigation is that the Board considers, on the basis of the collective experience of the Board members voting at the meeting when a determination is made, that it is in the public interest that the Board authorise a special operation or special investigation. The committee notes that the changes proposed in the bill would significantly expand the discretionary power of the Board to authorise a special operation or special investigation.

1.6 The committee expects that the inclusion of such a broad discretionary power, that has the potential to unduly trespass on personal rights and liberties, would be thoroughly justified in the explanatory materials. In this instance, the explanatory materials provide no justification as to why it is necessary or appropriate to provide the Board with the broad discretionary power to authorise a special operation or special investigation.

1.7 Additionally, section 16 of the ACC Act currently provides that if an intelligence operation is determined by the Board to be a special operation or an investigation is determined by the Board to be a special investigation then any act or thing done by the ACC because of the determination must not be challenged, reviewed, quashed or called in question in any court on the ground that the determination was not lawfully made.

1.8 Item 24 of the bill seeks to amend section 16 to provide that if a determination is made under subsection 7C(2) or 7C(3), then any act or thing done by the ACC because of the determination must not be challenged, reviewed, quashed or called in question in any court on the ground that the determination was not lawfully made. The committee notes that this provision may limit the rights of affected person to seek judicial review of the making of a determination. However, it is difficult for the committee to accurately assess the impact of the changes when the explanatory materials contain no justification for the need for the amendments.

1.9 As no justification has been provided in the explanatory materials, the committee requests the minister's advice as to why the Board has been provided with broad discretionary powers to authorise special operations or special investigations.

No-invalidity clause[2]

1.10 Proposed subsection 7C(4C) provides that a determination by the Board to authorise a special operation or special investigation must, to the extent that the board reasonably considers appropriate having regard to the level of generality at which it has authorised the special investigation or special operation, describe the general nature of the circumstances or allegations constituting the federally relevant criminal activity to which the determination relates and set out the purpose of the investigation or operation. Proposed subsection 7C(4J) provides that the validity of a determination is not affected by any failure to comply with subsection 7C(4C).

1.11 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the inclusion of a no-invalidity clause to be provided in the explanatory memorandum.

1.12 In this instance, the explanatory memorandum does not include a justification for the use of a no-invalidity clause, merely restating the operation of the provision. The committee notes that its scrutiny concerns regarding the use of no-invalidity clauses are heightened in this instance by the broad discretionary powers provided to the Board and the potential serious consequences flowing from a decision of the Board to authorise a special investigation or special operation.

1.13 As no justification has been provided in the explanatory materials, the committee requests the minister's advice as to why it is necessary and appropriate to include a no-invalidity clause in relation to the actions required of the Board in proposed subsection 7C(4C).

Retrospective validation[3]

1.14 Item 55 of the bill seeks to validate all previous determinations made by the Board if the determination would otherwise be invalid or ineffective because it did

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2 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

3 Schedule 1, items 55 and 56. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

not satisfy the requirements of the ACC Act. Item 56 of the bill seeks to validate all things done by a person in connection with a special operation or special investigation in performing any function or exercising any power under the ACC Act to the extent that doing the thing would otherwise be invalid or ineffective because no investigation or intelligence operation was being undertaken at the time the thing was done.

1.15 Underlying the basic rule of law principle that all government action must be legally authorised, is the importance of protecting those affected by government decisions from arbitrary decision-making and enabling affected persons to rely on the law as it currently exists. Retrospective legislation has the potential to undermine these values.

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

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

1.17 The committee notes that the explanatory memorandum does not contain any information as why it is necessary to retrospectively validate either determinations by the Board to authorise a special operation or investigation or the exercise of powers done in connection with any special operation or investigation

1.18 Additionally, the committee notes that subitem 55(5) of the bill provides that the validation of determinations does not affect rights or liabilities arising between parties to proceedings heard and finally determined by a court. Subitem 56(5) provides the same in relation to the exercise of powers. However, there is no information on the face of the bill or in the explanatory materials regarding an exception for matters that are currently on foot. As a result, it is unclear to the committee whether there are current matters before the courts that may be detrimentally affected by the retrospective validation.

1.19 As no justification has been provided in the explanatory materials, and noting the potentially serious scrutiny concerns arising from the retrospective validation of determinations by the Board and the exercise of powers under the

***Australian Crime Commission Act 2002*, the committee requests the minister's advice regarding:**

- **why it is necessary and appropriate to retrospectively validate both determinations by the Board and the exercise of powers done in connection with any special operation or investigation;**
- **the number of persons who may be affected by this retrospective validation, whether any affected persons would suffer a detriment as a result and whether this would lead to unfairness; and**
- **whether there are any current matters before the courts that may be affected and the extent to which a matter may be affected.**

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019

Purpose	This bill seeks to amends Acts in relation to unfair contract terms and insurance contracts, funeral expenses facilities, funeral benefits, mortgage brokers and mortgage intermediaries Schedule 1 seeks to extend the existing protection of unfair contract terms regime under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to insurance contracts governed by the *Insurance Contracts Act 1984* Schedule 2 seeks to ensure that the consumer protection provisions of the ASIC Act apply to funeral expenses policies Schedule 3 seeks to amend the *National Consumer Credit Protection Act 2009* to: • require mortgage brokers to act in the best interests of consumers; and • address conflicted remuneration for mortgage brokers
Portfolio	Treasury
Introduced	House of Representatives on 28 November 2019

Significant matters in delegated legislation[4]

1.20 Item 5 of Schedule 3 to the bill seeks to insert a new Part 3-5A into the *National Consumer Credit Protection Act 2009*. The proposed new Part would require mortgage brokers to act in the best interests of consumers, and addresses conflicted remuneration for mortgage brokers. In general, the circumstances in which the proposed bans on conflicted remuneration will apply will be set out in regulations.

1.21 Proposed section 158N provides that conflicted remuneration is any benefit, whether monetary or non-monetary, that:

- is given to a licensee who provides credit assistance to consumers that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the credit assistance provided; or

4 Schedule 3, items 5 and 6, proposed new Division 4 of Part 3-5A of the *National Consumer Credit Protection Act 2009*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- is given to a licensee who acts as an intermediary and because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence whether or how the licensee acts as an intermediary.

1.22 However, proposed section 158NA provides that the regulations may prescribe additional circumstances in which a benefit will be conflicted remuneration, as well as the circumstances where a benefit will not be conflicted remuneration. The bill also includes a number of proposed civil penalty provisions which ban the acceptance or giving of conflicted remuneration in circumstances that will be prescribed in the regulations. The penalty for each of the provisions is 5000 penalty units.[5]

1.23 The committee also notes that proposed item 3 of Schedule 10 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, would allow the regulations to prescribe circumstance in which the proposed Division on conflicted remuneration applies, or does not apply, to a benefit given to a licensee.[6]

1.24 The committee has consistently raised scrutiny concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of the Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as what constitutes conflicted remuneration and the circumstances in which it is banned, should be included in primary legislation unless a sound justification is provided. In this instance, the explanatory memorandum states:

> The ability to prescribe by regulation what is and is not conflicted remuneration provides flexibility for the regime to efficiently and effectively respond to changes in industry practice and to ensure that the new regime operates for the benefit of consumers.
>
> Regulations also give effect to the ban on conflicted remuneration. This provides flexibility to provide the circumstances in which conflicted remuneration is banned.[7]

1.25 While noting this explanation, the committee's consistent scrutiny view is that the need for flexibility does not, of itself, provide an adequate justification for leaving significant matters to delegation legislation. In this instance, it is unclear why these matters cannot be included on the face of the primary legislation. The

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5 See proposed sections 158NB, 158NC, 158ND, 158NE, and 158NF.

6 See Schedule 3, item 6.

7 Explanatory memorandum, pp. 36–37.

committee's scrutiny concerns are further heighted by the high civil penalties that can be imposed.

1.26 The committee's consistent scrutiny view is that significant matters, such as what constitutes conflicted remuneration and the circumstances in which it is banned, should be included in the primary legislation unless a sound justification is provided. The committee therefore requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to leave the circumstances in which a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned, to regulations; and**
- **whether it is appropriate for the bill to be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.**

Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019

Purpose	This bill seeks to amend *Interactive Gambling Act 2001* to establish a Nation Self-exclusion Register
Portfolio	Social Services
Introduced	House of Representatives on 27 November 2019

Reversal of the evidential burden of proof[8]

1.27 The bill seeks to insert new Part 7B into the *Interactive Gambling Act 2001* to create a National Self-exclusion Register (the Register). The Register, which will be managed by the Register operator (a body corporate appointed by the ACMA), will allow individuals to apply to exclude themselves from being provided interactive wagering services and limit the amount of marketing a licenced wagering service can provide to that individual.

1.28 The bill sets out a number of offences relating to how licenced wagering services and others interact with persons who are on the Register. Many of the offences include offence-specific defences. These offence-specific defences reverse the evidential burden of proof.

1.29 At common law, it is ordinarily the duty of the prosecution to prove all the 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.[9]

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

- it is peculiarly within the knowledge of the defendant; and

8 Schedule 1, item 9, proposed subsections 61JP(7), 61KA(5), 61LA(6), 61LB(3), 61LC(3), 61LD(3), 61MA(3), 61MB(4), 61MC(4), 61NB(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[10]

1.31 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The explanatory materials do not contain any information regarding why it is appropriate to reverse the evidential burden of proof for offences in this bill.

