

Senate Standing Committee
for the
Scrutiny of Bills

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Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

Appropriation Bill (No. 1) 2016-2017

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government
Portfolio	Finance
Introduced	House of Representatives on 31 August 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

Insufficient parliamentary scrutiny of legislative power—ordinary annual services of the government

General comment

This bill seeks to appropriate money from the Consolidated Revenue Fund. The appropriations in this bill are said to be for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation some measures in the bill may have been inappropriately classified as ordinary annual services.

The inappropriate classification of items in appropriation bills as ordinary annual services when they in fact relate to new programs or projects undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (see Senate standing order 24(1)(a)(v)).

By way of background, under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation. Noting these provisions, the Senate Standing Committee on Appropriations and Staffing (now known as the Senate Standing Committee on Appropriations, Staffing and Security) has kept the issue of items possibly inappropriately classified as ordinary annual services

of the government under active consideration over many years (see 50th Report, p. 3; and recent annual reports of the committee).

The distinction between appropriations for the ordinary annual services of the government and other appropriations is reflected in the division of proposed appropriations into pairs of bills—odd-numbered bills which should only contain appropriations for the ordinary annual services of the government and even-numbered bills which should contain all other appropriations (and be amendable by the Senate). However, the Appropriations and Staffing Committee has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure (45th Report, p. 2). The Senate has not accepted this assumption.

As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 (in accordance with a recommendation made in the 50th Report of the Appropriations and Staffing Committee), the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
- 2) That appropriations for expenditure on:
 - a) the construction of public works and buildings;
 - b) the acquisition of sites and buildings;
 - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
 - d) grants to the states under section 96 of the Constitution;
 - e) new policies not previously authorised by special legislation;
 - f) items regarded as equity injections and loans; and
 - g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

There were also two other parts to the resolution: the Senate clarified its view of the correct characterisation of payments to international organisations and, finally, the order provided that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as

part of ordinary annual services. (*Journals of the Senate*, 22 June 2010, pp 3642–3643).

The committee concurs with the view expressed by the Appropriations and Staffing Committee that if ‘ordinary annual services of the government’ is to include items that fall within existing departmental outcomes then:

...completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas. (45th Report, p. 2)

The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill that is not for the ordinary annual services of the government (45th Report, p. 2).

Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad ‘departmental outcomes’ to categorise appropriations, rather than on an individual assessment as to whether an appropriation relates to a new program or project, continues and appears to be reflected in the allocation of some items in the most recent appropriation bills.

For example, it appears that the initial expenditure in relation to the following items may have been inappropriately classified as ordinary annual services and therefore improperly included in Appropriation Bill (No. 1) 2016-2017:

- Australian International Education — enabling growth and innovation (Budget Paper No. 2, 2016-17, p. 76)
- Investment Approach to Welfare — Try, Test and Learn Fund (Budget Paper No. 2, 2016-17, p. 142)
- National Carp Control Plan (Budget Paper No. 2, 2016-17, p. 129)

The committee has previously written to the Minister for Finance and considered this general matter in relation to inappropriate classification of items in other appropriation bills on a number of occasions (see *Tenth Report of 2014* at pp 402–406, *Fourth Report of 2015* at pp 267–271, *Alert Digest No. 6 of 2015* at pp 6–9, and *Fourth Report of 2016* at pp 249–255).

On each of these occasions, the committee noted that the government does not intend to reconsider its approach to the classification of items that constitute ordinary annual services of the government; that is, the government will

continue to prepare appropriation bills in a manner consistent with the view that only administered annual appropriations for new outcomes (rather than appropriations for expenditure on new policies not previously authorised by special legislation) should be included in even-numbered appropriation bills.

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

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

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

The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to some items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 1) 2016-2017 which should only contain appropriations that are not amendable by the Senate).

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

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

Appropriation Bill (No. 2) 2016-2017

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for services that are not the ordinary annual services of the government
Portfolio	Finance
Introduced	House of Representatives on 31 August 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

Delegation of legislative power

Parliamentary scrutiny—section 96 grants to the States

Clause 16 and Schedules 1 and 2

Clause 16 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the States. Section 96 states that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

Clause 16 of this bill delegates this power to the relevant Minister, and in particular, provides the Minister with the power to determine:

- conditions under which payments to the States, the Australian Capital Territory, the Northern Territory and local government may be made: clause 16(2)(a); and
- the amounts and timing of those payments: clause 16(2)(b).

Subclause 16(4) provides that determinations made under subclause 16(2) are not legislative instruments. The explanatory memorandum (at p. 14) states that this is:

...because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.

The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills—see the

committee's *Seventh Report of 2015* (at pp 511–516) and *Ninth Report of 2015* (at pp 611–614).

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

Most recently the committee considered this matter in its *Fifth Report of 2016* (at pp 352–357) and in that report the committee considered a response from the Minister for Finance received on 15 March 2016. Relevant extracts of the response are included below:

While the concept of a stand-alone location of explanatory information on appropriations including purposes and specific statutory provisions that authorise programs has some appeal, it would be well outside the scope of an explanatory memorandum. The explanatory memoranda to the Bills address technical aspects of the operative clauses of the Bills, rather than specific details of appropriation amounts for proposed Government expenditure. Any further expansive background in the explanatory memoranda to the appropriation Bills would add considerably to production times for Budget documentation, which would be impractical where some decisions can be settled late in the process and final production work ties down available staff in rigorous processes for reconciling financial data and quality assuring documentation for typesetting and preparation of the legislation.

The suite of Budget documentation has been carefully developed over the years and is continually evolving. The detail of proposed Government expenditure, and the detail for the Budget generally, appears in the Budget Papers, with more specific detail provided in portfolio budget statements prepared for each portfolio and authorised by the relevant Minister. Such information as the Committee seeks is most closely managed by responsible entities and appropriately reported by each in their portfolio statements and other resources such as the Federal Financial Relations website (www.federalfinancialrelations.gov.au). The portfolio statements provide the Senate with additional information and facilitate understanding of the proposed appropriations as a 'relevant document' under the *Acts Interpretation Act 1901* for the associated Appropriation Bills.

The committee again thanks the Minister for this response and for his ongoing engagement with the committee on this matter.

The committee takes this opportunity to reiterate the fact that the power to make grants to the States and to determine terms and conditions attaching to them is *conferred on the Parliament* by section 96 of the Constitution. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their State or Territory. While, as highlighted by the Minister, some information in relation to grants to the States is publicly available, effective parliamentary scrutiny is difficult because the information is only available in disparate sources. It is appropriate that at least a minimum level of information is readily and easily available as a matter of course in order to enable Senators and others to determine whether further inquiries are warranted.

The committee also notes the Minister's advice that Budget documentation 'has been carefully developed over the years and is continually evolving' and that the:

...detail for the Budget generally appears in the Budget Papers, with more specific detail provided in portfolio budget statements prepared for each portfolio and authorised by the relevant Minister. Such information as the Committee seeks is most closely managed by responsible entities and appropriately reported by each in their portfolio statements and other resources such as the Federal Financial Relations website.

Noting the above context, the committee seeks the Minister's advice as to:

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

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

Pending the Minister's reply, the committee draws Senators' attention to the bill, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference, and may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Appropriation (Parliamentary Departments) Bill (No. 1) 2016-2017

Purpose	This bill appropriates money out of the Consolidated Revenue Fund for expenditure in relation to the parliamentary departments
Portfolio	Finance
Introduced	House of Representatives on 31 August 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee has no comment on this bill.

Australian Crime Commission Amendment (Criminology Research) Bill 2016

Purpose	This bill amends the <i>Australian Crime Commission Act 2002</i> and repeals the <i>Criminology Research Act 1971</i> to merge the functions of the Australian Institute of Criminology with the Australian Crime Commission
Portfolio	Justice
Introduced	House of Representatives on 14 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee commented on the measures in this bill when it considered the Australian Crime Commission Amendment (Criminology Research) Bill 2015 in the previous Parliament (see pages 761–766 of the committee’s *Fourteenth Report of 2015*). The committee takes this opportunity to re-state these comments below.

Trespass on personal rights and liberties—privacy Schedule 1, item 5, proposed section 59AE

The overarching purpose of Schedule 1 is to make amendments necessary to enable the functions currently performed by the Australian Institute of Criminology (AIC) to be undertaken by the Australian Crime Commission (ACC) and to ensure that the merged agency can carry out the existing functions of the AIC (in particular the conduct and dissemination of criminological research).

Item 5 of schedule 1 inserts a provision which authorises the CEO of the ACC to disclose and publish criminological research if so doing would not be contrary to:

- subsection 25A(9) of the *Australian Crime Commission Act 2002* (the ACC Act);
- another law of the Commonwealth that would otherwise apply; or
- a law of a State or Territory that would otherwise apply.

This authorisation may apply in relation to research that contains personal information. Given that the *Privacy Act 1988* does not apply to the ACC this raises a matter of scrutiny concern, which is addressed by proposed subsection 59AE(2). Under this provision the ACC CEO will be prohibited from disclosing personal information that was collected for the purpose of criminological research for another purpose except if certain circumstances apply. These additional requirements are modelled on the information use and dissemination provisions of the Privacy Act, particularly Australian Privacy Principle 6. The explanatory memorandum gives the assurance that the inclusion of this provision ‘will ensure that personal information collected by the [ACC] for research purposes remain subject to the same disclosure protections that currently apply to the AIC’ (at p. 9). **In light of this assurance, the committee leaves the general question of whether the approach is appropriate to the Senate as a whole.**

However, it is unclear why the jurisdiction of the Information Commissioner, who is empowered to investigate breaches of the Privacy Act, should not be extended to investigate breaches of the disclosure regime that applies to the ACC in relation to criminological research. The explanatory memorandum notes that the ACC is subjected to a robust accountability framework which includes oversight by the Ombudsman, Integrity Commissioner and the Parliamentary Joint Committee on Law Enforcement. Nevertheless, it is not clear that the coverage by these oversight bodies would be coextensive with that of the Information Commissioner whose jurisdiction covers privacy issues expressly and has therefore developed extensive relevant expertise.

Additionally, the explanatory memorandum suggests that the ACC has experience in dealing with sensitive information and that it is well placed to put in place technical and administrative mechanisms to ensure that personal information collected for research is collected, used and stored appropriately. Although this may be accepted, it is not clear how this supports the conclusion that the Information Commissioner should not be given oversight of the new disclosure regime in the ACC Act.

When the committee considered this bill in the previous Parliament it sought the Minister’s advice as to whether the Information Commissioner could be given appropriate jurisdiction to investigate breaches of the proposed disclosure regime.

The Minister responded to the committee in a letter received on 30 November 2015:

Is the proposed approach for information disclosure appropriate?

As outlined in the Alert Digest, Item 5 of Schedule 1 would insert a provision into the Australian Crime Commission Act 2002 (ACC Act) to authorise the CEO of the ACC to disclose and publish criminological research if doing so would not be contrary to:

- subsection 25A(9) of the ACC Act;
- another law of the Commonwealth that would otherwise apply; or
- a law of a State or Territory that would otherwise apply.
- Section 59AE(2) is a safeguard on the disclosure of personal information under the proposed regime. Under the new subsection 59AE(2), the ACC CEO may only disclose personal information that was collected for a research purpose for another purpose:
 - with the individual's consent;
 - where the individual concerned would reasonably expect the ACC to disclose their information; or
 - where the ACC is otherwise required to disclose the information to lessen or prevent a serious threat to the life, health or safety of any individual, or to protect public health and safety.

The new regime is intended to supplement the ACC's existing information dissemination regime in sections 59AA and 59AB of the ACC Act. Currently, sections 59AA and 59AB contain strict information sharing provisions that apply to all information that is in the ACC's possession. This is appropriate, given the sensitive nature of the ACC's operations.

However, following a merger it will be important that the ACC can make AIC research available to other government agencies, researchers and the broader community in the same way as the AIC currently does. The new information disclosure regime in section 59AE is intended to achieve this objective and closely mirrors the circumstances in which the AIC Director can currently disclose research containing personal information.

Under subsection 16(b) of the *Criminology Research Act 1971* (CR Act), the AIC Director has the broad power of communicating the results of the AIC's research to the public and community. The CR Act does not contain any restrictions on this power.

However, unlike the ACC, the AIC is subject to the *Privacy Act 1988*. Under Australian Privacy Principle 6, the AIC may only disclose personal information collected for research purposes for another purpose:

- with the individual's consent;

- where the individual concerned would reasonably expect the AIC to disclose their information;
- where the disclosure is required or authorised by law;
- where a permitted general situation exists (including where the AIC believes that the disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to protect public health and safety); or
- where the AIC reasonably believes the disclosure is necessary for an enforcement purpose.

The safeguards in new subsection 59AE(2) are modelled on these provisions of the Privacy Act, to ensure that personal information collected by the ACC for research purposes remains subject to similar restrictions on disclosure as currently apply to the AIC (noting that the ACC is exempt from the Privacy Act).

Can the Information Commissioner be given appropriate jurisdiction to investigate breaches of the proposed disclosure regime?

Given the sensitive nature of the ACC's operations, the Government's position is that the Information Commissioner (and his office) is not the most appropriate body to deal with complaints against the ACC. A separate system of oversight and accountability exists specifically to ensure that the ACC exercises its powers appropriately while maintaining the appropriate balance between secrecy and accountability. Any privacy issues relating to the ACC should be monitored through this separate system. Consistent with this, the Government does not propose to give the Information Commissioner jurisdiction to investigate breaches of the proposed regime in new subsection 59AE(2).

The ACC is already subject to a robust oversight framework, including the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity and the Parliamentary Joint Committee on Law Enforcement. These bodies have extensive expertise on the ACC, its functions, statutory regime and secrecy provisions, making them the most appropriate forums to monitor the ACC's compliance with its obligations under the new criminology research disclosure regime.

In addition to these existing oversight mechanisms, following a merger the ACC will also become subject to the ethical requirements set by the *National Health and Medical Research Committee guidelines for research involving human subjects*. These include the requirement to ensure that unit-record data (which has the potential to identify a single participant) is only used for research purposes. An ethics committee will oversee the ACC's compliance with these requirements, as is currently the case for the AIC.

Ultimately, disclosure of personal information that was originally provided under a guarantee of confidentiality would discourage participation in

criminology research projects and reduce the reliability and accuracy of the research, providing strong motivation for the ACC to ensure strict compliance with the proposed disclosure regime.

Further, the ACC currently holds a wide range of sensitive information, including sensitive law enforcement intelligence and coercively obtained information. It is very experienced in ensuring that that information is held securely and accessed and disclosed on a need-to-know basis, consistent with its legislative obligations.

The Government considers that the ACC's existing and comprehensive oversight regime and the ACC's new obligation to comply with ethical requirements provides appropriate assurance that the ACC will comply with the proposed new information disclosure regime and that any alleged breaches of this regime will be appropriately investigated, without the need for additional oversight by the Information Commissioner.

The committee thanked the Minister for this detailed response and noted the Minister's advice that:

- a separate system of 'oversight and accountability exists specifically to ensure that the ACC exercises its powers appropriately while maintaining the appropriate balance between secrecy and accountability' and that 'any privacy issues relating to the ACC should be monitored through this separate system';
- the ACC will become subject to the *National Health and Medical Research Committee guidelines for research involving human subjects*; and
- there is 'strong motivation for the ACC to ensure strict compliance with the proposed disclosure regime' as unauthorised disclosure would discourage participation in criminology research projects.