1.32 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of each provision which reverses the burden of proof is assisted if it explicitly addresses the relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[11]

Computerised decision-making[12]

1.33 Proposed section 61QA would allow the Register operator to arrange for the use of computer programs for any purpose for which the Register operator may make a decision, exercise a power or comply with an obligation, or do anything related to those matters.

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

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

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

12 Schedule 1, item 9, proposed section 61QA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iii).

1.35 The explanatory memorandum states:

> This provision will allow for more efficient decision making, such as in registering an individual on the Register, re-registering, de-registering and varying entries. However, this provision also ensures that computerised decisions are taken to be decisions of the Register operator so that they are held responsible for any computerised actions.[13]

1.36 The committee acknowledges that there may be merit in streamlining registration processes, and notes that there are mechanisms in place to ensure that errors made by the operation of a computer program can be quickly corrected. However, in light of the potential impacts on administrative decision-making outlined above, the committee would expect the explanatory materials to include a more comprehensive justification for allowing *all* of the Register operator's administrative functions to be performed by computer program. The committee also considers that it would be useful for the explanatory materials to explain how automated decision-making will comply with relevant administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).

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

- **why it is considered necessary and appropriate to permit the Register operator to arrange for the use of computer programs for *any* purpose for which the Register operator may or must take administrative action;**
- **whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and**
- **whether consideration has been given to including guidance on the face of the bill as to the types of administrative actions (for example, complex or discretionary decisions) that must be taken by a person rather than by a computer.**

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13 Explanatory memorandum, p. 26.

Significant matters in delegated legislation

Adequacy of review rights[14]

1.38 Proposed section 61QB allows the Register rules to prescribe procedures that must be followed by the Register operator in order to deal with complaints about the administration or operation of the Register. Proposed subsection 61QB(2) provides that if a person has reason to believe that another person has contravened a provision of the bill or the rules and the person makes a complaint to the Register operator, that complaint must be referred to the ACMA.

1.39 The committee notes that there is no information on the face of the bill or the explanatory materials as to what the complaints process that may be set out in the Register rules will entail. In addition, the committee notes that proposed subsection 61QB(1) provides that the Register rules *may*, rather than *must*, set out procedures that must be followed by the Register operator for dealing with complaints.

1.40 The committee's view is that significant matters, such as how a complaints process will operate, should be provided in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum merely restates the operation of the provision and notes that a person who has made a complaint 'may then make a further complaint to the Office of the Australian Information Commissioner'.[15]

1.41 In this instance, it is unclear to the committee why at least high-level guidance regarding how the complaints process will operate cannot be included on the face of the primary legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.42 The committee also notes that a complaints process is quite different to a system for merits review. The latter typically provides for review by an independent tribunal or decision-maker who is empowered to make a substitute decision on the basis of their view of what the correct or preferable decision should be. It is therefore unclear as to whether a person will be able to seek effective review of decisions made by the Register operator.

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

- **why it is necessary and appropriate to leave significant matters, such as how a complaints process will operate, to delegated legislation;**

14 Schedule 1, item 9, proposed section 61QB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

15 Explanatory memorandum, p. 27.

- **whether it would be appropriate for the bill to be amended to:**
  - **include at least high-level guidance regarding the complaints process on the face of the primary legislation; and**
  - **provide that the Register rules *must*, rather than *may*, set out procedures that must be followed by the Register operator for dealing with complaints; and**
- **whether judicial review and independent merits review of decisions made by the Register operator will be available.**

Parliamentary scrutiny: tabling of documents in Parliament[16]

1.44 Proposed section 61QG provides for an evaluation of the provisions underpinning the new National Self-Exclusion Register to be conducted three years after the Register becomes operational. Proposed subsection 61QG(2) provides that a report of the evaluation must be given to the minister and published on the department's website, however there is no requirement for the report to be tabled in Parliament.

1.45 The committee notes that not providing for the evaluation report to be tabled in Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. As such, the committee expects there to be appropriate justification for not including a requirement for review reports to be tabled in Parliament. The committee generally does not consider the costs involved in tabling documents to be a sufficient basis for not providing for a requirement to table in Parliament.

1.46 Noting the impact on parliamentary scrutiny of not providing for the evaluation report to be tabled in Parliament, the committee requests the minister's advice as to whether proposed section 61QG of the bill can be amended to provide that the evaluation report be tabled in each House of the Parliament (as is currently provided for in proposed subsection 61QF(4) in relation the 12-month review report).

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16 Schedule 1, item 9, proposed section 61QG. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

Migration Amendment (Regulation of Migration Agents) Bill 2019

Purpose	This bill seeks to amend *Migration Act 1958* (Migration Act) to: • remove unrestricted legal practitioners from the regulatory scheme that governs migration agents; • allow eligible restricted legal practitioners to be both registered migration agents and restricted legal practitioners for a period of up to two years; • ensure that the time period in which a person can be considered an applicant for repeat registration as a migration agent is set out in delegated legislation rather than on the face of the Migration Act, and remove the 12 month time limit within which a person must apply for registration following completion of a prescribed course; • repeal various provisions that reference regulatory arrangements that are no longer in place; • allow the Migration Agents Registration Authority (MARA) to refuse an application to become a registered migration agent where the applicant has been required to, but has failed to, provide information or answer questions in relation to their application by making a statutory declaration or appearing before the MARA; • require registered migration agents to notify the MARA if they have paid the non-commercial application charge in relation to their current period of registration but give immigration assistance otherwise than on a non-commercial basis; and • ensure that the definitions of 'immigration assistance' and 'makes immigration representations' include assisting a person in relation to a request to the Minister to exercise his or her power under section 501C or 501CA of the Migration Act to revoke a character-related visa refusal or cancellation decision
Portfolio	Home Affairs
Introduced	House of Representatives on 27 November 2019

Strict liability[17]

1.47 Item 25 of Schedule 1 to the bill seeks to insert proposed subsection 312(4) into the *Migration Act 1958*. Proposed subsection 312(4) provides that a registered migration agent must notify the Migration Agents Registration Authority within 28 days after the agent becomes either a restricted legal practitioner or an unrestricted legal practitioner. The penalty for failing to comply with this requirement is 100 penalty units. Proposed subsection 312(5) provides that an offence against subsection 312(4) is one of strict liability.

1.48 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[18]

1.49 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 of up to 60 penalty units for an individual.[19]

1.50 In this instance, the explanatory memorandum states:

> The penalty imposed for failure to comply with new subsection 312(4) is 100 penalty units. The penalty is consistent with the penalty imposed by current subsection 312(1) of the Migration Act, which requires a registered migration agent to notify the MARA within 14 days after certain events.[20]

1.51 While noting this explanation, the committee does not consider that consistency with other legislative provisions is, of itself, a sufficient justification for providing penalties for strict liability offences above what is recommended by the

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17 Schedule 1, item 25. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

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

20 Explanatory memorandum, p. 21.

Guide to Framing Commonwealth Offences. Additionally, the explanatory memorandum does not include an explanation as to why it is necessary or appropriate for the offence to be one of strict liability.

1.52 The committee requests the minister's more detailed justification as to why it is considered necessary and appropriate for the offence in proposed subsection 312(4) to be one of strict liability with a penalty of 100 penalty units. The committee notes that its assessment of this matter would be assisted if the minister's response addresses the principles set out in the *Guide to Framing Commonwealth Offences*.[21]

Broad delegation of administrative powers[22]

1.53 Proposed subsection 320(1) seeks to provide that the minister may delegate any of the powers or functions given to the Migration Agents Registration Authority under Part 3 of the *Migration Act 1958* to an APS employee in the Department. Some of these powers and functions are significant including, for example, the power to cancel or suspend the registration of a registered migration agent,[23] require registered migration agents or former registered migration agents to give information,[24] and bar former registered migration agents from being registered for up to 5 years.[25]

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 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 offices or to members of the senior executive service (SES). 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.

1.55 In this case, the explanatory memorandum states:

> The delegation of power at new subsection 320(1) is appropriate and consistent with the current framework of the Migration Act.

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

22 Schedule 3, item 16, proposed subsection 320(1).

23 *Migration Act 1958*, s 303.

24 *Migration Act 1958*, ss 308, 311EA.

25 *Migration Act 1958*, s 311A.

> The level of delegation has not been specified in the Migration Act. Doing so would create an unnecessary administrative and legislative burden, by requiring a change to the Migration Act each time there was a restructure to the administrative arrangements of the MARA.
>
> The existing powers and functions under Part 3 of the Migration Act have been delegated by the minister under a legislative instrument and have been working effectively, with the MARA exercising its powers appropriately.[26]

1.56 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility or the existence of similar provisions in existing legislation as sufficient justifications for allowing a broad delegation of administrative powers to officials at any level.

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

- **why it is considered necessary to allow for the minister to delegate *any* of the powers or functions given to the Migration Agents Registration Authority to APS employees at any level; and**
- **whether the bill can be amended to provide legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated. For example, the committee notes that it may be possible to at least restrict the delegation of significant cancellation, suspension and information gathering powers (such as those referred to in paragraph 1.53 above) to SES or Executive level employees.**

26 Explanatory memorandum, p. 38.

Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019

Purpose	This bill seeks to amend the *Student Identifiers Act 2014* to: • expand the range of entities that may request access to an individual's authenticated vocational education and training transcript; • create a civil penalty and infringement notice regime; • allow the Student Identifiers Registrar's to grant exemption to the requirement to hold a Unique Student Identifier; and • make minor technical changes in relation to funds held in the Student Identifiers Special Account
Portfolio	Employment, Skills, Small and Family Business
Introduced	House of Representatives on 28 November 2019

Significant matters in delegated legislation[27]

1.58 Subsection 53(1) of the *Student Identifiers Act 2014* provides that a registered training organisation must not issue a VET qualification or statement of attainment to an individual if the individual has not been assigned a student identifier. The bill seeks to insert proposed subsection 53(5), which provides that an individual may request that the Student Identifiers Registrar (the Registrar) make a determination that subsection 53(1) does not apply to the individual. Proposed subsection 53(9) provides that the minister may, by legislative instrument, determine the matters that must be considered by the Registrar when making a determination, and proposed subsection 53(12) provides that before making a legislative instrument, the minister must obtain the agreement of the Ministerial Council.

1.59 The committee's view is that significant matters, such as the matters to be considered when making a determination to exempt a student from the requirement to have a student identifier, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum does not address why it is necessary or appropriate to leave the matters to be considered when making a determination to delegated legislation, merely restating the operation of the provision. It is unclear to the committee why the relevant matters could not be included in the primary legislation. The committee notes that a legislative instrument, made by the executive, is not

27 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.60 The committee's view is that significant matters, such as the matters that must be considered by the Registrar when making a determination to exempt a student from the requirement to have a student identifier, should be included in primary legislation unless a sound justification is provided. The committee therefore requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to leave the matters to be considered when making a determination under proposed subsection 53(6) to delegated legislation; and**
- **whether it would be appropriate for the bill to be amended to set out at least high-level guidance in relation to the relevant matters on the face of the primary legislation.**

Merits review[28]

1.61 The *Student Identifiers Act 2014* provides for certain decisions of the Registrar to be reviewed by the Administrative Appeals Tribunal (AAT); however, the bill does not provide for a determination by the Registrar under proposed subsection 53(6) to be reviewed by the AAT.

1.62 The committee considers that, generally, administrative decisions that will or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. The explanatory memorandum states:

> Exclusion of merits review for decisions made by the Registrar is justifiable in order to meet legitimate policy objectives in the Act. Currently the number of individuals seeking an exemption in the VET sector under the Act is negligible in comparison to the number of student identifiers issued by the Registrar each year. The inclusion of merits review would not be an efficient use of Commonwealth resources where the cost of merits review would be greatly disproportionate to the number of individuals requesting exemptions. Also, external merits review at the Administrative Appeals Tribunal may have the disadvantage of delaying outcomes for an individual which may impact on whether an individual can enrol in a course that would lead to a VET qualification or VET statement of attainment.[29]

1.63 The committee appreciates that certain decisions may be unsuitable for merits review – including decisions which have such limited impact that the costs of review cannot be justified. However, the committee considers that this justification is

28 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

29 Explanatory memorandum, p. 11.

only appropriate in circumstances where the cost of providing merits review would be vastly disproportionate to the *significance* of the decision under review, not where the number of individuals seeking merits review is likely to be proportionately low in comparison to the number of applicants under the relevant scheme.[30] The committee notes that a refusal by the Registrar to make a determination under proposed subsection 53(6) may potentially have a significant impact on an individual as it may prevent a registered training organisation from issuing that individual a VET qualification or statement of attainment.

1.64 Additionally, the committee considers that the fact that external review may delay outcomes for an individual is a factor that may be considered by the individual when considering whether to seek independent merits review. The committee does not consider that this is an appropriate justification for the exclusion of independent merits review in circumstances where the relevant determination will affect the rights or interests of an individual.

1.65 The committee requests the minister's more detailed advice as to why merits review will not be available in relation to determinations by the Registrar under proposed subsection 53(6). The committee's consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

30 See Administrative Review Council, *What Decisions Should be Subject to Merits Review* (1999) available online at https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/practice-guides/what-decisions-should-be-subject-to-merit-review-1999.aspx.

Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019

Purpose	This bill seeks to amend various Acts in relation to telecommunications to: • amend the superfast network rules to clarify the default structural separation requirement; • introduce a statutory infrastructure provider regime; • introduce a funding mechanism for regional broadband services
Portfolio	Communications, Cyber Safety and the Arts
Introduced	House of Representatives on 28 November 2019

Significant matters in delegated legislation[31]

1.66 Schedule 4 to this bill, along with the Telecommunications (Regional Broadband Scheme) Charge Bill 2019, seeks to establish an ongoing funding arrangement for fixed wireless and satellite broadband infrastructure through a new industry charge to be known as the Regional Broadband Scheme. Schedule 4, among other things, seeks to establish the types of broadband services subject to and exempt from the charge, penalties for avoiding the charge, and information gathering and disclosure powers and information reporting obligations.

1.67 Proposed subsections 76AA(2), 79A(1) and 79A(2) would give the Minister the power to determine, by legislative instrument, that one or more classes of carriage service be excluded from the definition of 'designated broadband service', and to determine whether a location is taken, or not taken, to be 'premises', for the purpose of the Regional Broadband Scheme.

1.68 The explanatory memorandum notes that as ministerial determinations made under these provisions would alter the tax base, it is appropriate to give the Parliament the opportunity to scrutinise and disallow the determinations before they take effect.[32] To this end, the bill seeks to modify the usual commencement procedures for these determinations.[33] Proposed subsection 102ZFB(3) improves

31 Schedule 4, item 13, proposed subsections 76AA(2), 79A(1) and 79A(2) and section 102ZFB. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

32 Explanatory memorandum, pp. 178 and 206.

33 The usual commencement procedures are contained in section 12 of the *Legislation Act 2003*.

parliamentary oversight of these determinations by ensuring that they do not come into effect until after the disallowance period has expired. The committee welcomes this modified commencement procedure. The committee also welcomes the inclusion of proposed subsection 102ZFB(3A) which provides that where a notice of motion to disallow a determination has been given, and the motion has not been considered within 15 sitting days, the determination will be taken to have been disallowed.

1.69 While the committee welcomes the modifications to the disallowance procedures for these determinations which improve parliamentary oversight, the committee also notes that these ministerial determinations relate to important matters which could impact on the tax base under the proposed Regional Broadband Scheme.

1.70 The committee therefore draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the Minister to make determinations which could impact the tax base via delegated legislation.

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

Telecommunications Legislation Amendment (Regional Broadband Scheme) Charge Bill 2019

Purpose	This bill seeks establish ongoing funding arrangement for fixed wireless and satellite infrastructure through the imposition of a charge
Portfolio	Communications, Cyber Safety and the Arts
Introduced	House of Representatives on 28 November 2019

Significant matters in delegated legislation[34]

1.72 This bill seeks to establish an ongoing funding arrangement for fixed wireless and satellite broadband infrastructure through the imposition of a charge. The funding arrangement is to be known as the Regional Broadband Scheme and the explanatory memorandum notes that the bill is a taxation measure.[35] The bill operates in conjunction with Schedule 4 to the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 which, among other things, seeks to establish the types of broadband services subject to and exempt from the charge, penalties for avoiding the charge, and information gathering and disclosure powers and information reporting obligations.[36]

1.73 The bill sets out default rates of charge which will require all telecommunications carriers to pay a charge of approximately $7.10 per month, per chargeable premises. Chargeable premises are premises where a carriage service provider (i.e. a provider of retail broadband services) provides a designated broadband service. Under the bill, the initial $7.10 monthly charge will be comprised of a $7.09 base component[37] and a $0.01 administrative cost component.[38] The base component is indexed annually to the consumer price index (CPI).[39] The default

34 Subclauses 12(4) and 16(8). The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

35 Explanatory memorandum, p. 2.

36 Explanatory memorandum, p. 3.

37 Subclause 12(1).

38 Subclause 16(1).

39 Subclauses 12(2)–(3).

administrative cost component is specified in the bill for each of the first five years,[40] and then is indexed annually to CPI thereafter.[41]

1.74 Although specific default rates of charge are set out on the face of the bill, subclauses 12(4) and 16(8) provide that the Minister may, by legislative instrument, change the amount of both the base component and the administrative cost component;[42] however, the sum of the base and administrative cost components for any month cannot exceed $10, indexed annually to CPI.[43] In addition, in deciding whether to make such a determination the Minister must have regard to advice provided by the ACCC.[44]

1.75 In relation to the ministerial determinations altering the base component and administrative cost component made under subclauses 12(4) and 16(8), the bill also seeks to modify the usual commencement procedures for these determinations.[45] Subclause 19(3) improves parliamentary oversight of these determinations by ensuring that they do not come into effect until after the disallowance period has expired. The committee welcomes this modified commencement procedure. The committee also welcomes the inclusion of subclause 19(3A) which provides that where a notice of motion to disallow a determination has been given, and the motion has not been considered within 15 sitting days, the determination will be taken to have been disallowed.