However, the committee remained of the view that it would be appropriate for the Information Commissioner to be given jurisdiction to investigate breaches of the proposed disclosure regime, noting that:

- the Office of the Australian Information Commissioner (OAIC) has specific expertise in privacy law and policy;
- the jurisdiction of the OAIC could be limited to the proposed regime in new subsection 59AE(2); and
- the fact that the Commonwealth Ombudsman's jurisdiction covers the ACC demonstrates that a body that does not have specific expertise on

the ACC and its functions can play a useful role in overseeing its operations, or parts of them.

The committee also 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 e.g. section 15AB of the *Acts Interpretation Act 1901*).

The committee notes its disappointment that the Minister did not take the opportunity to include this information in the explanatory memorandum before the current bill was introduced. In requesting that important information be included in an explanatory memorandum, the committee's intention is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill.

The committee restates its earlier request that the key information provided by the Minister to the committee be included in the explanatory memorandum.

The committee also restates its earlier view that it would be appropriate for the Information Commissioner to be given jurisdiction to investigate breaches of the proposed disclosure regime.

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

Broadcasting Legislation Amendment (Television and Radio Licence Fees) Bill 2016

Purpose	This bill amends the <i>Television Licence Fees Act 1964</i> and the <i>Radio Licence Fees Act 1964</i> to permanently reduce the licence fees payable by commercial television broadcasting licensees and commercial radio broadcasting licensees by 25 per cent
Portfolio	Communications and the Arts
Introduced	House of Representatives on 15 September 2016

The committee has no comment on this bill.

Budget Savings (Omnibus) Bill 2016

Purpose	This bill contains 24 measures which, if implemented, would result in \$6 billion in savings
Portfolio	Treasury
Introduced	House of Representatives on 31 August 2016
Status	This bill received Royal Assent on 16 September 2016

This bill is an omnibus bill which proposes amendments across a large number of portfolios. It includes some measures introduced in the previous Parliament, as well as new measures.

Initial comments made by the committee on the bill were published in *Alert Digest No. 6 of 2016*. The comments below relate to the committee's consideration of the remaining schedules to the bill.

Retrospective validation Schedule 8 (Aged care), item 2

This item provides that classification decisions (in relation to the level of care an aged care recipient requires) made before the commencement of these amendments, that took into account the manner in which care was provided, are valid. However, as the revised explanatory memorandum (at p. 58) indicates, the item does not affect the validity of any such decisions that have been the subject of proceedings heard and finally determined by a court.

The revised explanatory memorandum (at p. 58) notes that the amendment is designed to ensure that:

...classification decisions which considered the manner in which care was provided, including the qualifications of the person providing the care, in determining the amount of Commonwealth subsidy payable to an approved provider will be valid, even if made before commencement of this item.

As the explanatory memorandum does not address the extent of any detriment which may be suffered by this retrospective validation or why the retrospective validation of past classification decisions is necessary, the committee seeks Treasurer's advice in relation to these matters.

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

**Explanatory memorandum
Schedule 8 (Aged care)**

In addition to the comments above in relation to item 2, the committee notes that item numbers in the 'notes on clauses' sections of the revised explanatory memorandum for this schedule do not reflect the actual item numbers in the bill.

In order to assist the committee in finalising its consideration of this bill the committee requests that it be provided with a revised version of the explanatory materials for this schedule which includes the correct item references.

Counter-Terrorism Legislation Amendment Bill (No. 1) 2016

Purpose	This bill amends various legislation in relation to: <ul style="list-style-type: none">• extending control orders to children aged 14 or 15 years• control orders and tracking devices• preventative detention orders• telecommunications interception• use of surveillance devices• a new offence of advocating genocide• delayed notification search warrants
Portfolio	Attorney-General
Introduced	Senate on 15 September 2016 <i>This bill is similar to a bill introduced in the previous Parliament</i>

The committee commented on the measures in this bill when it considered the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 in the previous Parliament (see pages 136–186 of the committee’s *Third Report of 2016*). The committee takes this opportunity to re-state the relevant comments below and make some additional comments.

Trespass on personal rights and liberties—extension of control orders

Schedule 2, general comment

Currently Division 104 of Part 5.3 of the *Criminal Code* specifies that control orders can only be made in relation to persons 16 years of age or older. Where control orders are imposed on persons aged 16 or 17 the maximum duration is three months, rather than the 12 month period applicable for adults.

This schedule will allow control orders to be imposed on a person who is 14 years of age or older. The schedule provides that the maximum duration for children aged 14 to 17 is three months.

The schedule requires the issuing court to take into account, as a primary consideration, the ‘best interests’ of the person when considering whether to impose each of the proposed obligations and requirements sought by the police in relation to children aged 14 to 17 years.

Unlike the previous bill, the schedule no longer requires the issuing court to appoint an ‘advocate’ for the child in relation to any control order matter. Rather, it specifically provides that a child has to be informed of their right to legal representation in control order proceedings (proposed subparagraph 104.12(1)(b)(iii)). In addition, government amendments introduced to Schedule 2 of the bill will require an issuing court to appoint a lawyer to represent a child aged 14 to 17 years in relation to a control order where the child does not have legal representation (other than *ex parte* proceedings for an interim or urgent control order) (see proposed subsection 104.28(4)). These amendments were made in response to a recommendation of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (see recommendation 2 of the PJCIS’s *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*, February 2016). The committee welcomes the implementation of the PJCIS’s recommendation to ensure that a child has access to legal representation in control order proceedings.

However, the committee has previously noted that the control order regime established by Division 104 of Part 5.3 of the *Criminal Code* constitutes what is generally acknowledged to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction. That traditional approach involves a number of steps: investigation, arrest, charge, remand in custody or bail, and then sentence upon a conviction.

In contrast, control orders provide for restraint on personal liberty without there being any criminal conviction (or without even a charge being laid) on the basis of a court being satisfied on the balance of probabilities that the threshold requirements for the issue of the orders have been satisfied. Protections of individual liberty built into ordinary criminal processes are necessarily compromised (at least, as a matter of degree). The extraordinary nature of the control order regime is recognised in the current legislation by the inclusion of a sunset period, due to expire on 7 September 2018 (section 104.32 of the *Criminal Code*).

In view of these general scrutiny concerns, any proposal to extend the operation of the control order regime to children aged 14 and 15 must also be subject to close scrutiny.

As noted above, the control order regime substantially departs from the traditional approach to restraining persons only on the basis of a criminal conviction. As a result of this, the committee notes that the control order regime raises a number of scrutiny concerns, which are particularly acute in the context of control orders applying to children, and therefore there is a question as to whether the proposed extension of the control orders to children aged 14 and 15 may unduly trespass on personal rights and liberties.

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

**Trespass on personal rights and liberties—control orders: service of documents on a parent or guardian
Schedule 2, items 7, 9, 10, 16, 18, 20 and 23**

These items insert notice requirements (requiring that a specified document be served) in relation to control order decisions made in relation to a child aged 14 to 17 years. 'Reasonable steps' must be taken to serve the document to at least one parent or guardian of the child. The explanatory memorandum states that if the Australian Federal Police (AFP) member has taken reasonable steps to serve a copy of the document on at least one parent or guardian but the service was not successful, the AFP member is not required to serve a copy on another parent or guardian. This is different to positive requirements to serve parents or guardians under other legislation, such as under the *Family Law Act 1975*. The explanatory memorandum explains this difference as 'in those circumstances the parent or guardian is a party to the proceedings and has a clear interest in receiving all relevant documents' as opposed to control order proceedings where they are not a party (p. 58).

The items also require an AFP member to take reasonable steps to serve a copy on a parent or guardian in relation to documents relating to decisions to confirm or not confirm a control order or to vary or revoke a control order. Under the previous bill this requirement to serve only applied if a parent or guardian had already been served with a copy of the interim control order. The explanatory memorandum explains that this is intended to operate flexibly to

allow the AFP member to serve a parent or guardian ‘irrespective of whether it is the same parent or guardian who was served a copy of the initial order’ (pp 58–59). This is intended to ensure that where it is not possible or practicable to locate the same parent or guardian at a subsequent stage of proceedings they will not be required to be served.

This appears to implement the PJCIS’s recommendation 3 that the obligation to take reasonable steps to serve notifications and copies of all orders associated with a control order, applies irrespective of whether the AFP member had previously served a copy of the order on that parent or guardian.

The committee previously sought further information as to whether consideration was given to including a provision in the bill that would have the effect of requiring that *all* reasonable steps are taken to notify a parent or guardian (rather than ‘take reasonable steps’), to ensure documents are served in all but the most exceptional circumstances.

The Attorney-General’s response stated, among other things:

Amending the requirement to require that ‘*all* reasonable steps’ are taken could be interpreted as requiring the AFP to take steps that another person contemplates, but that were not contemplated by the AFP at the time. In other words, it could bring an element of hindsight into the test, resulting in an AFP officer who acted in good faith and took reasonable steps to undertake service being found not to have taken a further step that another person identified after the fact.

The committee welcomes the amendments in this bill to ensure that the obligation to serve a parent or guardian applies to subsequent notifications in relation to control orders, even if the parent or guardian had not been served with notice of an interim control order.

However, the committee remains of the view that from a scrutiny perspective, the issue of a control order for a young person is of such significance that it is appropriate to set the test for service at a level that includes a requirement to take ‘all reasonable steps’. This would require that, in taking such action, the AFP is required to think comprehensively about what might constitute the range of reasonable conduct.

In light of previous correspondence with the Attorney General, the committee draws this matter to the attention of Senators and leaves the

question of whether the proposed approach is appropriate to the Senate as a whole.

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

Trespass on personal rights and liberties—preventative detention orders
Schedule 5

Schedule 5 contains amendments to the preventative detention order (PDO) regime set out in Division 105 of the *Criminal Code*.

The bill proposes replacing the current definition of a terrorist act as one being imminent and expected to occur in the next 14 days to one that 'is capable of being carried out, and could occur, within the next 14 days'. The new approach focuses on the question of capability and possibility rather than requiring any expectation that an event will occur in within the specified timeframe. In this way, the circumstances which may enable a PDO to be made are expanded.

The explanatory memorandum states that this approach is justified on the basis of the evolving terrorist threat. It is stated that there is an 'operational gap in the ability to deal with terrorist acts that are not planned to occur on a particular date, even where the preparations for that terrorist act may be in the final stages or complete' (p. 72).

Although the explanatory memorandum thus justifies the expansion of circumstances in which a PDO may be sought, it may be noted that a significant change is being made to the basis for preventative detention: from an expectation that an attack will occur to a conclusion about the capability for an attack to be carried out.

The statement of compatibility rejects the notion that this change diminishes the right to freedom from arbitrary detention and arrest on the basis of stated existing safeguards in the PDO regime. Although it may be accepted that existing elements of the PDO regime will continue to apply, and the committee notes the justification in the explanatory memorandum, the focus

on the capability to mount a terrorist attack constitutes a broadening of the power to limit a person's liberty.

The committee previously asked the Attorney General for advice as to whether there were alternative powers at the disposal of law enforcement to respond to knowledge that a person has the necessary tools to commit a terrorist act in circumstances where no evidence is available about when an attack may occur.

The Attorney-General response in part stated:

The issuing authority must be satisfied that making the preventative detention order would substantially assist in preventing an imminent terrorist act occurring, and that detaining the person is reasonably necessary for the purpose of preventing a terrorist act. Accordingly, the power is only available when detention of the person is required. The AFP can arrest and detain a person for the purpose of investigating a terrorism offence under Part 1C of the *Crimes Act 1914* (Cth). However, there will be situations when arrest is not a viable option, but a person nonetheless presents a credible risk to public safety in relation to an imminent terrorist act.

The committee notes that the amendments in Schedule 5 of the bill constitute a broadening of the power to limit a person's liberty. In light of the committee's previous correspondence with the Attorney-General on this matter the committee makes no further comment and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Trespass on personal rights and liberties—new 'monitoring warrant' regime

Schedule 8, general comment

Schedule 8 seeks to create a 'monitoring warrant' regime in a new Part IAAB of the *Crimes Act 1914* to confer powers on law enforcement agencies to monitor compliance with control orders. Unlike the existing search warrant regime, the new regime will not require the issuing authority to be satisfied that an offence has already occurred or is going to be committed. Rather, this regime will be targeted at monitoring compliance with the conditions of a

control order for the purpose of preventing a person from engaging in terrorist act planning or preparatory acts.

The powers conferred by this schedule relate to:

- entering premises by consent or under a warrant (proposed section 3ZZKA);
- general monitoring powers in relation to premises, including the power to search premises and anything on the premises, the power to search for and record fingerprints, the power to make any still or moving image or any recording of the premises or any thing on the premises, and the power to take extracts from, or make copies of, documents (proposed section 3ZZKB);
- operating and securing electronic equipment (proposed sections 3ZZKC and 3ZZKD);
- asking questions and seeking production of documents (proposed section 3ZZKE);
- seizing things found during the exercise of monitoring powers on a premises (proposed section 3ZZKF);
- the availability of assistance and use of force in executing a warrant (proposed sections 3ZZKG and 3ZZLD);
- searching a person by consent or under a warrant (proposed section 3ZZLA);
- monitoring powers in relation to persons, including the power to search things found in the possession of person, the power to search any recently used conveyance, and the power to record fingerprints and take samples from things (proposed section 3ZZLB); and
- seizing things located during the search of a person or a recently used conveyance (proposed section 3ZZLC).

The committee consistently expects that the expansion of circumstances in which coercive and intrusive powers can be used should be comprehensively justified.

As an example, proposed sections 3ZZKF and 3ZZLC will provide automatic authority to a constable to seize evidential material located during a search authorised under a monitoring warrant.

However, in its general consideration of monitoring warrant schemes, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) indicates (at p. 87) that these schemes typically confer power on an authorised officer to only *secure* evidence pending an application for a search/seizure warrant where he or she ‘has reasonable grounds to believe that evidence of an offence would be lost, destroyed or tampered with by the time a search warrant is obtained’ (p. 88). This is the approach taken in Part IAA of the Crimes Act.

The committee therefore sought the Attorney-General’s justification for the approach taken and whether the principles in the Guide were considered. The Attorney-General provided further justification for including the power to seize items to the committee, stating:

...where police identify evidential material and seizable items, it is not only appropriate, but vital, that they are able to take action as quickly as possible with respect to those items to protect the Australian community. Unlike some monitoring warrant precedents that only allow for evidence to be ‘secured’ pending an application for a search and seizure warrant law enforcement, this would be inadequate to deal with the security risk in this proposed regime. If there is a delay in which the evidence can be used, caused by a requirement to get a second warrant, this could have significant adverse outcomes.

The regime provides a number of safeguards and accountability mechanisms to protect rights against arbitrary and unlawful interferences with privacy.