1.76 One of the most fundamental functions of the Parliament is to levy taxation.[46] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this case, the fact that default rates of the charge and a maximum cap is set in the primary legislation partly addresses the committee's scrutiny concerns. As noted above, the committee also welcomes the modified commencement procedures for the determinations. However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers.

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40 Subclauses 16(1)–(5).

41 Subclauses 16(6)–(7).

42 Subclauses 12(4) and 16(8).

43 Subclause 17A.

44 Paragraph 12(5)(a), clause 13, paragraph 16(9)(a), and clause 17.

45 See clause 19. The usual commencement procedures are contained in section 12 of the *Legislation Act 2003*.

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

1.77 While the committee welcomes the important limitations in the bill on the proposed ministerial power to alter the rate of taxation, the committee reiterates its consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax.

1.78 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the Minister to alter the rate of a tax via delegated legislation.

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

Trade Support Loans Amendment (Improving Administration) Bill 2019

Purpose	This bill seeks to amend the *Trade Support Loans Act 2014* to empower the Secretary to: • make a determination to offset a payment of a trade support loan that a person is required to pay through the tax system once their income reaches the minimum repayment income threshold; and • prescribe the circumstances in which later instalments can be reduced in rules
Portfolio	Employment, Skills, Small and Family Business
Introduced	House of Representatives on 28 November 2019

Significant matters in delegated legislation[47]

1.80 Item 6 of Schedule 1 to the bill seeks to empower the Secretary to provide for offsetting arrangements where an amount of trade support loan (TSL) is wrongly paid to a person who was not entitled to the payment. Proposed subsection 11(4) will allow the rules (i.e. delegated legislation) to prescribe the circumstances in which the Secretary is to determine that amounts of later TSL instalments are to be reduced.

1.81 The committee's view is that significant matters, such as the circumstances in which the amounts of later trade support loan instalments may be reduced, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum provides no explanation as to why it is necessary to prescribe such circumstances in delegated legislation.

1.82 In this instance, it is unclear to the committee why at least high-level guidance regarding the circumstances in which the amounts of later TSL instalments may be reduced cannot be included in primary legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.83 The committee's view is that significant matters, such as the circumstances in which the amounts of later trade support loan (TSL) instalments may be reduced,

47 Schedule 1, item 6. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

should be included in primary legislation unless a sound justification is provided. The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave significant matters, such as the circumstances in which the amounts of later TSL instalments may be reduced, to delegated legislation; and**
- **whether it would be appropriate for the bill to be amended to set out at least high level guidance regarding the relevant circumstances on the face of the primary legislation.**

Bills with no committee comment

1.84 The committee has no comment in relation to the following bills which were introduced into the Parliament between 25 – 28 November 2018:

- Commonwealth Electoral Amendment (Transparency Measures—Lowering the Disclosure Threshold) Bill 2019;
- Commonwealth Electoral Amendment (Transparency Measures—Real Time Disclosure) Bill 2019;
- Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019;
- Farm Household Support Amendment (Relief Measures) Bill (No. 2) 2019;
- Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Bill 2019;
- Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019;
- National Self-exclusion Register (Cost Recovery Levy) Bill 2019;
- Private Health Insurance Legislation Amendment (Fairer Rules for General Treatments) Bill 2019;
- Special Recreational Vessels Bill 2019; and
- Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019.

1.85 This is on the basis that, based on the committee's initial assessment, the bill does not raise any scrutiny concerns or where the bill does contain matters that interact with the committee's principles an appropriate justification has been provided in the explanatory materials.

1.86 As noted in the introduction to this Digest, any senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so.

Commentary on amendments and explanatory materials

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

- Family Assistance Legislation Amendment (Building on the Child Care Package) Bill 2019;[48] and
- Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019.[49]

48 On the 25 November 2019 the House of Representatives agreed to four Government amendments. The Minister for Education (Mr Tehan) presented a supplementary explanatory memorandum and the bill was read a third time.

49 On 27 November 2019 the House of Representatives agreed to 10 Government amendments, the Minister for Government Services (Mr Ramsey presented a replacement explanatory memorandum, the Assistant Minister for Community Housing, Homelessness and Community Services (Mr Howarth) presented a supplementary explanatory memorandum and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Bill 2019

Purpose	This bill seeks to amend various Acts relating to agricultural and veterinary chemicals to: • provide the Australian Pesticides and Veterinary Medicines Authority (APVMA) and industry with flexibility to deal with certain types of new information provided when the APVMA is considering an application; • enable the use of new regulatory processes for chemicals of low regulatory concern; • provide for extensions to limitation periods and protection periods as an incentive for chemical companies to register certain new uses of chemical products; • simplify reporting requirements for annual returns; • support computerised decision-making by the APVMA; • provide for APVMA to manage errors in an application at the preliminary assessment stage; • enable APVMA to grant part of a variation application under section 27 of the Schedule to the *Agricultural and Veterinary Code Act 1994* (Agvet Code); • enable a person to apply to vary an approval or registration that is suspended; • establish civil pecuniary penalties for contraventions of provisions in the Agvet Code and the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Administration Act)*;* • provide APVMA with more comprehensive grounds for suspending or cancelling approvals or registrations; • enable the use of new, simpler processes for assessments

	based on risk; • simplify the APVMA's corporate reporting requirements; • amend the mechanism for dealing with minor variations in the constituents in a product; • clarify what information must be included on a label; • correct anomalies in the regulation-making powers for the labelling criteria; • amend the notification requirements in section 8E of the Agvet Code and amend section 7A of the Administration Act to clarify the authority to make an APVMA legislative instrument for residues of chemical products in protected commodities; • amend the definition of expiry date in the Agvet Code; and • establish a governance Board for the APVMA and cease the existing APVMA Advisory Board
Portfolio	Agriculture
Introduced	House of Representatives on 18 September 2019
Bill status	Before House of Representatives

Computerised decision-making[1]

2.2 In *Scrutiny Digest 8 of 2019* the committee requested the minister's further advice as to whether the minister proposes to bring forward amendments to the bill to:

- limit the types of decisions that can be made by computers; and/or
- provide that the APVMA must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.[2]

1 Schedule 1, item 36, proposed section 5F. The committee draws senators' attention to this provision pursuant to Senate Standing Orders 24(1)(a)(ii) and (iii).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 37–42.

Minister's response[3]

2.3 The minister advised:

> The Liberal and Nationals Government agrees to incorporate the information in the explanatory material and intends to amend the Bill to prescribe additional safeguards to help ensure that decisions made by computers will be consistent with relevant laws.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the key information will be incorporated into the explanatory memorandum and that the government intends to amend the bill to prescribe additional safeguards to help ensure that decisions made by computers will be consistent with relevant laws.

2.5 The committee welcomes the minister's advice that the government intends to amend the bill to prescribe additional safeguards to ensure that decisions made by computers will be consistent with relevant laws.

2.6 In light of the minister's undertaking to amend the bill, the committee makes no further comment on this matter.

3 The minister responded to the committee's comments in a letter dated 28 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019

Purpose	This bill seeks to amend Acts in relation to combatting of money laundering and financing of terrorism and the Australian Federal Police to: • expand the circumstances in which reporting entities may rely on customer identification and verification procedures undertaken by a third party; • prohibit reporting entities from providing a designated service if customer identification procedures cannot be performed; • increase protections around correspondent banking; • expand exceptions to the prohibition on tipping off to permit reporting entities to share suspicious matter reports and related information with external auditors, and foreign members of corporate and designated business groups; • provide a simplified and flexible framework for the use and disclosure of financial intelligence; • create a single reporting requirement for the cross-border movement of monetary instruments including physical currency and bearer negotiable instruments; • amend the Criminal Code to clarify that sash used in undercover operations is considered 'proceeds of crims' for the purpose of Commonwealth money laundering offences; • expand the rule-making powers of the Chief Executive Officer of AUSTRAC; • make it an offence for a person to dishonestly represent that a police award has been conferred on them
Portfolio	Home Affairs
Introduced	House of Representatives on 17 October 2019
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[4]

2.7 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of each 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*.[5]

Minister's response[6]

2.8 The minister advised:

> As set out in the Committee's Scrutiny Digest No. 8 of 2019 (p. 5-7), the Committee has identified that the Bill creates a number of offence-specific defences which require a defendant to establish one or more matters. I have considered the comments made by the Committee and will be tabling an Addendum to the Bill's Explanatory Memorandum to address the Committee's concerns (see enclosed).
>
> As identified by the Committee, it is ordinarily the duty of the prosecution to prove all of the elements of an offence. However, the *Guide to Framing Commonwealth Offences* (the Guide) (at p. 50) provides that including a matter as an offence specific defence may be appropriate where:
>
> - the matter is peculiarly within the knowledge of the defendant; and
> - it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.
>
> The Guide also indicates that it may also be appropriate to include a matter as an offence-specific defence where only one of the above tests can be satisfied (see p. 51 of the Guide).
>
> The offence-specific defences in the Bill allow Australian Transaction and Reports Analysis Centre information to be recorded, disclosed or otherwise used for specific purposes. The purpose of a defendant in recording, disclosing or otherwise using this information is a matter that is peculiarly within their knowledge. While external circumstances may be used as evidence of the existence of this underlying purpose, the defendant is the only person who can state with certainty their purpose in recording, disclosing or using that information.