Further justification has been provided in the explanatory material, particularly the statement of compatibility, to this bill about the new monitoring warrant regime. In addition, the bill has implemented recommendations 9 to 11 of the PJCIS report. These changes require:

- the issuing officer to have regard to whether allowing access to the premises and using the powers in the bill would be likely to have the least interference with any person’s liberty and privacy that is necessary in the circumstances;
- the AFP to notify persons required to answer questions or produce documents by virtue of a monitoring warrant of their right to claim privilege against self-incrimination and legal professional privilege; and
- the AFP to notify the Commonwealth Ombudsman within six months following the exercise of monitoring powers, and the Ombudsman has been given the power to inspect AFP records to determine compliance with the bill or monitoring warrants.

In light of the amendments to the bill and the justification in the explanatory memorandum and statement of compatibility for including the power to seize items in certain circumstances as well as to secure them, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Trespass on personal rights and liberties—use of information obtained where interim control order declared void
Schedule 8, item 1, proposed section 3ZZTC of the *Crimes Act 1914*
Schedule 9, item 58, proposed section 299 of the *Telecommunications (Interception and Access) Act 1979*
Schedule 10, item 45, proposed section 65B of the *Surveillance Devices Act 2004*

Proposed section 3ZZTC of the *Crimes Act 1914* (as outlined in item 1 of Schedule 8), specifies certain purposes for which things seized, information obtained or a document produced pursuant to a monitoring warrant can be communicated or adduced as evidence where a court has subsequently declared the interim control order to be void. The same amendment is made in relation to information obtained under the provisions of *Telecommunications (Interception and Access) Act 1979* (the TIA Act) (see Schedule 9, item 58, proposed section 299) and to information obtained under the provisions of the *Surveillance Devices Act 2004* (the SD Act) (see Schedule 10, item 45, proposed section 65B) where the control order is subsequently declared to be void.

The committee previously noted that the use of information obtained in these circumstances may have serious implications for personal rights and liberties. As such, the committee sought the Attorney-General's advice as to whether similar provisions appear in other Commonwealth legislation and requested a more detailed justification for the use of material obtained in circumstances in which the relevant control order has been declared void.

The Attorney-General provided a response to the committee, much of which now forms the reasons given in the statement of compatibility as to why these

provisions do not undermine a right to a fair trial and fair hearing (pp 44–45). The statement of compatibility notes that the provision ‘enables agencies to further use either lawfully intercepted information or lawfully accessed information obtained under an interception warrant relating to an interim control order which is subsequently declared void’ (p. 44):

It is a fundamental principle of the Australian legal system that courts have a discretion as to whether or not to admit information as evidence into proceedings, irrespective of the manner in which the information was obtained. As an example, the *Bunning v Cross*¹ discretion places the onus on the accused to prove misconduct in obtaining certain evidence and to justify the exclusion of the evidence. This principle is expanded on in Commonwealth statute,² where there is an onus on the party seeking admission of certain evidence to satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. This fundamental principle reflects the need to balance the public interest in the full availability of relevant information in the administration of justice against competing public interests, and demonstrates the role the court plays in determining admissibility of evidence.

However, the TIA Act departs from these fundamental principles, by imposing strict prohibitions on when material under those Acts may be used, communicated or admitted into evidence.³ Under the TIA Act, it is a criminal offence for a person to deal in information obtained under these Acts for any purpose, unless the dealing is expressly permitted under one or more of the enumerated and exhaustive exceptions to the general prohibition. This prohibition expressly overrides the discretion of the judiciary, both at common law and under the Evidence Act, to admit information into evidence where the public interest in admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. There is also a risk that the prohibition might be interpreted, either by a court considering the matter after the fact, or by an agency considering the question in extremis, to override the general defence to criminal responsibility under the Criminal Code.

The committee welcomes the incorporation of this further information in the explanatory materials. However, the relevant provisions remain unchanged from the previous bill. In relation to the justification provided, the committee makes the following observations.

Although it is said that the information is obtained ‘lawfully’ it remains the case that, if that basis for obtaining the information is subsequently declared to be void, the information was obtained in excess of the powers granted to

¹ (1978) 141 CLR 54.

² Section 138 of the *Evidence Act 1995* (Cth).

³ See s 63 of the TIA Act.

obtain information. In this context, describing the information as ‘lawfully obtained information’ does not capture the essential point that information was obtained on the bases of a legally invalid exercise of power.

It may be accepted that there is a default judicial discretion about whether or not information may be admitted as evidence into proceedings, irrespective of the manner in which it was obtained. However, describing the imposition of strict prohibitions on when materials may be used, communicated or admitted into evidence under the SD Act and TIA Act as a departure from this ‘fundamental’ principle downplays the reasons why that approach was taken. The strict limits on the use that may be made of information obtained reflects a recognition that the methods of surveillance authorised by these Acts constitutes a significant invasion on an individual’s right to privacy.

The committee notes that the explanatory memorandum states that the current prohibitions in the TIA Act override a fundamental principle of the Australian legal system, that courts have a discretion as to whether or not to admit information as evidence into proceedings, irrespective of the manner in which the information was obtained. However, the provisions as currently drafted, allow a person to adduce the thing, information or document as evidence so long as that person reasonably believes doing so is necessary to assist in preventing or reducing the risk of a number of harms (or for the purposes of a preventative detention order (PDO)). It does not appear to allow the court any discretion as to whether such evidence should be adduced; it appears that it may be enough that the person who wants to adduce the evidence has the belief or is using it for the purpose of the PDO. It also appears that section 138 of the *Evidence Act 1995*, which allows the court the discretion to exclude evidence that was improperly or illegally obtained, may not apply where evidence was obtained pursuant to a control order which is later declared to be void. If this is the case, it is not clear to the committee why this fundamental principle of the court having the discretion to admit evidence has been overridden in this instance.

For the above reasons the committee reiterates its scrutiny concerns in relation to these provisions and requests the Attorney-General’s advice as whether the provisions override judicial discretion as to whether the evidence should be adduced and, if so, why provisions similar to section 138 of the *Evidence Act 1995* do not apply (which sets out the matters that should be taken into account by the court in deciding to allow certain evidence to be admitted).

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

Trespass on personal rights and liberties—authorisation of intrusive powers

Schedules 9, 10 and 14, general comment

As noted above, Schedules 9 and 10 seek to extend telecommunications interception warrants and surveillance device warrants to the control order regime. The bill would enable agencies who are seeking to use surveillance powers to apply to an eligible judge or a nominated Administrative Appeals Tribunal (AAT) member. The committee considers that judicial oversight of the use of intrusive powers is an important safeguard in ensuring that these powers are appropriately utilised. In this regard, the committee's consistent preference is that the power to issue warrants authorising coercive or intrusive powers should only be conferred upon judicial officers (rather than non-judicial officers such as members of the AAT). The committee notes that current provisions allow 'nominated AAT members' to issue warrants under the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*.

This issue also applies to Schedule 14, which seeks to clarify the threshold requirements for the issue of a delayed notification search warrant ('eligible issuing officers' for the purposes of issuing delayed notification warrants are a judge of the Federal Court of Australia or of a state or territory Supreme Court or a nominated AAT member).

The committee generally does not regard factors such as 'administrative convenience' as being sufficient justification for conferring such power on non-judicial officers.

The committee previously asked the Attorney-General for advice as to why the categories of eligible issuing officers should not be limited to persons who hold judicial office. The Attorney-General provided a detailed response stating that 'AAT members have extensive experience exercising personal functions under a broad range of legislative schemes' and that the role set out in this bill 'is consistent with existing functions able to be undertaken by AAT

members'. (For more detail see the Attorney-General's response in the committee's *Third Report of 2016* at pp 159–163).

The committee had requested that key information provided in this response be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*). The committee is disappointed that this does not appear to have been included in the explanatory memorandum for this bill and requests that the explanatory memorandum be amended to include this key information.

The committee reiterates that its consistent preference is that the power to issue warrants authorising intrusive powers be conferred upon judicial officers. The committee generally does not regard factors such as 'administrative convenience' as being sufficient justification for conferring such power on non-judicial officers.

In addition, the committee notes that in some contexts the ability to issue warrants is limited to judicial officers and very senior members of the AAT (see, for example, sections 3ZZAD and 3ZZAF of the *Crimes Act 1914* which limits the issuing of delayed notification search warrants to a Deputy President or full-time senior member of the AAT who has been enrolled as a legal practitioner for not less than 5 years).

However, noting the explanation previously provided by the Attorney-General, the committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach to the authorisation of warrants is appropriate to the Senate as a whole.

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

Trespass on personal rights and liberties—freedom of expression Schedule 11

This schedule originally sought to create a new offence of publicly advocating genocide. The explanatory memorandum (at p. 130) states that:

A person will commit an offence if the person advocates genocide, and the person advocates genocide reckless as to whether another person will engage in genocide.

Proposed new subsection 80.2D(3) defines ‘advocate’ for the purpose of the offence as counselling, promoting, encouraging or urging the commission of a genocide offence. These expressions will have their ordinary meaning.

The explanatory memorandum (at pp 131–132) suggests that it is important that the relevant expressions are interpreted broadly to ensure that a person who advocates genocide does not escape punishment by relying on a narrow construction of one of the terms. Some examples of the ordinary meaning of each of the expressions are included in the explanatory memorandum (at p. 132):

...to ‘counsel’ the doing of an act (when used as a verb) is to urge the doing or adoption of the action or to recommend doing the action; to ‘encourage’ means to inspire or stimulate by assistance of approval; to ‘promote’ means to advance, further or launch; and ‘urge’ covers pressing by persuasion or recommendation, insisting on, pushing along and exerting a driving or impelling force.

The explanatory memorandum (at p. 132) also states that these questions will ultimately be determined by a judicial officer:

Whether specific conduct, such as making or commenting on a particular post on the internet or the expression of support for committing genocide, is captured by the offence will depend on all the facts and circumstances. Whether a person has actually ‘advocated’ the commission of a genocide offence will ultimately be a consideration for judicial authority based on all the facts and circumstances of the case.

While this may be accepted, the breadth of the definition may amount to an undue trespass on personal rights and liberties as it is not sufficiently clear what the law prohibits. This is particularly important given the substantial custodial penalty (7 years imprisonment). It is also possible that the provision may have a chilling effect on the exercise of the right of free expression. **However, in light of the explanation provided in the explanatory memorandum for the provision, the committee leaves the general question of whether it is appropriate to broadly define ‘advocate’ for the purpose of the offence of advocating genocide to the Senate as a whole.**

The bill has been amended from the previous bill to remove reference to a requirement that the person ‘publicly’ advocate genocide. This addresses the committee’s previous concern that there was no guidance as to the meaning of ‘publicly’ on the face of the legislation. However, while removing the ‘public’ component of the offence addresses concerns in relation to the lack of clarity about what is intended to be captured, it also increases the scope of the offence to include all advocacy of genocide, whether in public or private. The committee notes that it would have been possible to address the first concern by further clarifying the meaning of the term ‘publicly’ for the purpose of the proposed offence, rather than removing this component of the offence entirely.

The committee notes that the bill has also been amended to adopt recommendation 17 of the PJCIS so that, in order for a person to be convicted of the proposed advocating genocide offence, the person must be reckless as to whether another person might engage in genocide on the basis of their advocacy. The amendments mean a person could only be guilty of the offence if it is proved beyond a reasonable doubt that the person *intentionally* advocated genocide and was *reckless* as to whether another person might engage in genocide on the basis of their advocacy. While this is a lower threshold than ‘intention’, the inclusion of a ‘recklessness’ threshold for the second element still requires the prosecution to prove that the accused was aware of a substantial risk that a genocide offence would occur as the result of their conduct and additionally, having regard to the circumstances known to him or her, it was unjustifiable to take that risk. This committee welcomes this amendment to the bill.

Noting that the bill has been amended to remove the requirement that the advocating of genocide be made publicly, thereby broadening the offence with implications for freedom of speech, the committee leaves the question of the appropriateness of the offence provision to the Senate as a whole.

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

Trespass on personal rights and liberties—fair hearing Schedule 15, general comment

The broad purpose of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act) is to prevent the disclosure of information in federal criminal and civil proceedings where disclosure is likely to prejudice national security. Schedule 15 proposes some significant amendments to that Act by enabling a court to make three new types of orders in control order proceedings. The effect of the proposed amendments can generally be described as allowing the court to determine that it can rely, in control order proceedings, on secret evidence in particular circumstances. The three new orders a court may make are:

- that the subject of the control order and their legal representative may only be provided with a redacted or summarised form of national security information. Despite this, however, the court may consider the information in its entirety (proposed new subsection 38J(2));
- that the subject of the control order and their legal representative may not be provided with any information in an original source document. Despite this, however, the court may consider all of that information (proposed new subsection 38J(3)); and
- when a hearing is required under subsection 38H(6) the subject of the control order and their legal representative can be prevented from calling the relevant witness, and if the witness is otherwise called, the information provided by the witness need not be disclosed to the subject of the control order or their legal representative. Despite this, however, the court may consider all of the information provided by the witness (proposed new subsection 38J(4)).

Notably, the provisions provide that a court may determine whether one of the new orders should be made in a closed hearing, that is, a hearing at which the parties to the control order proceeding and their legal representatives are not present.

These proposals clearly undermine the fundamental principle of natural justice which includes a fair hearing. In judicial proceedings a fair hearing traditionally includes the right to contest any charges against them but also to test any evidence upon which any allegations are based. In many instances it may not be possible in practice to contest the case for the imposition of control orders without access to the evidence on which the case is built.

Evidence is susceptible to being misleading if it is insulated from challenge. Given that the burden of proof in civil cases is lower than criminal proceedings, that risk is magnified.

The explanatory materials point to the increasing ‘speed of counter-terrorism investigations’ as the reason why these powers are necessary (p. 142). At the general level, the explanatory memorandum suggests that ‘for control orders to be effective, law enforcement need to be able to act quickly, and be able to present sensitive information...to a court as part of a control order proceeding without risking the integrity, safety or security of the information or its source’ (p. 142).

On the other hand, the explanatory memorandum also recognises that it is important that a court, in the context of control order proceedings, continue to be able to ensure procedural fairness and the administration of justice. However, it is questionable whether the amendments in the bill adequately preserve procedural fairness to the subject of a control order.

The committee reiterates its previous comments in relation to the overall approach of requiring the courts to determine when the disclosure of information will be likely to prejudice national security. Courts are not well placed to second-guess law enforcement evaluations of national security risk which means that it may be particularly challenging to protect an individual’s interest in a fair hearing. The fact that the court has discretion as to how to draw the balance between national security and any adverse effect on the ‘substantive hearing’ (in relation to whether a special order be made, or in the exercise of any general powers to stay or control its proceedings) cannot be said to ‘guarantee’ procedural fairness.

In considering the extent to which judges will be able, in the exercise of their discretionary powers under the proposed regime, to resist the claims of a law enforcement agency that an order should be made, it should be noted that judges routinely accept that the courts are ‘are ill-equipped to evaluate intelligence’ [*Leghaei v Director-General of Security* (2007) 241 ALR 141; (2007) 97 ALD 516] and the possibility that law enforcement agencies may be wrong in their national security assessments. For this reason, the fact that security information is read by judges in the context of the legislative regime proposed in this schedule does not mean that they will be well placed to draw a different balance between security risk and fairness than is drawn by law enforcement agencies.