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4 Items 24, 26, 50, 51, 55 and 75 of Schedule 1, proposed subsections 123(5B), 126(7), 126(7AB), 50A(2), 121(2), 121(3), 126(2), 126(3), 126(5), 129(2) and 53(6). The committee draws senators attention to these provision pursuant to Senate Standing Order 24(1)(a)(i).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 5-7.

6 The minister responded to the committee's comments in a letter dated 27 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

> Noting this, it would be significantly more difficult and costly for the prosecution to prove that the defendant did not record, disclose or otherwise use the information for a permitted purpose, than it would be for the defendant to point to the permitted purpose underpinning their conduct.
>
> For example, if an official of the Australian Transaction and Reports Analysis Centre disclosed information to a lawyer in breach of the offence provision at subsection 126(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the prosecution would be required to prove beyond reasonable doubt that the official did not disclose the information for a permitted purpose under subsections 126(2) or (3).
>
> As the official's purpose for making the disclosure was only known to themselves, this would often be impossible to prove in practice. The official, on the other hand, should be readily able to point to the purpose underpinning the disclosure. If this is done, the prosecution must refute the defence beyond reasonable doubt.
>
> As such, the offence-specific defence provisions in the Bill are consistent with Commonwealth criminal law policy and are necessary in order to preserve the integrity of Australia's anti-money laundering and counter-terrorism financing regime. The provisions will ensure agencies are empowered to better investigate and prosecute offenders.

Committee comment

2.9 The committee thanks the minister for this response. The committee notes the minister's advice that the defendant's purpose for recording, disclosing or otherwise using information that is collected by Australian Transaction and Reports Analysis Centre would be peculiarly within the knowledge of the defendant. The committee further notes the minister's advice that while external circumstances may be used as evidence of the existence of this underlying purpose, the defendant is the only person who can state with certainty their purpose in recording, disclosing or using that information.

2.10 The committee also notes the minister's advice that it would be significantly more difficult and costly for the prosecution to prove that the defendant did not record, disclose or otherwise use information for a permitted purpose, than it would be for the defendant to raise evidence they had a permitted purpose.

2.11 The committee welcomes the minister's undertaking to table an addendum to the bill's explanatory memorandum to include further information about the use of offence-specific defences in response to the committee's comments. Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist in interpretation, the committee looks forward to an addendum being tabled as soon as is practicable.

2.12 In light of the minister's undertaking and the explanation provided by the minister, the committee makes no further comment on this matter.

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019

Purpose	This bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* to: • provide information-sharing between Australian Sports Anti-Doping Authority (ASADA) and National Sporting Organisations; • amend ASADA's disclosure notice regime; and • extend statutory protection against civil actions to cover National Sporting Organisations in certain circumstances
Portfolio/Sponsor	Youth and Sport
Introduced	House of Representatives on 17 October 2019
Bill status	Before the House of Representatives

Privacy[7]

2.13 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice regarding the lowering of the threshold for the giving of disclosure notices and the impact this may have on the right to privacy. In particular, the committee requested further detail about:

- why lowering the current 'reasonable belief' standard is necessary given that a 'reasonable belief' may be formed on the basis of intelligence gathered while investigating a potential anti-doping rule violation; and
- any safeguards that will be in place to guard against the unauthorised use or disclosure of personal information obtained under a disclosure notice.[8]

Minister's response[9]

2.14 The minister advised:

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7 Schedule 1, items 13, 43 and 44. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 8-9.

9 The minister responded to the committee's comments in a letter dated 28 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to Scrutiny Digest 10 of 2019 available at: www.aph.gov.au/senate_scrutiny_digest

Disclosure notices

Article 17 of the International Covenant on Civil and Political Rights prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence and protects a person's honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and are non-arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to this purpose.

The Australian Government reiterates these amendments are reasonable, necessary and proportionate to the legitimate aim of catching doping cheats and the persons who facilitate doping, particularly given the safeguards existing in the ASADA Act for the protection of information. Doping is potentially injurious to a person's health, may distort the outcome of sporting contests and, over time, undermines the overall integrity of sport. Australian governments make significant investments in sport and this investment is diminished when the integrity of sport is compromised in this way. These measures are necessary as the detection of doping is becoming increasingly reliant on effective non-analytical investigations.

It is true that a 'belief' can be formed based on intelligence. But it is vital that integrity authorities can respond where there is information generating a reasonable suspicion relevant information will be realised. For example, ASADA may have financial evidence of multiple transactions between a support person and a website known to sell prohibited substances. In the absence of evidence of the substance purchased or the details of the transaction, it would be difficult to form a reasonable belief. However, a reasonable suspicion could be formed to allow for further investigation.

Similarly, information obtained as a result of a tip-off may only raise a suspicion a possible breach of a rule has occurred. If a reasonable belief is required then this information may not be able to be pursued. This is especially the case where an athlete support person is suspected of committing a possible breach of the rules as there are no further tools, such as initiating a drug· test, available to obtain evidence of the possible breach. The issuing of a Disclosure Notice based on 'reasonable suspicion' would address this gap and allow ASADA to better direct its investigative resources at facilitators and sophisticated doping programs.

This approach is consistent with recent calls from Thomas Bach, President of the International Olympic Committee, 'for the urgent need to focus much more on the Athlete's entourage' ... 'using the full support of government authorities ... who have the necessary authority and tools to take action'.

While the difference between the thresholds of suspicion and belief need not be enormous, the fact remains an inability to act on a suspicion may

mean the suspicion is never dispelled. This is not in the interests of sport integrity. The lowering of the current 'reasonable belief' to 'reasonable suspicion' will promote the integrity of Australian sport. It is easy to dispel, or to establish, a suspicion about the conduct of a person - the ability for the ASADA CEO to be able to do this will promote expedition in the investigation of anti-doping rule violations, and in turn, the integrity of the relevant sport. On the other hand, if a suspicion is required to mature into a belief, this is likely to lead to lengthier investigations and, in turn, the existence of a continued threat to the integrity of a sport while a matter is being investigated.

Safeguards against unauthorised use of information

Section 67 of the ASADA Act creates an offence, punishable by two years' imprisonment, for an 'entrusted person' to disclose information except in the circumstances permitted by Part 8 of the ASADA Act. For the purposes of the ASADA Act, 'protected information' means all personal information collected for or under the ASADA Act other than information in relation to an entrusted person. The World Anti-Doping Code International Standard for the Protection of Privacy and Personal Information is a mandatory International Standard imposing strict requirements on an anti-doping organisation to ensure the privacy of persons subject to doping control are fully respected. As Australia's National Anti-Doping Organisation, ASADA must comply with this standard when processing personal information pursuant to the Code.

While the purposes for which this information can be lawfully released are generally directed to giving effect to Australia's anti-doping regime, the provisions give the CEO discretion to disclose information in other circumstances, for example, if ASADA uncovers information about the misconduct of an individual who is beyond the reach of the World Anti-Doping Code or the conduct is so serious it requires attention beyond the Code such as by other law enforcement or regulatory agencies. In this way, the provisions strike an appropriate balance between the need to maintain the confidentiality of information except when disclosure is necessary for the purposes of enforcing Australia's anti-doping regime or where it is necessary due to broader public interest considerations.

Committee comment

2.15 The committee thanks the minister for this response. The committee notes the minister's advice that, while a 'belief' can be formed based on intelligence gathered while investigating a potential anti-doping rule violation, it may be difficult to establish such a 'belief' and establishing a 'reasonable suspicion' would allow for further investigation. The committee also notes the minister's advice that lowering the current 'reasonable belief' standard will promote the integrity of Australian sport.

2.16 The committee further notes the minister's advice that the unauthorised use or disclosure of personal information obtained through a disclosure notice is an

offence under section 67 of the *Australian Sports Anti-Doping Authority Act 2006*, and that the Australian Sports Anti-Doping Authority also complies with the World Anti-Doping Code International Standard for the Protection of Privacy and Personal Information.

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

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

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019

Purpose	This bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* to establish the Sport Integrity Australia agency
Portfolio/Sponsor	Youth and Sport
Introduced	House of Representatives on 17 October 2019
Bill status	Before the House of Representatives

Immunity from civil liability[10]

2.19 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to why it is considered appropriate to provide members of the Advisory Council with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.[11]

Minister's response[12]

2.20 The minister advised:

> Section 78 of the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act), as it is to be amended by the bill, is intended to promote the frank and open provision of advice by the Advisory Council to the Sport Integrity Australia Chief Executive Officer (CEO).
>
> While the Advisory Council will not be permitted to provide advice relating to a particular individual or to a particular investigation (subsection 27(2)), inevitably, advice provided by the Advisory Council is likely to mention individuals or refer to incidents involving individuals who are capable of being identified. This will include, for example, individuals who may be, or have been, the subject of an investigation of threats to sports integrity.
>
> In the event the Advisory Council's advice becomes publicly known, there is a risk a person mentioned in the advice might institute civil proceedings, for example for defamation, against one or more members of the Advisory Council. This is likely to inhibit the frank and open provision of advice by

10 Schedule 1, item 53 proposed subsection 78(1A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 10-11.

12 The minister responded to the committee's comments in a letter dated 28 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

> the Advisory Council to the CEO and, in turn, deprive Sport Integrity Australia of the benefit of the advice and experience of the Advisory Council members. Where Advisory Council members have been exercising their functions in good faith, they should not be exposed to proceedings aimed at frustrating their work and the work of Sport Integrity Australia more generally. New subsection 78(1A) will ensure Council members are appropriately protected in the performance of their functions.

Committee comment

2.21 The committee thanks the minister for this response. The committee notes the minister's advice that the immunity is aimed at protecting members of the Advisory Council that have exercised their functions in good faith. The committee also notes the minister's advice that it is likely to inhibit the provision of frank advice by members of the Advisory Council if a person mentioned in that advice might institute civil proceedings in response.

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

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

Privacy[13]

2.24 In *Scrutiny Digest 8 of 2019* the committee requested the minister's more detailed advice as to why it is considered necessary and appropriate for Sport Integrity Australia to be an enforcement body for the purpose of the *Privacy Act 1988*. In particular, the committee noted that its consideration of this matter would be assisted by a fuller explanation of how Sport Integrity Australia's enforcement related activities will be undertaken in practice, including the nature of the enforcement powers and who will be exercising the enforcement powers.[14]

Minister's response

2.25 The minister advised:

> Consistent with the bill and in line with the Wood Review's recommendations, Sport Integrity Australia will function as a national platform for preventing and addressing threats to sports integrity and

13 Schedule 2, item 23. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 10-11.

coordinating a national approach to matters relating to sports integrity with a view to:

- achieving fair and honest sporting performances and outcomes
- promoting positive conduct by athletes, administrators, officials, supporters and other
- stakeholders on and off the sporting arena
- achieving a safe, fair and inclusive sporting environment at all levels
- enhancing the reputation and standing of sporting contests and of sport overall.

The Bill defines 'threats to sports integrity' as including the:

- manipulation of sporting competitions
- use of drugs and doping methods in sport
- abuse of children and other persons in a sporting environment
- failure to protect members of sporting organisations and other persons in a sporting environment from bullying, intimidation, discrimination or harassment.

As identified in the Wood Review, '[s]ports integrity matters are now complex, globalised, connected and beyond the control of any single stakeholder.' Accordingly, to effectively execute its core functions, Sport Integrity Australia will be required to coordinate and strengthen relationships with a range of entities including sporting organisations, betting operators, domestic (Commonwealth, state and territory) and foreign law enforcement and regulatory agencies, and international organisations.

Critically, in order to 'prevent and address' threats to sports integrity, Sport Integrity Australia will be an information 'hub', collecting, analysing, interpreting and disseminating information, including personal and sensitive information, in coordination with this range of entities, often within a time-critical framework. Receiving, assessing and monitoring information from multiple and varied sources will also develop capability, knowledge and expertise to better identify current and future threats.

In terms of specific powers, Sport Integrity Australia will have the existing powers available to ASADA for anti-doping matters only, which include the powers to issue disclosure notices and to enforce breaches through the issuing of infringement notices or through instituting civil penalty proceedings.

It is fundamental to Sport Integrity Australia's role that it work side by side with conventional law enforcement bodies, sport betting regulators and sports controlling bodies and it will need the capacity to exchange information with those bodies. While Sport Integrity Australia will not

directly enforce criminal laws, it will provide support and assistance to law enforcement agencies in enforcing laws relevant to sports integrity.

It is necessary to include Sport Integrity Australia in the definition of 'enforcement body' to give confidence to law enforcement agencies they can lawfully disseminate information to it. If Sport Integrity Australia is not included in the definition, it is likely law enforcement agencies will be reluctant to disseminate information they hold to Sport Integrity Australia, which will undermine its ability to achieve its purpose. It will also hinder the efforts of those law enforcement agencies to detect and prosecute criminal behaviour associated with sport.

Committee comment

2.26 The committee thanks the minister for this response. The committee notes the minister's advice that it is fundamental to the role of Sport Integrity Australia to be able to exchange information, including personal and sensitive information, with a range of entities, including conventional law enforcement bodies. In this regard, the committee notes the minister's advice that, while it will not directly enforce criminal law, Sport Integrity Australia may provide support and assistance to law enforcement agencies in enforcing laws relevant to sports integrity.

2.27 The committee also notes the minister's advice that Sport Integrity Australia will have the existing powers available to the Australian Sports Anti-doping Authority for anti-doping matters only, including the power to issue disclosure notices and infringement notices, and the power to institute civil penalty proceedings.

2.28 The committee further notes the minister's advice that it is considered necessary to designate Sport Integrity Australia as an enforcement body for the purposes of the *Privacy Act 1988* as it would foster confidence with law enforcement agencies and aid in detecting and prosecuting criminal behaviour associated with sport.

2.29 While the committee notes this explanation, the committee does not consider that it adequately addresses its request for fuller information on how Sport Integrity Australia's enforcement related activities will be undertaken in practice. For example, the committee notes that it remains unclear as to who will be exercising the enforcement powers.

2.30 Noting that the minister's response and the explanatory materials do not adequately address the committee's concerns, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of designating Sport Integrity Australia as an enforcement body for the purposes of the *Privacy Act 1988*.

Education Legislation Amendment (2019 Measures No. 1) Bill 2019

Purpose	This bill seeks to amend Acts in relation to higher education to: • increase the combined Higher Education Loan Program (HELP) loan limit for students undertaking eligible aviation courses on or after 1 January 2020 at higher education providers; • enable the Minister to determine the aviation courses for which a person has the higher HELP loan limit; • provide for all or part of a person's HELP debt to be remitted for their recognised initial teacher education course after they have been engaged as a teacher for four years in a school in a very remote location of Australia from the start of the 2019 school year; • reduce indexation on a person's outstanding accumulated HELP debt while they are teaching in a school in a very remote location of Australia; and • allow the Department of Human Services restricted access to higher education data and VET student loans data in order to administer student benefits.
Portfolio	Education
Introduced	House of Representatives on 16 October 2019
Bill status	Passed both Houses on 14 November 2019

Reversal of evidential burden of proof[15]

2.31 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee noted that 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*.[16]

15 Schedule 3, items 10, 16, 21, 22 and 23. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 16-18.

Minister's response[17]

2.32 The minister advised:

> The amendments to offence provisions in Schedule 3 to the Bill provides for three kinds of exception to existing offences in the *Higher Education Support Act 2003* (HESA) and the *VET Student Loans Act 2016* (VSL Act). I note at the outset that the amendments add exceptions to existing offences rather than broaden the offences or remove any existing burden on the prosecution to establish those offences, and consequently are beneficial for defendants.
>
> The three kinds of exception added to existing offences are:
>
> (a) the person to whom the information protected by the offence provision relates has agreed to its use or disclosure (new subsection 179-10(2) and subclause 73(2) of Schedule 1A to HESA; new subsection 99(2) and subsections 100(2A) and (5) of the VSL Act)
>
> (b) the use or disclosure of the information protected by the offence provision is authorised by Commonwealth law (new subsection 179-10(3) and subclause 73(3) of Schedule 1A to HESA)
>
> (c) the use or disclosure of the information protected by the offence provision is authorised by a prescribed law of a State or Territory (new subsection 179-10(4) and subclause 73(4) of Schedule 1A to HESA).
>
> Exceptions (b) and (c) are formulations of the "lawful authority" defence. It appears as a defence in section 10.5 of the Criminal Code, to which section 13.3 of the Criminal Code applies. "Lawful authority" is a defence of general application to a criminal offence and is neither an element of the relevant offences nor an offence-specific defence as referred to in the Guide.
>
> The exception (b) defences recreate the "lawful authority" defence of general applicability found in section 10.5 of the Criminal Code. I'm advised that the defence of lawful authority was inserted in the Criminal Code by the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000, in recognition of the fact that a defence of lawful authority was a longstanding common law principle which would need to be recognised in the Criminal Code if it were to continue to apply. Exception (b) defences do not extend to any scenarios where the general Criminal Code defence of lawful authority do not already apply. Under subsection 13.3(2) of the Criminal Code, the defence bears the evidential burden for a defence of lawful authority. Given exception (b) defences are intended to operate identically to the existing defence of lawful authority

17 The minister responded to the committee's comments in a letter dated 2 December 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

(albeit limited to their specific offences) it is appropriate that the defendant bears an evidential burden for the exception (b) defences.

The exception (c) defences mirror the exception (b) defences except that they provide a lawful authority defence where the conduct is authorised under state or territory law rather than Commonwealth law. Apart from that distinction, these defences are intended to operate in an identical fashion to the Criminal Code defence of lawful authority and the exception (b) defences. Given that, it is appropriate that the evidential burden is also treated in a similar way, and is applied to the defendant.

In connection with exception (a), the question of whether the person to whom the information protected by the offence provision has consented to the relevant use or disclosure by the alleged offender will, in those cases where a prosecution is brought, be a matter peculiarly within the knowledge of the defendant. As noted in the Explanatory Memorandum to the Bill, the principal purpose of including exception (a) in the relevant offence provisions is to enable officers of Commonwealth agencies to use and disclose students' information collected under HESA and the VSL Act with the consent of those students. This consent will typically be provided in forms (such as application forms) filled out by the students. Consequently, the Commonwealth will generally have a good record of the consents provided by students to the use of disclosure of their information.