The committee previously requested, and received, from the Attorney-General, a justification for the proposed approach including whether further safeguards for fairness had been considered. Following that advice, the committee previously concluded that it was not persuaded that the previous bill provided an appropriate balance between the need to protect national security information and the controlee's right to procedural fairness.

Schedule 15 of this bill has made a number of amendments to the scheme. The committee's view in relation to these amendments is set out below.

Sufficient information to be provided

The PJCIS in its Advisory Report recommended (recommendation 4) that the bill be amended to ensure that the subject of the control order proceeding be provided with 'sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations'.

As a result, item 21, proposed paragraph 38J(1)(c) has been altered so that the court must be satisfied that the relevant person has been given 'sufficient information about' the allegations on which the control order was based, to 'enable effective instructions to be given in relation to those allegations'. Previously the bill had provided that the court must be satisfied that the relevant person has been given 'notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations)'. This change provides a greater level of detail about the allegations on which the control order request is made to be provided to the potential subject of the order.

The committee welcomes this amendment which will enable the person who may be subject to the control order to be given more information to better enable them to provide instructions and present their defence. However, the committee notes that with the introduction of special advocates (see further below) it is important that the disclosure of this 'sufficient information' be made prior to national security information being disclosed to a special advocate, to enable the special advocate to obtain effective instructions from the controlee. This is important as communication between the controlee and their legal representative is heavily restricted after national security information has been disclosed to the advocate.

The committee welcomes the amendment to ensure sufficient information is provided to a person who may be subject to a control order in order to obtain effective instructions. However, the committee seeks the Attorney-General's advice as to whether the 'sufficient information' will be provided to a person before a special advocate has been provided with national security information (disclosed pursuant to proposed section 38PE) to enable them to adequately communicate with the special advocate.

Additional reporting obligations

The PJCIS also recommended that the Attorney-General have increased reporting obligations in relation to the orders made under the proposed new non-disclosure regime. In response, item 31 of Part 1 of Schedule 15 imposes additional obligations on the Attorney-General to report to Parliament annually on the number of orders under section 38J granted by the court, and the control order proceedings to which the orders granted by the court under section 38J relate. This measure is designed to provide 'an additional transparency and oversight measure, [and to] enhance public confidence in the operation of revised section 38J' (p. 154 of the explanatory memorandum).

The committee welcomes the additional reporting obligations to Parliament and considers that this contributes to parliamentary oversight of this significant power.

Special advocates

The major change to the schedule and the process by which the court can prevent the disclosure of information to the potential subject of a control order, is the introduction of a special advocates scheme. This was introduced as a result of recommendation 5 of the PJCIS's report. The PJCIS had recommended that a system of special advocates be introduced to represent the interests of persons subject to control order proceedings where the subject and their legal representative have been excluded. A special advocate is to be a security-cleared lawyer who represents the interests of a person who may be subject to a control order (the controlee) who has been excluded from parts of the control order proceeding. The explanatory memorandum (at pp 156–157) explains that the special advocate may represent the interests of the controlee by:

- making submission to the court at any part of a hearing when the controlee or their legal representative are not entitled to be present;
- adducing evidence and cross-examining witnesses at such a hearing; and
- making written submissions to the court.

While the special advocate scheme may help to ameliorate some of the committee's concerns regarding the fairness of adducing evidence without the controlee knowing the full extent of that evidence, the committee is concerned that the current formulation of the special advocate scheme may not guarantee a controlee's procedural rights. In particular, a controlee is not entitled to insist that a special advocate be appointed. Rather, whether a special advocate is appointed remains in the discretion of the court. The explanatory memorandum (at p. 163) provides the following justification for this approach:

The provisions are designed to provide the court flexibility to conduct the control order proceedings in the manner it considers most appropriate. This will require the court to balance the need to conduct proceedings efficiently and effectively with the need to protect the procedural rights of the controlee.

One instance in which the court may not appoint a special advocate even where the criteria outlined above have been satisfied is where the court considers itself adequately equipped to manage the sensitive national security information. Courts are not unfamiliar with considering sensitive national security information. The courts are well-equipped to make judgments as to the weight that should be given to the risk that disclosing information will prejudice national security.

However, if secret evidence is to be used against a controlee and they are not entitled to insist on the appointment of a special advocate, this significantly diminishes the adequacy of the special advocate scheme in ameliorating the apparent unfairness of the new regime.

Given this, the committee requests a more detailed justification from the Attorney-General as to the rationale for leaving the appointment of a special advocate to the discretion of the court.

In addition, the bill tightly regulates communication between special advocates and controlees (and their legal representatives) after national security information has been disclosed. However, subsection 38PD(1) allows unrestricted communication prior to the disclosure of that information. Proposed subsection 38PD(2) provides that the court may restrict or prohibit

communication between the controlee and the special advocate if satisfied that it is in the interests of national security to do so and the orders are not inconsistent with the Act or regulations made under it. No justification is provided in the explanatory memorandum as to why this exception is required. It is unclear why such communication need be restricted given at this point in time no sensitive information would have been disclosed to the special advocate. If communication prior to national security information being disclosed is restricted it may make it very difficult for the special advocate to adequately perform their functions given that communication after disclosure is so tightly regulated by the provisions.

The committee considers that the exception in proposed subsection 38PD(2) is not sufficiently explained in the explanatory materials and seeks the Attorney-General's advice as to why it is necessary to empower the court to prohibit or restrict communication between a special advocate and a controlee prior to sensitive national security information being disclosed to the special advocate.

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

Delegation of legislative power

Schedule 15, item 41, proposed subsection 38PA(2)(a)

Proposed section 38PA sets out when a court may appoint a person as a special advocate. Paragraph 38PA(2)(a) provides that a person may be appointed as a special advocate only if they meet 'any requirements in the regulations'. The primary legislation does not specify any requirements as to the qualifications or experience of persons who are to be appointed as special advocates, nor does it specify any further details. The explanatory memorandum states that a special advocate is a 'security cleared lawyer', but this does not appear to be a legislative requirement for this (see p. 156).

The explanatory memorandum indicates that matters relating to the terms on which a person serves as a special advocate, including terms relating to remuneration, conflicts of interest or immunity will be dealt with in the regulations (see proposed section 38PI and p. 172 of the explanatory memorandum). The explanatory memorandum indicates that the additional

details about the scheme to be provided for by regulations principally relate to ‘administrative arrangements’. On the contrary, however, it may be argued that matters such as those listed above are centrally relevant to the question of whether special advocates are, and appear to be, impartial of the government. Such details would also presumably relate to the ethical obligations of special advocates.

For the reasons set out above, the committee seeks the advice of the Attorney-General as to why details regarding the appointment process of persons as special advocates, and the terms and conditions of their appointment, are not provided for in the primary legislation.

Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.

Trespass unduly on personal rights and liberties—Delayed commencement

Item 2 (commencement) and Schedule 15, Part 2

The commencement provisions of the bill sets out that Part 2 of Schedule 15 will commence on a day to be fixed by proclamation, and in any event, within 12 months. This differs from Part 1 of Schedule 15, which sets out the changes to allow secret evidence to be adduced in court, which is said to commence the day after the Act receives Royal Assent. The explanatory memorandum justifies this approach on the following basis (at p. 159):

The delayed commencement ensures that sufficient time is provided to operationalise the special advocate role. This will include making appropriate regulations which will govern a range of matters including the process by which an individual serves as a special advocate, the remuneration of special advocates and conflicts of interests. It will also be necessary to ensure sufficient special advocates are available such that the controlee has a ‘choice’ of special advocates to choose from. These supporting regulations and administrative arrangements will be established as soon as practicable in order to operationalise the special advocates role swiftly.

The delayed commencement of the special advocates amendments mean that the amendments contained in Part 1 will apply for up to 12 months before the special advocates role in Part 2 becomes operational. However, as noted by the Committee advisory report, nothing in the amendments contained in Parts

1 or 2 of Schedule 15 preclude the court from exercising its inherent powers to appoint a special advocate on an ad hoc basis if it considers it necessary.

The committee notes the justification in the explanatory memorandum relies, in the main, on administrative convenience as the basis for delaying the commencement of these provisions. However, it also states that the court has an inherent power to appoint a special advocate on an ad hoc basis if it considers it appropriate and the provisions in the bill do not limit this inherent power. This claim is left unelaborated but it appears to be based on the following statement in the PJCIS's Advisory Report:

The Committee considers it important to note that prior to the establishment of a special advocates scheme, nothing in the proposed amendments to the NSI Act precludes the court from exercising its inherent discretion to appoint a special advocate on an ad hoc basis during control order proceedings where the subject of the control order and their legal representative have been excluded. The Committee further notes that in *R v Lodhi* [2006] NSWSC 586, Justice Whealy held that the framework of the NSI Act is not inconsistent with the appointment of a special advocate and that its provisions were sufficiently broad to permit special advocates to take part in specific hearings under the NSI Act. (see p. 80 of the PCJIS Advisory Report)

There are, however, difficulties with the reliance on the existence of the courts' inherent powers to appoint special counsel to justify the delayed commencement of the statutory scheme, a scheme which attempts to offset the unfairness involved in the secret evidence proposals.

The courts' power to make such appointments is uncertain. Based on the explanatory materials it appears that there is an absence of Australian appellate authority for the proposition that the courts' inherent powers warrant the development of the common law to construct a scheme for the appointment of special advocates and closed material proceeding generally in civil or criminal litigation, nor in a particular context. As Whealy J noted in *R v Lodhi* at [12], that case was the first in which an application for the appointment of a special advocate has been made in Australia. Furthermore, the *Lodhi* case was decided in a very different context and it is not clear to the committee that it provides direct support for the reliance on an inherent power to appoint special counsel, particularly in the context of the proposed legislative changes.

Given the dearth of legal analysis provided on this issue, the committee has concluded that the question of whether the courts in Australia possess an

inherent power to appoint special counsel may be less certain that the explanatory material asserts. But even if such a power exists, it is unclear that the inherent power of the court to appoint special counsel (if it exists) would be exercised in particular cases, and if it could continue to exist in light of a statutory scheme to establish closed evidence procedures. Nor are senators able to evaluate any details about how such a judicially created scheme would work in practice. Details about how such a scheme would operate are unknown. No judicial practice of appointing special counsel has developed in Australia, in this or any other context.

For the reasons set out above the committee does not believe that persuasive reasons have been provided for the delayed commencement of the amendments in Part 2. To the extent the special advocate scheme is thought to ameliorate the unfairness involved in the amendments in Part 1, this issue of delayed commencement is matter of significant concern. The committee therefore seeks the Attorney-General's advice as to why the commencement of Part 1 of Schedule 15 should not be delayed until such time as the special advocate scheme is in place. The committee notes that if (as set out above in relation to the delegation of legislative power) the important details concerning the appointment of the special advocate scheme were included in the primary legislation then this issue may not arise.

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

Trespass unduly on personal rights and liberties—retrospective commencement

Schedule 15, item 32

Item 32 of Schedule 15 states that the new special orders in relation to secret evidence that may be made under proposed section 38J apply to civil proceedings that begin before or after the commencement of this item.

The explanatory materials do not explain why the amendments should apply to proceedings which have already begun, especially given that (as explained above) the amendments may be in conflict with the fair hearing principle. **The committee previously sought the Attorney-General's advice as to the**

rationale for the proposed retrospective application of the amendments to proceedings already commenced and as to how many current proceedings or potential proceedings are, or are likely to be, affected by this provision.

The Attorney-General responded:

It is appropriate that the new orders are available as soon as they come into force, regardless of whether a control order proceeding has already commenced. This is consistent with existing protections that are available under the NSI Act. Section 6A of the NSI Act provides that the Act can apply to civil proceedings that take place after the NSI Act has been invoked, irrespective of whether the proceedings commenced prior to the invocation of the Act. However, the new orders will only be available to those parts of the proceeding that have not yet occurred. Accordingly, the provisions will not operate retrospectively.

Unfortunately this further information was not included in the current explanatory memorandum as requested by the committee. The committee requests that the explanatory memorandum be amended to include this information. On the basis of the committee's previous correspondence the committee leaves the question of whether the new orders should be available in proceedings that have started before the commencement of these new provisions to the Senate as a whole.

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

Trespass on personal rights and liberties—protected taxation information and privacy
Schedule 17, general comment

Item 1 of Schedule 17 enables disclosure of protected information by taxation officers to any Australian government agency for the purposes of preventing, detecting, disrupting or investigating conduct that relates to a matter of security as defined by the ASIO Act.

As such, there are implications for personal privacy in relation to the amendment. The explanatory materials suggest that the importance of the public purposes of enabling government agencies to use information where so doing could prevent, detect, disrupt or investigate conduct that relates to a

matter of security outweigh this adverse consequence (statement of compatibility, p. 41).

From a scrutiny perspective it is, however, a matter of concern that disclosure is authorised to 'any' Australian government agency. The statement of compatibility suggests that this is justified because 'bodies that have a role in preventing, disrupting or investigating a threat related to security threats vary from time to time' (p. 41). The statement of compatibility notes that bodies such as the National Disruption Group are multi-jurisdictional and the composition may change at short notice.

Although the committee accepts that some breadth in the authorisation to disclose may be appropriate, it is not persuaded that it is necessary to authorise disclosure to 'any' Australian government agency for the purposes of this provision. The committee therefore sought the Attorney-General's advice about more targeted alternative authorisation options and why they were rejected. The Attorney-General's response to the committee reiterated that the membership or composition of relevant bodies can change at short notice and that taxation information could be useful in allowing early intervention in terrorist activities:

Options arbitrarily limiting the Australian government agencies to which disclosures could be made to those agencies that have a national security role today could prevent disclosure to an agency with a national security role tomorrow. This could have devastating outcomes, including loss of many lives in time critical scenarios.

This further information has not been included in the explanatory material for this bill.

The committee is disappointed that the further information provided to the committee was not included in the explanatory memorandum to this bill and requests that the explanatory memorandum be amended to include this key information.

The committee restates its previous comments, that it accepts that some breadth in the authorisation to disclose may be appropriate and notes that it is not suggesting arbitrarily limiting the scope of the provision. However, it is not persuaded that it is necessary to authorise disclosure to *any* Australian government agency for the purposes of this provision without any parliamentary oversight. The committee emphasises that

flexibility with some parliamentary oversight could be maintained through the use of a disallowable legislative instrument to extend authorisation to additional agencies or classes of agencies where necessary.

The committee draws its concerns to the attention of Senators and leaves the question of whether allowing disclosure of taxation information to ‘any’ Australian government agency is appropriate to the Senate as a whole.

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

Criminal Code Amendment (Firearms Trafficking) Bill 2016

Purpose	This bill amends the <i>Criminal Code Act 1995</i> to provide for a mandatory minimum sentence and increased maximum penalties for the offences of trafficking firearms or firearms parts within Australia, and into and out of Australia
Portfolio	Justice
Introduced	Senate on 15 September 2016 <i>This bill is identical to a bill introduced in the previous Parliament</i>

The committee commented on the measure in this bill when it considered the Criminal Code Amendment (Firearms Trafficking) Bill 2015 in the previous Parliament (see pages 82–88 of the committee’s *Second Report of 2016*). The committee takes this opportunity to restate these comments below with some modifications.