In circumstances where an offence against one of the relevant provisions is alleged to have occurred, it will be the case that the Commonwealth Director of Public Prosecutions, advised of all the consents to use or disclosure of which the Commonwealth is aware, is satisfied that no such consent has been given. Any consent to an otherwise unlawful use or disclosure of the protected information that is not in the form of written consents obtained by the Commonwealth as part of it usual administration of HESA and the VSL Act will have been given by a student to the defendant independently through some action of the defendant, such as requesting the student's consent. Such a matter is peculiarly within the knowledge of the defendant. Accordingly, it is appropriate that evidence of consent that is not in the Commonwealth's possession is provided by the defendant.

Providing that the defendant bears an evidential burden of proof in establishing whether a person has consented to the use or disclosure of information giving rise to the alleged offence is consistent with the principles on defence-specific offences in the Guide.

Committee comment

2.33 The committee thanks the minister for this response. The committee notes the minister's advice that the bill seeks to add three types of exemptions to existing offences, rather than broaden the offences or remove any existing burden on the

prosecution to establish those offences, and consequentially are beneficial for defendants.

2.34 The committee also notes the minister's advice that exceptions to existing offences, related to the disclosure of information authorised by Commonwealth, state or territory law, create a 'lawful authority' defence, and therefore appropriately reverse the evidential burden of proof as it is consistent with subsection 13.3(2) of the *Criminal Code*.

2.35 The committee further notes the minister's advice that exceptions to existing offences, related to consent, are appropriate as any consent to an otherwise unlawful use or disclosure of the protected information, that is not in the form of written consents obtained by the Commonwealth as part of it usual administration of HESA and the VSL Act, will have been given by a student to the defendant independently through some action of the defendant, such as requesting the student's consent. In this regard, the committee notes that such matters are likely to be peculiarly within the knowledge of the defendant.

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

Medical and Midwife Indemnity Legislation Amendment Bill 2019

Purpose	This bill seeks to amend various Acts in relation to medical and midwife indemnity to: • simplify the current legislative structure underpinning the Government's support for medical indemnity insurance; • repeal redundant legislation; • remove the existing contract requirements for the Premium Support Scheme (PSS) and incorporate the necessary requirements in legislation; • require all medical indemnity insurers to provide universal cover to medical practitioners; • maintain support for high cost claims and exceptional claims made against allied health professionals and enable exceptional cost claims to be made, which is provided for in a separate scheme to medical practitioners; • support high cost claims and exceptional cost claims made against private sector employee midwives not covered under the MPIS; • clarify eligibility for the Run-off Cover Schemes (ROCS) and permit access for medical practitioners and eligible midwives retiring before the age of 65; • cause an actuarial assessment to report on the stability and affordability of Australia's medical indemnity market, with the report to be laid before each House of Parliament; and • amend reporting obligations and improve the capacity for monitoring and information sharing
Portfolio	Health
Introduced	House of Representatives on 18 September 2019
Bill status	Passed both Houses on 14 November 2019

Computerised decision-making[18]

2.37 In *Scrutiny Digest 8 of 2019* the committee requested the minister's further advice as to whether the minister proposes to bring forward amendments to the bill to:

- limit computerised decision making to decisions under section 37 of the *Medical Indemnity Act 2002*; and/or
- generally limit the types of decisions that can be made by computers; and/or
- provide that the Chief Executive Medicare must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.[19]

Minister's response[20]

2.38 The minister advised:

> On 1 November 2019, I wrote to the Committee providing a response to this issue, specifically:
>
> - the Chief Executive Medicare will determine the types of decisions which are suitable for automation through the claims IT system. These decisions will be limited to ensuring that required claims information has been submitted by insurers. For example, whether the doctor's name, registration and current insurance policy details are submitted when a claim is lodged
> - Schedule 3 Item 15 of the Bill also provides that the Chief Executive Medicare may substitute a decision taken by the operation of a computer program
> - matters of substantive administrative decision-making, such as assessment of the merits of claims and whether payments should be made, will continue to be made manually by Department officers.
>
> As a result, the Australian Government does not propose to make any further amendments to the Bill or Explanatory Memorandum.

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18 Schedule 3, item 15, proposed section 76A; item 26, proposed section 87A. The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(ii) and (iii).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 83-86.

20 The minister responded to the committee's comments in a letter dated 29 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

Committee comment

2.39 The committee thanks the minister for this response. The committee notes the minister's advice that the government does not propose to make any further amendments to the bill or explanatory memorandum.

2.40 The committee remains concerned that there is no limitation on the types of decisions that will be subject to computerised decision-making on the face of the primary legislation.

2.41 The committee notes that the bill has already passed both Houses of the Parliament. The committee considers that when future changes to the *Medical Indemnity Act 2002* or the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* are being formulated consideration should be given to limiting the types of decisions that will be subject to computerised decision-making on the face of each Act.

Reversal of evidential burden of proof[21]

2.42 In *Scrutiny Digest 8 of 2019* the committee requested that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Minister's response

2.43 The minister advised:

> I note the feedback from the Scrutiny Committee on the reversal of evidential burden of proof. This was addressed in my response to the Committee dated 1 November 2019. The Government does not propose to make any further amendments to the Bill or Explanatory Memorandum as there is already sufficient explanation on this issue.

Committee comment

2.44 The committee thanks the minister for this response. The committee notes the minister's advice that the government does not propose to make any further amendments to the bill or explanatory memorandum.

2.45 **The committee notes that the bill has already passed both Houses of the Parliament. The committee takes this opportunity to reiterate that where it requests that key information be included in an explanatory memorandum, it does**

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21 Schedule 3, item 18, proposed subsections 77(2A) and (2B); item 29, proposed subsections 88(2A) and (2B). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

so on the basis that these documents are an important a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Broad delegation of legislative power[22]

2.46 In *Scrutiny Digest 8 of 2019* the committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of allowing regulations to modify and exempt matters from the primary legislation.

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

Minister's response

2.48 The minister advised:

> All legislative instruments to be made under the proposed Bill will be subject to Senate Scrutiny in 2020. The Government is currently consulting with key stakeholders on these instruments following a Medical Indemnity Stakeholder Workshop held on 18 November 2019.
>
> I look forward to working with the Senate on the legislative instruments so we can be ready for implementation on 1 July 2020.

Committee comment

2.49 The committee thanks the minister for this response. The committee notes the minister's advice that all legislative instruments to be made under the bill will be subject to Senate scrutiny in 2020.

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

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22 Schedule 6, item 3, proposed paragraphs 34ZZG(2)(b) and 34ZZZD(2)(b); proposed subsections 34ZZZF(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

Native Title Legislation Amendment Bill 2019

Purpose	This bill seeks to amend the *Native Title Act 1993* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* to modify the native title claims resolution, agreement-making, Indigenous decision making and dispute resolution processes
Portfolio	Attorney-General
Introduced	House of Representatives on 17 October 2019
Bill status	Before the House of Representatives

Retrospective application[23]

2.51 In *Scrutiny Digest 8 of 2019* the committee requested the Attorney-General's more detailed advice as to the necessity and appropriateness of retrospectively validating section 31 agreements, including more detailed information regarding whether there will be a detrimental effect to any involved parties.[24]

Attorney-General's response[25]

2.52 The Attorney-General advised:

> According to data held by the National Native Title Tribunal, as of October 2019 there are 3656 section 31 agreements across Australia. The majority of these agreements are located in Western Australia and Queensland. The advice of stakeholders across the sector – including native title holders and their representatives, industry and state governments – was that hundreds of section 31 agreements may require validation as a result of *McGlade v Native Title Registrar* [2017] FCAFC 10 (*McGlade*).
>
> For example, in its February 2018 submission on the options paper for native title reform, the Western Australian Government advised it was aware of 307 mining leases, 11 land tenure grants and four petroleum titles which had section 31 agreements possibly affected by *McGlade*. This submission is available on my department's website.

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23 Schedule 9, item 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 25-26.

25 The Attorney-General responded to the committee's comments in a letter dated 2 December 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

> There has been widespread consultation on the proposed approach to validation. Those consultations have indicated that it is well-supported by the native title and Indigenous representatives, states and territories and peak industry groups.
>
> Section 31 agreements, reached between native title groups, project proponents and relevant governments, can underpin resources projects and can provide benefits for native title groups. The uncertainty created by the potential invalidity poses risks to both those projects and the related benefits flowing to native title groups. These benefits may include employment, monetary payments and other arrangements.
>
> The amendment seeks to restore the situation as the relevant parties understood it to be prior to *McGlade*. I note that the if amendment results in an acquisition of property other than on just terms, provision has been made for compensation to be payable (under Schedule 9 of the Bill).

Committee comment

2.53 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that according to data held by the National Native Title Tribunal, as of October 2019 there are 3656 section 31 agreements across Australia. The committee also notes the Attorney-General's advice that there has been widespread consultation on the proposed approach to validation and that those consultations have indicated that it is well-supported by the native title and Indigenous representatives, states and territories and peak industry groups.

2.54 The committee further notes the Attorney-General's advice that section 31 agreements, reached between native title groups, project proponents and relevant governments, can underpin resources projects and can provide benefits for native title groups. The committee also notes the Attorney-General's advice that the uncertainty created by the potential invalidity poses risks to both those projects and the related benefits flowing to native title groups and that these benefits may include employment, monetary payments and other arrangements.

2.55 The committee requests that the key information provided by the Attorney-General 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*).

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

Transport Security Amendment (Serious Crime) Bill 2019

Purpose	This bill seeks to amend the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003* to: • establish a regulatory framework for introducing new eligibility criteria under the aviation and maritime security identification card schemes; • allow regulations to prescribe penalties for offences; • clarify the legislative basis for undertaking background checks of individuals; and • make technical amendments
Portfolio	Home Affairs
Introduced	House of Representatives on 23 October 2019
Bill status	Before the House of Representatives

Significant matters in delegated legislation
Penalties in delegated legislation[26]

2.57 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the new eligibility criteria for access to relevant aviation and maritime transport zones to delegated legislation, and the appropriateness of amending the bill to provide at least high level guidance in this regard; and
- the appropriateness of amending the bill to either include all relevant penalties and offences in the primary legislation or for the maximum penalties to be reduced to be consistent with the *Guide to Framing Commonwealth Offences*.[27]

26 Schedule 1, items 4 and 17, proposed sections 38AB and 113F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 29-.

Minister's response[28]

2.58 The minister advised:

> I also note that the 2019 Bill substantially replicates the Transport Security Amendment (Serious or Organised Crime) Bill 2016, which was introduced in the previous Parliament by the then Minister for Infrastructure and Transport (the 2016 Bill).
>
> In comparison to the 2016 Bill, the 2019 Bill has been amended to capture new classes of ASICs and MSICs that have been introduced into the Aviation Transport Security Regulations 2005 (the Aviation Regulations) and the Maritime Transport and Offshore Facilities Security Regulations 2003 (the Maritime Regulations) respectively.
>
> Further changes were made to align the regulation-making powers supporting the MSIC scheme in the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) with correlating powers supporting the ASIC scheme in the *Aviation Transport Security Act 2004* (the Aviation Act).
>
> ***Eligibility criteria for ASICs and MSICs***
>
> The Committee has raised concerns regarding the appropriateness of leaving the new eligibility criteria for holding an ASIC or MSIC under the Aviation and Maritime Regulations.
>
> *Current arrangements*
>
> Under the ASIC and MSIC schemes, a person is ineligible to be issued with an ASIC or MSIC if they have been convicted of an aviation-security-relevant-offence or a maritime-security-relevant-offence and sentenced to imprisonment specified by operation of paragraph 6.28(1)(d) of the Aviation Regulations and paragraph 6.08C(1)(e) of the Maritime Regulations.
>
> The offences that may be prescribed as an aviation-security-relevant-offence or a maritime-security-relevant-offence are limited to offences that pertain to the general purposes of the Aviation and Maritime Acts, to prevent the unlawful use of aviation, and maritime transport or offshore facilities.
>
> *New eligibility criteria*
>
> One of the purposes of the 2019 Bill is to provide for the consolidation and harmonisation of the existing eligibility criteria already prescribed in the ASIC and MSIC schemes, as well as to expand these criteria to include additional criminal offences for the purpose of preventing the use of

28 The minister responded to the committee's comments in a letter dated 26 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

aviation, and maritime transport or offshore facilities, in connection with serious crime.

As indicated in the Explanatory Memorandum to the 2019 Bill, the proposed eligibility criteria have been developed following consultation with stakeholders across the aviation, maritime and offshore oil and gas sectors, as well as with relevant Commonwealth, State and Territory government agencies.

After careful consideration, I consider it necessary and appropriate to include the new eligibility criteria in the Aviation and Maritime Regulations for the following reasons:

- the current ASIC and MSIC eligibility criteria, for offences relating to unlawful interference, are prescribed in the Aviation and Maritime Regulations, and it would be incongruous for guidance about eligibility criteria to be included in the principal Acts for some offences (relating to serious crime) and not for others (relating to unlawful interference)
- maintaining the detail of the ASIC and MSIC schemes, including the eligibility criteria, in the Aviation and Maritime Regulations means that the reader of the legislation is able to review the schemes in a single piece of legislation and enhances the readability and understanding of the legislative schemes
- any amendment to provide high level guidance for the eligibility criteria in the primary legislation would trigger significant consequential amendments to the Aviation and Maritime Acts for other provisions enabling the prescription of the ASIC and MSIC schemes, which would unnecessarily delay the passage of the 2019 Bill.
- making these amendments would also be contrary to the intended purposes of the Bill and the consultation already undertaken in relation to the Bill and the eligibility criteria, and
- the prescription of the eligibility criteria in the Aviation and Maritime Regulations would provide suitable flexibility to respond to changes in the threat environment at security controlled airports, seaports and offshore facilities. For example, this may include the creation of State or Territory criminal laws that are considered appropriate for inclusion in the eligibility criteria.

It is also noted that any changes to the ASIC and MSIC schemes by way of amendment to the Aviation and Maritime Regulations would be subject to parliamentary scrutiny (including potential disallowance) once made.

Maximum penalties for offences in the Aviation and Maritime Regulations

The Committee has raised concerns that the maximum penalty that could be prescribed by regulations made under the proposed provisions of the Bill may be up to 200 penalty units, which is above what is recommended by the Commonwealth Guide.

> As set out in the Explanatory Memorandum, the penalties are considered an appropriate deterrence mechanism given the security-sensitive environment at airports, seaports and offshore facilities which may be targeted by criminal enterprises to facilitate the movement of illicit goods.
>
> As also set out in the Explanatory Memorandum, the provisions would align with other regulation-making provisions of the Aviation Act. The Commonwealth Guide states that penalties prescribed by legislation should be consistent with penalties prescribed for existing offences of a similar kind or of a similar seriousness (see page 39). This advice was given primary consideration in the course of drafting the Bill.
>
> The 200 penalty unit maximum penalty threshold does not apply to the public at large, it only applies to offences committed by an 'airport operator or aircraft operator' as defined by the Aviation Act (see clause 4) or a 'port operator, ship operator, port facility operator or offshore facility operator' as defined by the Maritime Act (see clause 17). A 100 penalty unit maximum penalty threshold only applies to offences committed by 'an aviation industry participant' (clause 4) or a 'maritime industry participant' (clause 17) subject to limited exceptions.
>
> I also note that nothing in the proposed provisions requires offences to be prescribed with a maximum penalty greater than 50 penalty units. The Bill only provides a discretion for greater penalties to be prescribed. Appropriate consideration will be given to the penalty thresholds for regulations made under the proposed provisions and, if required to be above the general 50 penalty unit threshold, appropriate justification would be provided in explanatory materials.
>
> After consideration of the concerns raised by the Committee, I consider that the current penalty threshold is effective and appropriate. The 2019 Bill seeks to extend the application of the current penalty threshold so that it applies consistently across all parts of the ASIC and MSIC schemes. I do not consider that amendments to the 2019 Bill are required to include all penalties and offences in the Acts or to reduce the maximum penalties permitted by the Acts.

Committee comment

2.59 The committee thanks the minister for this response.

2.60 In relation to the inclusion of eligibility criteria for holding an ASIC or MSIC in delegated legislation the committee notes the minister's advice that this approach promotes consistency with the current arrangements of the ASIC and MSIC schemes.

2.61 The committee also notes the minister's advice that an amendment to provide for high level guidance for the eligibility criteria in the primary legislation would also require significant consequential amendments to the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*, and that these amendments may unnecessarily delay the passage of the bill and negate the consultation that was undertaken in relation to the bill.

2.62 The committee further notes the minister's advice that prescribing eligibility criteria in delegated legislation would allow for greater flexibility to respond to changes in the security environment.

2.63 In relation to the level of maximum penalties for offences in the regulations, the committee notes the minister's advice that appropriate consideration will be given to the penalty thresholds for regulations made under the proposed provisions and, if required to be above the general 50 penalty unit threshold, appropriate justification would be provided in explanatory materials.

2.64 The committee reiterates its consistent scrutiny view that significant matters, such as the requirements relating to access to relevant aviation and maritime transport zones, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. While noting the minister's advice, the committee emphasises that it does not generally consider that flexibility, or consistency with an existing regulatory regime, to be sufficient justification for including significant matters in delegated legislation.

2.65 The committee further reiterates its scrutiny view that serious offences and penalties should be contained in primary legislation to allow for appropriate levels of parliamentary scrutiny. Delegated legislation, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. In light of this, from a scrutiny perspective, the committee does not consider that the minister's advice has adequately justified the need to allow for the inclusion of criminal penalties that exceed 50 penalty units in delegated legislation.

2.66 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant matters, such as such as the requirements relating to access to relevant aviation and maritime transport zones and offence provisions prescribing penalties up to 200 penalty units, to delegated legislation.

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

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 bill to the attention of Senators:

- **Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019** — Schedule 4, item 13, section 89 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 80 of the Public Governance, Performance and Accountability Act 2013).

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*.