Offences—increased maximum penalties

General comment

This bill raises the maximum penalties and sets new mandatory minimum penalties for the offences of:

- trafficking firearms and firearm parts within Australia (in Division 360 of the *Criminal Code*); and
- trafficking firearms and firearm parts into and out of Australia (in Division 361 of the *Criminal Code*),

The maximum penalties for these offences will be raised from 10 years imprisonment or a fine of 2500 penalty units or both to 20 years imprisonment or a fine of 5000 penalty units or both. The doubling of the applicable maximum penalty is justified in the explanatory memorandum (at p. 6):

The increased maximum penalty is necessary to ensure that the serious offences of trafficking firearms within Australia, and into and out of Australia, are matched by commensurate punishments.

Consistent with the principles set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, the increased maximum penalty will be adequate to deter and punish the worst case offence. This ensures that sentences imposed by courts can continue to take into account the particular circumstances of the offence and the offender.

The new maximum penalty reflects the seriousness of the conduct covered by the offences, to address the clear and serious social and systemic harms associated with this trade.

The statement of compatibility elaborates the seriousness of the offences by reference to the ‘serious social and systemic harms associated with firearms trafficking’ and ‘the gravity of supplying firearms and firearm parts to the illicit market’. The gravity of the offences is illustrated by noting that the ‘entry of even a small number of illegal firearms into Australia can have a significant impact on the community’ on account of the fact that ‘firearms can remain within that market for many years and be accessed by individuals and groups who would use them to commit serious and violent crimes, such as murder’. For example, in 2014 firearms were identified as being the type of weapon used in 15% of homicides in Australia (at p. 4).

Although the explanatory materials make a case for increasing the maximum penalty, doubling the penalties represents a very significant increase. When the committee considered the version of this bill introduced in the previous Parliament, the committee sought the Minister’s advice as to examples of other offences that carry this level of penalty and a more detailed justification demonstrating that these trafficking offences are of a similar level of seriousness.

The Minister responded to the committee in a letter dated 10 February 2016:

Currently, the maximum penalties for firearms trafficking offences under the Code are imprisonment for 10 years, or a fine of 2,500 penalty units (equal to \$450,000), or both. The Bill would double those maximum penalties to imprisonment for 20 years, or a fine of 5,000 penalty units (equal to \$900,000), or both.

Offences under the Code which carry similar maximum penalties include a number of drug offences, such as trafficking marketable quantities of controlled drugs (section 302.3), cultivating or selling marketable quantities of controlled plants (section 303.5 and section 304.2 respectively), manufacturing marketable quantities of controlled drugs (section 305.4), and importing and exporting marketable quantities of border controlled drugs or border controlled plants (section 307.2). Each of these offences carry a

penalty of imprisonment for 25 years (five more than those proposed for firearms trafficking), or 5,000 penalty units, or both.

Increasing the maximum penalty for firearms trafficking offences in the Code from 10 to 20 years' imprisonment and 2,500 to 5,000 penalty units is analogous with the maximum penalties applied to serious drug offences. This indicates the serious social and systemic harms posed by both forms of trafficking and supply. In each case, the offender's behaviour gives rise to harmful and potentially deadly outcomes. Further, the risk posed to community health and safety by firearms endures over time, as—due to their imperishable nature—firearms can remain in the illicit market for decades and be used in the commission of countless crimes over their lifespan.

As noted by the Law Council of Australia in its submission to the Senate Legal and Constitutional Affairs References Committee, the increased penalties proposed by the Bill would also more closely align the Commonwealth's maximum penalties with maximum penalties for trafficking offences in the States and Territories. For example, in NSW firearms trafficking offences can attract a maximum sentence of 20 years' imprisonment (section 51 *Firearms Act 1996* (NSW)), while in the ACT repeated firearms trafficking offences within a 12-month period can also attract a maximum penalty of 20 years' imprisonment (section 220 *Firearms Act 1996* (ACT)).

The committee thanked the Minister for this response and also requested that the key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).

The committee notes it is disappointed that it does not appear that the key information provided by the Minister in his letter dated 10 February 2016 has been included in the explanatory memorandum to this bill and requests that the explanatory memorandum be amended to include this information.

The committee draws this general matter to the attention of Senators and, in light of the information provided by the Minister, leaves the question of whether doubling the maximum penalties for firearms trafficking offences is appropriate to the Senate as a whole.

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

Offences—mandatory minimum sentences

General comment

The justification provided for the imposition of a new mandatory minimum sentence of five years imprisonment is also addressed in the explanatory materials. The explanatory memorandum (at p. 7) states:

The Commonwealth has adopted a range of measures in response to the threat posed by illicit firearms, one of which is sentencing people convicted of firearms trafficking offences to mandatory minimum prison terms. Mandatory minimum sentences, when applied to individuals convicted of serious offences, are an effective way to deter potential offenders from firearms trafficking. The severe mandatory penalties associated with the firearms trafficking sentencing regime accord with the criminality of firearms smuggling, but must be carefully directed towards those whose individual culpability also justifies mandatory terms of imprisonment.

The mandatory minimum penalty will not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed (subsection 360.3A(2)). This preserves judicial discretion when sentencing to take into account the particular circumstances of minors.

The amendment does not prescribe a minimum non-parole period. This will preserve a court's discretion in sentencing, and will help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offence and the offender. The mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence.

The statement of compatibility suggests that the mandatory minimum penalty is proportionate given the seriousness of the offences, the fact it does not apply to children and because there is no minimum non-parole period.

Nevertheless, mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. Such discretions are exercised judicially and in light of sentencing principles and when the committee considered the version of this bill introduced in the previous Parliament, it noted that it was unclear why the discretion should be removed in this particular instance. For this reason the committee sought the Minister's more detailed justification for the proposed approach, including whether there are examples of analogous offences that carry a mandatory minimum penalty.

The Minister responded to the committee in a letter dated 10 February 2016:

Currently, there is no mandatory minimum term of imprisonment for firearms trafficking offences under the Code. The Bill introduces a five year mandatory minimum sentence for those offences.

The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers does not prohibit the use of mandatory minimum sentences. The Government's decision to introduce mandatory minimums for firearms trafficking offences demonstrates the seriousness with which it takes this type of offending, which can lead to the supply of firearms to those who would use them in the commission of serious crimes.

The outcomes of the Martin Place Siege Joint Commonwealth – NSW Review (the Review) support the view that firearms trafficking requires a strong response from Government. In drafting the Review, the Commonwealth and New South Wales Governments considered gunman Man Haran Manis' access to firearms. The Review noted that the measures included in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, which included mandatory minimum sentences, would strengthen the Commonwealth's ability to tackle the illegal trafficking of firearms and firearms parts into and out of Australia.

I note that the Committee has stated that mandatory penalties undermine the discretion of judges to ensure that penalties are proportionate in light of the individual circumstances of particular cases. Mandatory minimum sentences for firearms trafficking offences are reasonable and necessary both to deter would-be firearms traffickers, and to appropriately penalise those who commit these offences. There are appropriate limitations and safeguards in place to ensure that detention is proportionate in each individual case.

As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will remain at the discretion of the sentencing judge. In response to concerns raised by the Parliamentary Joint Committee on Human Rights when the mandatory minimums were first introduced in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, the Explanatory Memorandum for this Bill notes that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. The provisions similarly do not apply mandatory minimum penalties to children (those under the age of 18). These factors preserve a level of judicial discretion and ensure that custodial sentences imposed by courts take into account the particular circumstances of the offence and the offender. Importantly, the mandatory minimum term of imprisonment will only apply if a person is convicted of an offence as a result of a fair trial in accordance with such procedures as are established by law.

In response to concerns raised by the Senate Legal and Constitutional Affairs Committee in its report regarding the Bill, the Explanatory Memorandum (EM) has been amended to address the treatment of offenders with significant cognitive impairment. The EM now explicitly states that the lack of a non-

parole period for offenders will help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offender, including any mitigating factors such as cognitive impairment.

The EM also points to section 7.3 of the Code, which sets out that a person is not criminally responsible for an offence if at the time of carrying out the conduct the person was suffering from a mental impairment that affected their ability to know the nature and quality of the conduct, know that the conduct was wrong, or was unable to control the conduct. This insertion reinforces the discretion of the sentencing judge in applying non-parole periods which are proportionate in individual cases.

Further, under section 16A of the *Crimes Act 1914* courts are required to take into account the character, antecedents, age, means and physical or mental condition of the person. A sentencing judge will therefore be obliged to consider these matters in determining the amount of time an offender spends in custody if they are convicted of a firearms trafficking offence and receive the mandatory minimum head sentence of five years' imprisonment.

The United Kingdom has introduced similar mandatory minimum sentences for firearms-related offences. Under section 51A of the *Firearms Act 1968*, an individual in the United Kingdom may be subject to a five year mandatory minimum for offences such as possession of firearm with intent to injure, carrying a firearm with criminal intent, or carrying a firearm in a public place. The penalties in the United Kingdom are more stringent than those proposed in the Bill, as offenders under the age of 18 (in England and Wales) are still subject to a three year mandatory minimum term.

Australia's people smuggling offences set out in the *Migration Act 1958* (Migration Act) and the Code contain mandatory minimum sentences for certain aggravated offences. The offences contained in the Migration Act and Code carry a mandatory minimum sentence of five years for the offence of organising or facilitating the entry or proposed entry of five or more persons, and a mandatory minimum sentence of eight years for the offence of people smuggling where there is a danger of death or serious harm.

The Code and Migration Act penalties are analogous to the offences in this Bill for which mandatory minimum offences have been proposed. For example, the aggravated offence of people smuggling (danger of death or serious harm etc.) carries a maximum penalty of imprisonment for 20 years, or 2,000 penalty units, or both and carries a mandatory minimum sentence of eight years. In committing this offence, the person's conduct must have been reckless as to the danger of death or serious harm to the victim that arose from the conduct.

Those engaged in firearms trafficking are similarly reckless as to the risk of death or serious harm to any number of potential victims. Due to their imperishable nature, once firearms have been trafficked into the illicit market they can remain within that market for many years, and be accessed by individuals and groups who would use them to commit serious and violent

crimes such as murder. As demonstrated by the penalties for people smuggling offences, criminal conduct which is reckless as to potentially deadly consequences should carry significant penalties.

From a national perspective, in 2014 the New South Wales Government passed the *Crimes Amendment (Intoxication) Bill 2014*. As a result, a court is required to impose a sentence of imprisonment of not less than eight years on a person guilty of an offence under subsection 25A(2) of the *Crimes Act 1900* (NSW). Subsection 25A(2) addresses assault causing death when intoxicated (colloquially referred to as ‘one punch’ laws). Any non-parole period for the sentence is also required to be not less than eight years. The Queensland Government introduced an offence of unlawful striking causing death in the *Safe Night Out Legislation Amendment Act 2014* (Qld). Generally, if a court sentences a person to a term of imprisonment for such an offence, the court must make an order that the person must not be released from imprisonment until the person has served the lesser of 80% of the person’s term of imprisonment for the offence or 15 years.

The introduction of mandatory minimum sentences of five years’ imprisonment for firearms trafficking offences is an important aspect of the Government’s strategy to stop illegal guns and drugs at the border. The simultaneous introduction of increased maximum penalties ensures that the full range of penalties associated with these offences is commensurate with their seriousness, and with the grave nature of the associated crimes they can affect.

The committee thanked the Minister for this detailed response.

The committee noted the Minister’s advice that the provisions do not impose a mandatory non-parole period and therefore the actual time a person will be incarcerated will remain at the discretion of the sentencing judge, who will be able to take into account the particular circumstances of the offence and the offender, including any mitigating factors.

The committee also noted the Minister’s advice that the mandatory minimum sentences will not apply to children. However, the committee highlighted the fact that in order for this exception to apply, the defendant will bear an evidential burden regarding their age. This means that the defendant will need to adduce or point to evidence that suggests a reasonable possibility that they are under 18. The statement of compatibility accompanying this version of the bill contains an explanation for placing the evidential burden on the defendant in relation to this issue which is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

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

The committee notes its disappointment that it does not appear that the key information provided by the Minister in his letter dated 10 February 2016 has been included in the explanatory memorandum to this bill, and requests that the explanatory memorandum be amended to include this information.

The committee draws this general matter to the attention of Senators and leaves the question of whether the imposition of a five year mandatory minimum term of imprisonment for firearms trafficking offences is appropriate to the Senate as a whole.

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

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Purpose	This bill amends the <i>Criminal Code Act 1995</i> to establish a scheme for the continuing detention of high risk terrorist offenders at the conclusion of their custodial sentence
Portfolio	Attorney-General
Introduced	Senate on 15 September 2016

Trespass on personal rights and liberties

General comment

This bill provides for the continued detention of terrorist offenders who are serving custodial sentences, after those sentences have been served. Orders for continuing detention of terrorist offenders will, it is proposed, be based on a judicial assessment in civil proceedings that the offender presents an unacceptable risk to the community at the time they are due to be released, having served their sentence. Before making an order the courts must be satisfied to a ‘high degree of probability’ of the existence of this level of risk and, also, that there are no less restrictive means which would effectively prevent that risk. Although the period for which a continuing detention order may be made is limited to a maximum of 3 years, there is no limit on the number of such orders that may be made.

Proceedings for a continuing detention order (or an interim order) are characterised by the usual procedures and rules for civil proceedings: the standard rules of evidence and procedure apply, the parties have a right to be heard and adduce evidence, reasons for decisions must be given, and decisions may be appealed. However, the application of these indicia of judicial process does not change the fact that the proposed scheme for the continuing detention of terrorist offenders fundamentally inverts basic assumptions of the criminal justice system. ‘Offenders’ in our system of law may only be punished on the basis of offences which have been proved beyond reasonable doubt. This bill proposes to detain persons, who have committed offences and have completed their sentences for those offences, on the basis that there is a high degree of probability they will commit similar offences in the future.

In justifying this significant departure from the presumption of innocence, the explanatory memorandum points to the fact that some states and territories have enacted similar schemes in relation to sex offenders. It is suggested, however, that the principle that persons should not be imprisoned for crimes they may commit should continue to be accepted as a fundamental postulate of our system of law, despite some legislatures having accepted limited exceptions to it. If exceptions to this foundational principle are created and widened, then there is a risk to the integrity of the system of criminal justice. Furthermore, if one exception is used to justify further exceptions—based on predictive assessments about serious risk to the public—then it is unclear, as a matter of legal principle, how the proliferation of exceptions can be limited.

The inversion of fundamental principles proposed by this bill is justified on the basis that the rationale for detention is non-punitive. Rather, it is suggested, the bill has a protective purpose. The explanatory materials state that the detention will be authorised because of an unacceptable risk to the community. It will not be punishing the person for a past offence or a future offence which will likely be committed:

...the continued detention of a terrorist offender under the scheme does not constitute additional punishment for their prior offending – the continued detention is protective rather than punitive or retributive (statement of compatibility, p. 9)

It may be accepted that in some circumstances, detention may be justified on the basis of protecting the public from unacceptable risks without undermining the presumption of innocence or the principle that persons should not be imprisoned for crimes they may commit. For example, detention on the basis of risks associated with the spread of communicable disease do not threaten these basic assumptions of our criminal law. However, where the trigger for the assessment of whether or not a person poses an unacceptable risk to the community is prior conviction for an offence, the protective purpose cannot be clearly separated from the functioning of the criminal justice system. If the continuing detention is triggered by past offending, then it can plausibly be characterised as *retrospectively* imposing additional punishment for that offence. If the continuing detention is not conceptualised as imposing additional punishment, then the fact that it is triggered by past offending on the basis of predicted future offending necessarily compromises the principles identified above.

Unlike detention on the basis of other threats to the public (such as the spread of disease) the basis of detention, on either interpretation, is the person's

status as an offender (either a past offender or a likely future offender). It is for this reason that it is suggested that this bill inverts the fundamental principles of our criminal justice system. Although it is suggested in the explanatory material that the purpose of the detention may also be said to be protective, it remains the case that it is imposed based on a combination of past offending and conclusions about the likelihood of future offences being committed.

The committee draws Senators' attention to the significant scrutiny concerns outlined above about the proposed continuing detention order scheme and requests that the Attorney-General provide further justification for the approach which addresses these concerns.

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

Trespass on personal rights and liberties

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

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

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

Proposed subsection 105A.4(2) provides that the offender must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment. This general principle is subject to similar exceptions as in the case of proposed subsection 105A.4(1), along with further exceptions relating to rehabilitation, treatment, work, education, general socialisation or other group activity or where an offender elects to be accommodated or detained with the general prison population.

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

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

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

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

Trespass on personal rights and liberties—procedural fairness
Item 1, proposed subsection 105A.5(4)

Proposed subsection 105A.5(4) requires that an applicant for a continuing detention order must give a copy of the application to the offender within two business days of making the application. The provision, in this way, facilitates a fair hearing. However, subsection 105.5(5) provides that the applicant is not

required to give the offender, when the applicant gives them a copy of the application pursuant to subsection 105.5(4), any information included in the application if the Attorney-General is likely to, under a number of identified bases, seek to have information or material suppressed or protected from release to the general public.

The committee seeks the Attorney-General's advice as to the extent to which an offender will receive such information or material (which is part of the case made against them) prior to the ultimate hearing for the continuing detention order.

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

Rights and liberties unduly dependent upon insufficiently defined administrative powers

Proposed section 105A.8

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

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

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

Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016

Purpose	This bill amends the <i>Fair Work Act 2009</i> to: <ul style="list-style-type: none">• expand the definition of unlawful terms to include an objectionable emergency management term;• provide an entitlement to certain volunteer bodies to make submissions to the Fair Work Commission in relation to matters about enterprise agreements
Portfolio	Employment
Status	This bill passed both Houses on 10 October 2016

The committee has no comment on this bill.

Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016

Purpose	This bill amends various Acts in relation to family assistance
Portfolio	Education and Training
Introduced	House of Representatives on 1 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee commented on the measures in this bill when it considered the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015 in the previous Parliament (see pages 363–372 of the committee’s *Fifth Report of 2016*). The committee takes this opportunity to restate these comments below with some modifications.

Review rights—notice of a deemed refusal

Schedule 1, item 40, proposed subsections 85CE(4) and 85CH(5)

Section 85CE provides that the Secretary may make a determination that a child is at risk of serious abuse or neglect on application by an approved provider. However, subsection 85CE(4) provides that subsection 27A(1) of the *Administrative Appeals Tribunal Act 1975* (relating to the provision of a notice of decision and review rights) will not apply to a deemed refusal under this proposed provision.

A similar issue arises in relation to proposed subsection 85CH(5) (relating to determinations that an individual is experiencing temporary financial hardship).

As the explanatory memorandum accompanying the version of this bill introduced in the previous Parliament did not include a justification for this approach, the committee sought the Minister’s advice as to the rationale for the proposed approach.

The Minister responded to the committee in a letter received on 24 March 2016:

The Committee asked for the rationale for the proposed approach where subsection 27A(1) of the *Administrative Appeals Tribunal 1975* (the AAT Act) will not apply to a deemed refusal under subsections 85CE(4) and 85CH(5) of the *A New Tax System (Family Assistance) Act 1999* (FA Act).

Subsections 85CE(3) (child at risk) and 85CH(4) (temporary financial hardship) of the Bill require the Secretary to either make a determination, or to refuse an application, within 28 days of receipt of that application, and, where the Secretary does so, s/he would be required to give notice of the decision in accordance with subsection 27A(1) of the AAT Act. In the current FA Act there are no timeframes for which the Secretary is required to make a determination in relation to ‘at risk’ or ‘temporary financial hardship’ applications. As such, timeframes for response to these applications could drag out and the applicants would have no clear timeframe for when a decision will be made. The rationale for the inclusion of a 28 day timeframe is to ensure a timely response from the Department where there are children and families in these vulnerable circumstances. The Department of Education and Training is committed to making every attempt to deal with applications in a timely manner and expects to do so within the 28 days.

The deemed refusal provisions in subsections 85CE(4) and 85CH(5) were included for the purposes of providing certainty to applicants (that is, the child care service in relation to children at risk and families in relation to temporary financial hardship) in the rare event that their application is not determined in a timely manner. Significant work is, however, underway to reduce the chance of rare and unfortunate situations when an application is lost in the mail, or an application is not processed due to administrative oversight. In such circumstances, where the Secretary has neither made a determination nor refused the application, the application is taken to be refused under subsections 85CE(4) and 85CH(5) so that there is a clear outcome for an applicant.

In situations where a deemed refusal has occurred, the applicant will have full access to review rights (both merits review through internal review and subsequently through the Administrative Appeals Tribunal, and judicial review). For example, the applicant may contact the Department to ask about the progress of their application, and the Secretary would be able to initiate an own motion review of the refusal decision. Alternatively, the person may make a formal application for an internal review of the refusal decision. In addition, there is also nothing to prevent an applicant whose application is deemed to be refused from making a new application.

Subsection 27A(1) of the AAT Act provides that a person who makes a reviewable decision must take reasonable steps to give to an affected person a written notice of the decision and of their review rights. It would not be appropriate to require the Secretary to give a decision notice advising of review rights in relation to deemed refusals under subsections 85CE(4) and 85CH(5), because deemed refusals only come into effect in circumstances where the Secretary, (or his or her delegate), has failed to personally make a

decision: in other words, no actual decision was made by an officer. Accordingly, proposed subsections 85CE(4) and 85CH(5) simply reflect that it would be inappropriate to oblige the Secretary to notify of the act of not making an active decision. As such, the exemption from the notification requirement merely reflects the practical reality that any deemed refusals are likely to occur without the Secretary's actual and active knowledge.

The committee thanked the Minister for this detailed response and in light of the information provided made no further comment in relation to these provisions.

The committee takes this opportunity to thank the Minister for including further explanatory information in relation to these provisions in the explanatory memorandum accompanying the latest version of this bill. In light of this information the committee makes no further comment.

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

Delegation of legislative power—Henry VIII clause Schedule 1, item 205, proposed section 199G

The explanatory memorandum (at p. 81) states that proposed section 199G may be characterised as a Henry VIII clause because it appears to 'provide a broad modification power of principal legislation'. The explanatory memorandum states that it is 'intended to operate in a purely beneficial way to deal with any anomalies that may arise where an approval is taken to be backdated in time'. Nevertheless, the proposed section itself does not appear to include a limitation which ensures that it is only used beneficially.

As the explanatory memorandum accompanying the version of this bill introduced in the previous Parliament did not include a justification for this approach, the committee sought the Minister's advice as to the rationale for the proposed approach.

When the committee considered the version of this bill introduced in the previous Parliament, the committee sought the Minister's advice as to whether this provision could be drafted to ensure that the provisions are only used beneficially (i.e. in the manner described in the explanatory materials).

The Minister responded to the committee in a letter received on 24 March 2016:

The Committee asked for the rationale for the proposed sections of the Bill which provide broad powers of modification of the principal legislation.

The Secretary may approve a provider for the purposes of the family assistance law under section 194B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the FAA Act). Under subsection 194B(5) an approval can take effect on a date prior to the date of the approval decision, but no earlier than the date of the application. This means that there may be cases where an applicant is taken to have been approved in the time prior to notification of the approval decision. This in turn may mean that providers are retrospectively required to meet obligations by timeframes that have already passed and they could possibly be in a position where they are in breach of those requirements (such as the requirement to submit attendance reports under new section 204B). Similarly, it is possible that suspensions of services could be revoked with retrospective effect, again retrospectively requiring providers to meet obligations in the past.

In view of this, proposed section 199G gives Ministerial power to make rules which modify the FAA Act, so that it operates without anomalous or unfair consequences for providers where their approval takes effect during a past period. Such modifications would be beneficial for providers as they would ensure providers are not unfairly exposed to obligations in the past that they are unable to meet. One such possible modification, for example, would be to extend the time in which attendance reports under section 204B are required to be provided where providers are taken to have been approved in a past period.

Although it may be possible to include limiting words to ensure the provisions are only used beneficially, amendments of this nature could be equivocal and possibly confusing due to difficulties in defining what a ‘benefit’ is in the context of lifting obligations relating to backdated approvals. I note that any rules made in accordance with section 199G will be subject to further parliamentary scrutiny through the disallowance process for legislative instruments, which means that Parliament will be able to disallow any rules that are considered non-beneficial or otherwise unfair.

The committee thanked the Minister for this response and requested that the key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*. **The committee takes this opportunity to thank the Minister for including further explanatory information in relation to these provisions in the explanatory memorandum accompanying the latest version of this bill.**

However, the committee remains concerned about the breadth of the power in section 199G which allows rules (delegated legislation) to override the operation of the primary legislation. While the committee notes that the intention is for modifications to be beneficial, the suggestion that limiting words ‘could be equivocal and possibly confusing’ is not a compelling justification for broadening the scope of delegated powers.

The committee draws the breadth and nature of this power to the attention of Senators and, noting that any rules made in accordance with section 199G will be subject to disallowance, leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

The committee draws Senators’ attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.

Delegation of legislative power—Henry VIII clause Schedule 4, item 12 (transitional rules)

A similar issue arises in relation to item 12 of Schedule 4.

This item gives the Minister a broad power to make rules dealing with transitional issues, including allowing the Minister to modify the effect of principal legislation. The explanatory memorandum (at p. 96) indicates that power is intended to only be exercised beneficially but, as with the proposed section 199G above, there is no legislative provision requiring this approach.

When the committee considered the version of this bill introduced in the previous Parliament, the committee also sought the Minister’s advice as to whether this provision could be drafted to ensure that the provisions are only used beneficially (i.e. in the manner described in the explanatory materials).

The Minister responded to the committee in a letter received on 24 March 2016:

I intend that this power will be used in a beneficial way to ensure a smooth transition into the new system, including to ensure that: provider approvals happen seamlessly and without unintended or unfair consequences for child care services with existing approval under family assistance law; payment arrangements for individuals transitioning to the new Child Care Subsidy can operate without unexpected complications; and the public purse is appropriately protected by ensuring that outstanding debt or compliance matters on transition can still be dealt with under the new system. I consider that the power to make transitional rules needs to be worded as broadly as possible to ensure that any unforeseen and unintended consequences of repealing and amending legislation can be remedied promptly and flexibly by legislative instrument.

I consider this broad power is justified and proportionate given it can only operate for a limited period of two years, and any rules made would be subject to further parliamentary scrutiny through the process of disallowance of legislative instruments. Any rules that attempt to broadly modify the Act other than to assist transition would be beyond power and ineffective.

The committee thanked the Minister for this response and requested that the key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*. **The committee takes this opportunity to thank the Minister for including further explanatory information in relation to these provisions in the explanatory memorandum accompanying the latest version of this bill.**

The committee notes the justification provided, in particular that the disallowance process will apply and that the operation of the provision will be limited to two years. In light of this information, **the committee leaves the question of whether the scope of this delegation of legislative power is appropriate to the Senate as a whole.**

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

The committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

**Trespass on personal rights and liberties—strict liability
Schedule 1, item 205, new Part 8A, various provisions**

This Part contains a number of strict liability offences.

The explanatory materials accompanying the version of the bill introduced in the previous Parliament did not include a detailed justification of each instance of the application of strict liability which referenced to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The committee therefore sought the Minister's advice in relation to this for each proposed strict liability offence.

The Minister responded to the committee in a letter received on 24 March 2016:

The Committee has asked for a detailed justification of each instance of the application of strict liability, with reference to the principles set out in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (developed by the Attorney-General's Department to assist officers in Australian Government departments to frame criminal offences that are intended to become part of Commonwealth law).

Strict liability provisions exist in the current FAA Act in relation to a range of contraventions by operators of child care services. These have been expanded upon in the Bill for the purposes of addressing systemic non-compliance in the child care sector. In addition, new penalties have been included to address compliance issues that have emerged in relation to the administration of the child care payment system under existing legislation.

The Australian National Audit Office 2014-15 Financial Statements audit report estimates that \$692.9 million was inappropriately claimed by child care service providers in 2014-15. As such, the increased compliance measures in the Bill (including strict liability) are aimed at deterring inappropriate practices and penalising those providers that continue to disregard their legal obligations under the FA and FAA Act.

The integrity of the subsidy system relies on child care services engaging in a range of important administrative and business practices to ensure that the financial benefit of child care subsidy payments are passed onto families, including by appropriate record keeping, invoicing practices and reporting attendance and enrolment of children. A new child care information technology system will support services to be able to meet their obligations under the Bill while reducing regulatory burden.

Besides the criminal offences created under the Bill, the compliance regime outlined by the Bill also provides for the possibility of pursuing non-compliance through 'sanction' processes (including by cancelling or

suspending provider or service approval) as well as through an infringement notice and civil penalty regime. The imposition of strict liability offences in relation to the contravention of obligations offers the ability for criminal prosecution only where a contravention is considered to be sufficiently serious to pursue in this manner. Strict liability offences are only proposed in relation to contraventions that would have a significant impact on the payment integrity of the new child care regime. As explained in the enclosed table, I consider that the offences are justifiable in light of the principles set out in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Case history has demonstrated that civil penalty provisions on their own may not be a sufficient deterrent/penalty as services may choose not to pay these penalties and continue to operate. In some cases, civil penalties are not sufficient in their penalty amounts as it is more profitable for services to inappropriately claim and pay the fines. Therefore, they may not have the desired impact in penalising illegal behaviour.

The rationale for the various strict liability offences has been included at Attachment A. *[This attachment is included in full at the end of committee's Fifth Report of 2016, and an extract appears below.]*

The application of penalties greater than 60 penalty units

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability is generally only considered appropriate where, amongst other things, the offence is punishable by a fine of up to 60 penalty units.

The proposed penalty units for five of the clauses listed are set above this guideline:

Clause	Penalty Units
201A, 201C and 202C	80
204B and 204C	70

The failure to advise the Secretary of certain matters that may affect the approval of the provider or the approval of the service may impact families resulting in them:

- no longer having access to fee reduction payments for child care at that service (which can be at short notice)
- being unable to find alternative care arrangements at short notice to ensure they continue to receive fee reduction payments
- or receiving fee reduction payments for which they may not be eligible.

Given the impact on the Commonwealth and intended service recipients, it was determined to be appropriate to increase the penalty units in order to promote compliance from the outset.

The committee thanked the Minister for this detailed response and noted the key points made, including the need to address systemic non-compliance in the child care sector. The committee also noted the individual explanations provided for each proposed offence and the justification for the maximum penalties that can be imposed by delegated legislation.

The committee also requested that the key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*. **The committee takes this opportunity to thank the Minister for including further explanatory information in relation to these provisions in the explanatory memorandum accompanying the latest version of this bill.**

While the explanations for the application of strict liability in each instance appear to be consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide), the ability to impose penalties above 60 penalty units is not. The committee notes the Minister's advice that setting higher penalties in relation to several clauses (clauses 201A, 201C and 202C—80 penalty units and clauses 204B and 204C—70 penalty units) was considered to be appropriate in order to promote compliance. In this regard the Minister noted the impact on the Commonwealth and intended service recipients of a failure to advise the Secretary of certain matters that may affect the approval of a provider or service. However, it remains the case that in order to be consistent with the principles outlined in the Guide (see pp 23–24), strict liability offences should be applied only where the penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.

The committee therefore draws this matter to the attention of Senators and leaves the question of whether the proposed approach, including providing for strict liability offences with penalties above 60 penalty units, is appropriate to the consideration of the Senate as a whole.

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

Delegation of legislative power—incorporation of material as in force from time to time

Schedule 3, items 1 and 2, section 4 of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act)

Items 1 and 2 amend section 4 of the Family Assistance Act by specifying that, despite subsection 14(2) of the *Legislation Act 2003*, a determination made for subsection (1) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

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

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

However, in this instance the explanatory memorandum (at p. 92) contains a comprehensive explanation for the proposed approach which addresses these scrutiny concerns:

The departure from the general position reflected in section 14 of the *Legislation Act 2003* is intended to ensure that future versions of the instruments that set out vaccination and immunisation details and schedules (including the Australian Immunisation Handbook) can continue to be meaningfully referred to. The Australian Immunisation Handbook is approved by the National Health and Medical Research Council to provide clinical advice on vaccination. As the Handbook is updated regularly to take account of scientific evidence as it becomes available (and is currently in its 10th edition of publication) it is important to ensure that any reference in a legislative instrument made under section 4 is a reference to the current and up to date edition. The Handbook is publicly, readily and freely available to access from the National Health and Medical Research Council website, through the Australian Government Department of Health, for those seeking to access the content of the law. It is understood that updates to the Handbook are also regularly notified on the National Health and Medical Research Council's homepage.

The committee thanks the Minister for including this comprehensive justification in the explanatory memorandum.

The committee also takes this opportunity to highlight the expectation of the Senate Regulations and Ordinances Committee that delegated legislation which applies, adopts or incorporates any matter contained in an instrument or other writing should clearly state the manner in which the documents are incorporated—that is, whether the material is being incorporated as in force or existing from time to time or as in force or existing at the commencement of the legislative instrument. This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

In light of the detailed explanation in the explanatory memorandum the committee makes no further comment on these provisions

Freedom to Marry Bill 2016

Purpose	This bill amends the <i>Marriage Act 1961</i> to allow persons the freedom to marry regardless of sex, sexual orientation and gender identity
Sponsor	Senator Leyonhjelm
Introduced	Senate on 1 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee has no comment on this bill.

Great Australian Bight Environment Protection Bill 2016

Purpose	This bill seeks to protect the Great Australian Bight from environmental damage resulting from mining activities
Sponsor	Senator Hanson-Young
Introduced	Senate on 15 September 2016

The committee has no comment on this bill.

Higher Education Support Legislation Amendment (2016 Measures No. 1) Bill 2016

Purpose	<p>This bill amends the <i>Higher Education Support Act 2003</i> (the Act) to:</p> <ul style="list-style-type: none">• provide for grants to certain higher education providers to assist Indigenous students; and• allow the Secretary to be notified of Tax File Numbers (TFNs) for the purpose of administering student assistance under VET FEE-HELP <p>The bill also amends the <i>Income Tax Assessment Act 1936</i> to ensure Commonwealth officers are able to use and disclose TFNs under the Act for the purposes of administering VET FEE-HELP</p>
Portfolio	Indigenous Affairs
Introduced	House of Representatives on 15 September 2016

The committee has no comment on this bill.

Industry Research and Development Amendment (Innovation and Science Australia) Bill 2016

Purpose	<p>This bill amends the <i>Industry Research and Development Act 1986</i> to:</p> <ul style="list-style-type: none"> • transition Innovation Australia to become Innovation and Science Australia, an independent body responsible for strategic advice on all industry, innovation, science and research matters; and • create a statutory framework to provide legislative authority for Commonwealth spending activities in relation to industry, innovation, science and research programs
Portfolio	Industry, Innovation and Science
Introduced	<p>House of Representatives on 1 September 2016</p> <p><i>This bill is substantially similar to a bill introduced in the previous Parliament</i></p>

Delegation of legislative power—authorising spending activities Schedule 1, item 34, proposed section 33

This bill seeks to establish a statutory framework to provide legislative authority for Commonwealth spending activities in relation to industry, innovation, science and research programs. Proposed subsection 33(1) will allow ministers to prescribe industry, innovation, science and research programs in disallowable legislative instruments, thereby authorising expenditure of Commonwealth money for the purposes of the prescribed programs. The legislative instruments may also make provision for operational elements of spending programs, such as eligibility criteria, the process for making applications, whether application fees are payable in relation to the program, and other matters (proposed subsections 33(4) and (5)).

The committee notes that proposed subsection 33(2) confirms that a constitutional head of power is required to support Commonwealth industry, innovation, science and research spending programs authorised by these provisions.

The committee further notes that proposed subsection 33(3) will require legislative instruments made under proposed subsection 33(1) to specify the legislative power or powers of the Parliament in respect of which the instrument is made. **The committee welcomes the inclusion of this provision which will provide clarity in relation to the constitutional head(s) of power on which the Commonwealth is relying to support each industry, innovation, science and research program authorised by these provisions.**

The committee notes that this approach is consistent with the expectation of the Regulations and Ordinances Committee in relation to the authorisation of spending initiatives by regulations made pursuant to the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act). In this regard, the Regulations and Ordinances Committee expects that, where an instrument establishes legislative authority for spending activities, the explanatory statement should explicitly state, for each new program, the constitutional authority for the expenditure.

However, in relation to this delegation of legislative power generally, the committee has consistently expressed its preference that important matters be included in primary legislation, and for the explanatory memorandum to outline a clear justification when the use of delegated legislation is proposed. In light of this, and the High Court's reasoning in the *Williams* cases [*Williams v Commonwealth* (2012) 248 CLR 156 and *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416], the committee expects a detailed justification in the explanatory memorandum in relation to the rationale for delegating to the executive (through the use of regulations) the authorisation and establishment of new spending initiatives and programs.

In light of this, the committee seeks the Minister's advice as to:

- **the rationale for establishing this separate authorisation scheme which appears to operate in parallel with the authorisation of spending activities under the FF(SP) Act (for example, the committee seeks advice as to examples of the types of programs that will be authorised under this provision and whether all authorisations of spending activities in the industry, innovation and science portfolio will now be authorised under these proposed provisions, rather than the FF(SP) Act);**

- **whether consideration has been given to amending this provision with a view to ensuring that important matters are included in primary legislation and to ensuring the opportunity for sufficient Parliamentary oversight of these types of arrangements (in this regard, the committee notes that if new spending activities are not to be authorised by primary legislation it would be possible to provide for additional scrutiny in a number of ways, for example by:**
 - **requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or**
 - **incorporating a disallowance process such as requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*)).**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Parliamentary scrutiny—section 96 grants to the States Schedule 1, item 34, proposed subsection 35(1)

Under proposed subsection 35(1), where arrangements are made in relation to an industry, innovation, science and research program with a State or Territory, the arrangement must be subject to a written agreement containing terms and conditions under which money is payable by the Commonwealth. The relevant State and Territory must comply with the terms and conditions set out in the written agreement. As the explanatory memorandum notes, these will be the terms and conditions on the grant of the financial assistance to a State for the purposes of section 96 of the Constitution.

The committee has previously noted that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution. If this provision is agreed to and the Parliament is therefore delegating this power to the executive in this instance, the committee considers that it is appropriate that the exercise of this power be subject to at least some level of parliamentary scrutiny, particularly

noting the terms of section 96 and the role of Senators in representing the people of their State or Territory.

The committee therefore seeks the Minister's advice as to whether the bill can be amended to include a requirement that agreements with the States about grants of financial assistance relating to an industry, innovation, science and research program made under proposed subsection 35(1) are:

- **tabled in the Parliament within 15 sitting days after being made; and**
- **published on the internet within 30 days after being made.**

Pending the Minister's reply, the committee draws Senators' attention to the provision as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny in breach of principle 1(a)(v) of the committee's terms of reference.

Broad delegation of administrative powers Schedule 1, item 34, proposed section 36

Proposed section 36 provides that a minister or accountable authority of a non-corporate Commonwealth entity may delegate their powers under sections 34 or 35 (relating to the arrangements for, and terms and conditions attaching to, industry, innovation, science and research programs) to 'an official of any non-corporate Commonwealth entity'.

The committee has consistently drawn attention to legislation that allows delegations 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.

Where broad delegations are made, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. **In this case as there is no explanation for the approach in the explanatory memorandum, the committee seeks the Minister's advice as to the rationale for enabling a minister or accountable authority to delegate his or her powers to 'an official of any non-corporate Commonwealth entity' and whether consideration was**

given to limiting the powers that might be delegated or confining the delegation to members of the Senior Executive Service.

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

Marriage Legislation Amendment Bill 2016

Purpose	This bill amends the <i>Marriage Act 1961</i> to allow couples to marry, and have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status
Sponsor	Mr Shorten MP
Introduced	House of Representatives on 12 September 2016

Delegation of legislative power—retrospectivity and Henry VIII clause

Schedule 2, item 2

Subitem 2(1) of Schedule 2 will allow regulations to be made amending Acts, including the *Marriage Act 1961* and the *Sex Discrimination Act 1984*, that are consequential on, or that otherwise relate to, the amendments made by Schedule 1. A provision that expressly authorises the amendment of primary legislation by means of delegated legislation is known as a Henry VIII clause, which the committee generally considers may be an inappropriate delegation of legislative powers. The bill provides that the regulations may directly amend the text of an Act and thus this provision is considered to be a Henry VIII clause. However, the bill provides that the regulation-making power may only be exercised during the period of 12 months starting on the commencement of the item.

In addition, subitems 2(3) and (4) of Schedule 2 allow for the retrospective commencement of the regulations, even if this would affect the rights of a person or impose liabilities. However, subitem 2(5) specifies that a person cannot be convicted of an offence or have a pecuniary penalty imposed in relation to conduct contravening a retrospective regulation. The explanatory memorandum states that ‘this will provide adequate protection from the negative effects of any retrospective regulations’ and that ‘it will only be necessary to exercise the power to make retrospective regulations if the necessary regulations cannot be made before Schedule 1 commences’.

More generally, the explanatory memorandum provides the following rationale for this approach to the making of consequential amendments:

At the time of introduction of the Bill, it was not possible to ascertain all of the consequential amendments that might be required. It is likely that there will be only a short period of time between the passage of the Bill and the commencement of Schedule 1, which may not provide sufficient time to pass a Bill containing any necessary consequential amendments before that commencement. Including a regulation-making power will allow any necessary consequential amendments to be made before that commencement, providing a seamless transition from the old law to the new law.

In relation to allowing for retrospective commencement of the regulations, the explanatory memorandum states that:

Allowing retrospective commencement is necessary to ensure that all consequential amendments commence at exactly the same time as the amendments to the *Marriage Act 1961*. It is impossible to know in advance whether any of the necessary consequential amendments will adversely affect rights or impose liabilities. This is because a single amendment might be advantageous for one class of person, but disadvantageous for another class.

The committee draws this significant delegation of power and the possibility of retrospective commencement to the attention of Senators. However, in light of the explanation provided, the committee leaves the question of whether the proposed approach to the delegation of legislative power in this provision is appropriate to the Senate as a whole.

The committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Marriage Legislation Amendment Bill 2016 [No. 2]

Purpose	This bill amends the <i>Marriage Act 1961</i> to allow couples to marry, and have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status
Sponsors	Mr Bandt, Ms McGowan and Mr Wilkie
Introduced	House of Representatives on 12 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

Delegation of legislative power—retrospectivity and Henry VIII clause

Schedule 2, item 2

Subitem 2(1) of Schedule 2 will allow regulations to be made amending Acts, including the *Marriage Act 1961* and the *Sex Discrimination Act 1984*, that are consequential on, or that otherwise relate to, the amendments made by Schedule 1. A provision that expressly authorises the amendment of primary legislation by means of delegated legislation is known as a Henry VIII clause, which the committee generally considers may be an inappropriate delegation of legislative powers. The bill provides that the regulations may directly amend the text of an Act and thus this provision is considered to be a Henry VIII clause. However, the bill provides that the regulation-making power may only be exercised during the period of 12 months starting on the commencement of the item.

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At the time of introduction of the Bill, it was not possible to ascertain all of the consequential amendments that might be required. It is likely that there will be only a short period of time between the passage of the Bill and the commencement of Schedule 1, which may not provide sufficient time to pass a Bill containing any necessary consequential amendments before that commencement. Including a regulation-making power will allow any necessary consequential amendments to be made before that commencement, providing a seamless transition from the old law to the new law.

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Allowing retrospective commencement is necessary to ensure that all consequential amendments commence at exactly the same time as the amendments to the *Marriage Act 1961*. It is impossible to know in advance whether any of the necessary consequential amendments will adversely affect rights or impose liabilities. This is because a single amendment might be advantageous for one class of person, but disadvantageous for another class.

The committee draws this significant delegation of power and the possibility of retrospective commencement to the attention of Senators. However, in light of the explanation provided, the committee leaves the question of whether the proposed approach to the delegation of legislative power in this provision is appropriate to the Senate as a whole.

The committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Narcotic Drugs Legislation Amendment Bill 2016

Purpose	This bill amends the <i>Narcotic Drugs Act 1967</i> (the Act) to provide protection of sensitive law enforcement information used in licencing decisions under the Act
Sponsors	Health
Introduced	House of Representatives on 14 September 2016

Delegation of legislative power

Schedule 1, item 1, proposed subsection 4(1)

This item includes two new entries in the definition section of the *Narcotic Drugs Act 1967* to define ‘law enforcement agency’ and ‘sensitive law enforcement agency’. Both of these definitions are of critical importance to achieving the principal purpose of this bill, namely, to protect sensitive law enforcement information provided by relevant agencies for the purpose of regulatory actions in relation to licences for the cultivation and use of cannabis for medicinal and research purposes.

‘Law enforcement agency’, is defined broadly to include any ‘body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence in, or in a part of, Australia’. Paragraph (b) of this definition, however, provides that further entities can be prescribed by the regulations. The need for this regulation making power is not elaborated in the explanatory materials despite the breadth of the definition of law enforcement agency and the central role of the definition in the legislative scheme.

The committee therefore seeks the Minister’s advice as to why the definition of a ‘law enforcement agency’ can be expanded by regulation and seeks a justification as to the appropriateness of this delegation of legislative power.

Pending the Minister’s advice, the committee draws Senators’ attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.

Trespass on personal rights and liberties—procedural fairness and disclosure of sensitive law enforcement information
Schedule 1, items 4, 7, 16, 18, 20 and 21

Various proposed amendments in Schedule 1 have the effect of precluding the disclosure of sensitive law enforcement information to various persons, prior to a hearing being granted in relation to regulatory actions or as part of the statement of reasons for such an action being taken (see items 4, 7, 16, and 18 of Schedule 1).

Relatedly, item 19 of Schedule 1 makes a number of amendments relating to the protection and use of sensitive law enforcement information in Administrative Appeals Tribunal (AAT) applications. Proposed section 15M allows for the Secretary to request that the AAT make orders directing a hearing or part of a hearing take place in private, orders about the persons who may attend a hearing and orders prohibiting or restricting the publication or disclosure of information relating to the AAT's review of the matter. Such orders may be made if the Tribunal is satisfied the order is necessary for purposes listed in proposed subsection 15M(3) (which relate to protecting the integrity of law enforcement investigations and the safety of persons involved in those activities). Proposed section 15N would have the effect that the AAT's general power to ensure that an adequate statement of reasons for a reviewable decision is provided to an applicant is varied, so that an applicant is not entitled to sensitive law enforcement information as part of the statement.

Finally, item 20 of Schedule 1 provides that if 'the natural justice hearing rule would, but for the provisions of this Act, require the disclosure of information identified as sensitive law enforcement information under subsection 14LA(1) or (2), this Act is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the disclosure of that information'. The explanatory memorandum states that this measure is 'intended for consistency with the provisions relating to non-disclosure of sensitive law enforcement information, and to ensure that the natural justice hearing rule does not undermine the safeguards in the *Narcotic Drugs Act 1967* in relation to the non-disclosure of sensitive law enforcement information' (at p. 15). The statement of compatibility (at p. 7) also states that the non-disclosure of such sensitive information is considered necessary to protect the integrity of the medicinal cannabis framework and the manufacture of narcotic drugs framework by ensuring that persons who are not fit and

proper persons are not able to hold licences. The explanatory memorandum argues that '[w]ithout the assistance of law enforcement agencies, relevant information to support that objective may not be available to the decision-maker' (p. 15).

It may be accepted that there is a need to balance a person's interest in receiving a fair hearing with the public interest of protecting law enforcement operations and intelligence (see explanatory memorandum, pp 2–3). Nevertheless, it is not clear that the exclusion of the fair hearing rule is necessary to accomplish this objective. The common law rules of procedural fairness are applied with sensitivity to the statutory context. There is no doubt that the courts would recognise that there was a public interest in the Secretary and the AAT receiving sensitive law enforcement information and that the disclosure of such information may undermine the efficacy of the regulatory scheme. The common law rules of procedural fairness are, however, flexible and this flexibility may often mean that an individual's interest in a fair hearing is promoted through the disclosure of some, but not all, of the information in which there is a broad public interest in non-disclosure. For example, it may be possible to give the 'gist' of allegations or information without revealing particular details that may compromise sensitive law enforcement information.

The committee seeks the Minister's advice as to why it is necessary to exclude the natural justice hearing rule, given that the courts apply that rule by reference to a particular statutory scheme and its underlying purposes.

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

Trespass on personal rights and liberties—reversal of evidential burden of proof

Schedule 1, item 11, proposed subsection 14MA(2)

This subsection provides for a number of exceptions to the offence created in subsection 14MA(1) for the disclosure or use of sensitive law enforcement information. A defendant bears an evidential burden in relation to establishing the matters relevant for each of these exceptions. The explanatory

memorandum provides no explanation as to why it is appropriate to reverse the evidential burden of proof in this instance. Explanatory material should directly address these matters as outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

In light of the importance of any reversal of the evidential burden of proof, the committee seeks the Minister’s detailed justification for the proposed approach that addresses each of the instances in the bill against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

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

Delegation of legislative power and parliamentary scrutiny Schedule 2, item 28, proposed subsection 26B(2)

Proposed new subsection 26B(2) provides that in making legislative standards for the purposes of the Act, the standards may incorporate any matter contained in an instrument or other writing as in force or existing from time to time. The effect of this provision is to deprive parliamentary oversight of legislative standards as they may be amended by virtue of changes made to any incorporated instrument or other writing.

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

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

The explanatory memorandum provides no reason for the need for this provision, nor does it indicate whether any such standards will be publicly and freely available.

The committee therefore seeks the Minister's advice as to:

- **why it is necessary to rely on material incorporated by reference (including details about any measures taken to identify alternatives to incorporating material by reference and why such alternatives are not appropriate in this instance); and**
- **if the approach is still considered necessary:**
 - **how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law; and**
 - **whether a requirement specifying that any material incorporated by reference must be freely and readily available can be included in the bill.**

Pending the Minister's advice, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately and insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principles 1(a)(iv) and (v) of the committee's terms of reference.

Narcotic Drugs (Licence Charges) Bill 2016

Purpose	This bill enables the Commonwealth to collect a charge on a licence granted under the <i>Narcotic Drugs Act 1967</i>
Portfolio	Health
Introduced	House of Representatives on 14 September 2016

The committee has no comment on this bill.

Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016

Purpose	This bill amends the <i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i> (OPGGS Act) to: <ul style="list-style-type: none">• ensure the ongoing validity of apportionment agreements, where it becomes apparent that an agreement relates to an area which contains multiple petroleum pools, rather than a single discrete pool; and• ensure legislative support for regulations that provide for refunds and remittals of environment plan levies and safety case levies
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives on 15 September 2016

Retrospective application Schedule 1, item 4

This application provision states that subsections 54(1A) and (1E) of the OPGGS Act apply in relation to an agreement made before, at or after the commencement of this item.

The explanatory memorandum suggests that this is necessary as an apportionment agreement, about a particular petroleum pool which shares both Commonwealth and Western Australian waters, was made before the commencement of Schedule 1 to this bill (at p. 10).

However, although the explanatory memorandum indicates that this item will also give effect to any other agreement that may be negotiated and entered into before the commencement of schedule 1 to this bill, it does not expressly address the question of whether the application of subsections 54(1A) and (1E) to such agreements may cause any detriment to any parties.

The committee seeks the Minister's advice as to whether the application of subsections 54(1A) and (1E) of the OPGGS Act to agreements made

before the commencement of the provisions in this bill could cause detriment to any parties to those agreements.

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

Retrospective commencement Schedule 2, item 3

This item provides that the regulations may make provision for the remittal or refund of part of an amount of an environment plan (EP) levy which had been imposed by the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* (Regulatory Levies Act). Section 2 of the bill lists the commencement date for this item as 7 December 2011.

The explanatory memorandum explains why it is necessary for retrospective commencement of this provision. Neither the Regulatory Levies Act nor the OPGGS Act expressly authorise the making of regulations for the remittal or refund of amounts of a EP levy. Yet, regulations were made on 7 December 2011 to provide for the remittal or refund of amounts of an EP levy in certain circumstances. Since those regulations came into effect the National Offshore Petroleum Safety and Environmental Management Authority has been remitting and refunding amounts.

The explanatory memorandum explains that while there is some uncertainty as to whether such payments that have been made were valid (as they are not expressly authorised by primary legislation), if they are invalid 'those remittals and refunds would have been made without any legal basis, and, in the case of refunds, would amount to payments from the Consolidated Revenue Fund without a valid appropriation' (explanatory memorandum at p. 11).

The committee notes that the amendments seek to validate regulations that enabled payments which have already been made to regulated entities. It does not appear that those entities would suffer any detriment through the proposed retrospective commencement of this provision. The committee also notes that item 4 of Schedule 2 seeks to appropriate funds to offset any payments made (but that the appropriation is not retrospective). **Given the nature of the**

amendment and the explanation provided, the committee makes no further comment on this provision.

In the circumstances, the committee makes no further comment on this matter.

Plebiscite (Same-Sex Marriage) Bill 2016

Purpose	Establishes the legislative framework for a compulsory in-person vote in a national plebiscite that would ask Australians “Should the law be changed to allow same-sex couples to marry?”
Portfolio	Attorney-General
Introduced	House of Representatives on 14 September 2016

The committee has no comment on this bill.

Racial Discrimination Law Amendment (Free Speech) Bill 2016

Purpose	This bill repeals Part IIA of the <i>Racial Discrimination Act 1975</i>
Sponsors	Senators Leyonhjelm, Burston, Culleton, Day, Hanson, Hinch and Roberts
Introduced	Senate on 15 September 2016

The committee has no comment on this bill

Social Services Legislation Amendment (Simplifying Student Payments) Bill 2016

Purpose	<p>This bill amends the means testing for student payments by:</p> <ul style="list-style-type: none"> • removing the exemption from the assets test for youth allowance and austudy payment recipients who are partnered to certain income support recipients; • extending the social security means test rules used to assess interests in trusts and companies to independent youth allowance and austudy payment recipients; • aligning the social security benefit income test treatment of gift payments from immediate family members with existing pension rules; and • amending the family tax benefit income test
Portfolio	Social Services
Introduced	House of Representatives on 14 September 2016

The committee has no comment on this bill.

Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016

Purpose	<p>This bill amends various Acts relating to taxation, superannuation and grants to:</p> <ul style="list-style-type: none"> • establish a remedial power for the Commissioner of Taxation in relation to certain unforeseen or unintended outcomes in taxation and superannuation laws; • allow primary producers to access income tax averaging ten income years after choosing to opt out, instead of that choice being permanent; • provide relief from the luxury car tax to certain public institutions that import or acquire luxury cars for the sole purpose of public display; and • make a number of minor amendments
Portfolio	Treasury
Introduced	<p>House of Representatives on 14 September 2016</p> <p><i>This bill is identical to a bill introduced in the previous Parliament</i></p>

The committee commented on the measures in this bill when it considered the Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016 in the previous Parliament (see pp 23–27 of the committee’s *Alert Digest No. 5 of 2015*). The committee takes this opportunity to re-state these comments and seek the Minister’s advice.

Delegation of legislative power—Commissioner of Taxation’s remedial power **Schedule 1**

Schedule 1 to this bill proposes to confer on the Commissioner of Taxation a new and significant ‘remedial power’ to modify, by a disallowable legislative instrument, the operation of a taxation law. Although the remedial power does not empower the Commissioner to make a textual amendment to the relevant taxation law, it is akin to a so-called Henry VIII law as it enables a legislative

instrument to modify the operation of primary legislation. As applied, the power therefore clearly enables the content of the law to be changed.

The remedial power (see schedule 1, item 3, proposed section 370-5) gives the Commissioner a discretion to determine a modification of the operation of a taxation law where:

- the ‘modification is not is not inconsistent with the intended purpose or object of the provision’; and
- the ‘Commissioner considers the modification to be reasonable, having regard to: (i) the intended purpose or object of the provision; and (ii) whether the cost of complying with the provision is disproportionate to that intended purpose or object’; and
- the Commissioner is advised, by a specified person, that ‘any impact of the modification on the Commonwealth budget would be negligible’.

The remedial power is an extraordinary power. It confers legislative power on an unelected official to modify the operation of significant primary legislation. Although it only arises in the limited circumstances outlined above, it nevertheless has a very broad application as it applies to any taxation law which is defined broadly in the *Income Tax Assessment Act 1997* to include an Act or parts of an Act of which the Commissioner has the general administration (and legislative instruments made under such Acts).

The explanatory materials provide a detailed and useful justification for the introduction of the remedial power. The following features of the approach taken, or the context in which the power will be exercised, were given emphasis:

- Proposed subsection 370-5(4) provides that an entity must treat a modification made under the power as not applying to it and any other entity if the modification would produce a result for the first entity that is ‘less favourable’ than would have been the case absent the modification (see explanatory memorandum, pp 11 and 25–28). Furthermore, proposed subsection 370-5(5) provides that a determination made under the remedial power will not apply to an entity where it would affect a right or liability of that entity under an order made by a court before the commencement of the determination. (explanatory memorandum, p. 29)

- The ‘jurisdictional limits’ on the exercise of the remedial power will be subject to judicial review (as is the case with any statutory power to make a legislative instrument).
- Section 17 of the *Legislation Act 2003* (the LA) provides, in effect, that before exercising the power the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken (see explanatory memorandum, pp 11 and 23–24).
- The explanatory memorandum (at p. 11) states that the remedial power will, in practice, only be used as a last resort, where other options (such as applying a purposive approach or the Commissioner’s general powers of administration) cannot provide a suitable solution. Further, in some cases it may be more appropriate for the Commissioner to seek a Parliamentary amendment rather than to use the power.
- The explanatory materials also emphasise that a determination is, as a disallowable instrument, subject to parliamentary accountability and that the ordinary rules in the LA apply. Thus, for example, any instrument made under this power would not be enforceable if it had not been registered on the Federal Register of Legislation.
- Item 4 of Schedule 1 confers a discretionary power on the Minister to seek a review of the remedial power provisions within 3–5 years of their commencement. If such a review is commissioned it must be tabled in each House of Parliament within 15 sitting days of the Minister receiving the report.

The explanatory memorandum also sets out in detail the reasons why the remedial power is considered necessary (see p. 14). In principle, the committee agrees that the complexity of taxation laws may give rise to unintended outcomes. It is also accepted that where the only response available is to amend the primary legislation this may (properly) involve a lengthy process. In light of these reasons and points offered in justification of the overall approach noted above, the committee considers that the remedial power may have the potential to be a plausible policy response to a practical problem encountered in the administration of taxation laws.

Nevertheless the committee has a number of questions and concerns.

First, the committee questions whether the full breadth of the power is necessary. The explanatory materials do not consider whether it would be possible to limit the application of the remedial power to those areas of

taxation law and administration where the problem of unintended consequences regularly arises. Relatedly, from a scrutiny perspective, it would be preferable if the discretion to invoke the remedial power is limited or structured by the inclusion of legislative guidance as to the circumstances where parliamentary amendment of the primary legislation will be required (rather than use of the remedial power). The explanatory memorandum acknowledges (at p. 11) that there will be some circumstances where change to primary legislation is more appropriate but it does not expressly address whether the bill could include guidance about those circumstances. Nor are examples that illustrate such circumstances provided. The committee is concerned that there is nothing in the proposed amendments to ensure that the remedial power will be used in practice to complement rather than substitute ordinary processes to modify primary legislation. **The committee seeks the Assistant Treasurer’s advice in relation to the above points.**

Second, although it is accepted that the satisfaction of the jurisdictional limits (proposed subsection 370-5(1)) for the making of a determination under the remedial power could be determined in judicial review proceedings, the committee notes that the question of the reasonableness of the modification is a question which would only be reviewable on limited grounds (that is, courts would not be able to review the merits of these determinations). **In this context, the committee seeks the Minister’s advice as to whether a breach of the budget notification requirement (in proposed paragraph 370-5(1)(c)) is intended to result in the invalidity of the determination.**

Third, it is noted that the ‘less favourable result’ test (see proposed subsection 370-5(4)) involves some complexity and may generate uncertainty in its application. The committee recognises (and welcomes) the need to ensure that changes to the operation of taxation laws made by use of this extraordinary remedial power do not adversely affect taxpayers. The committee also acknowledges the detailed explanation as to the rationale for adopting the ‘less favourable result’ test outlined in the explanatory memorandum (see pp 25–28). **However, the committee seeks the Minister’s advice as to whether uncertainty in the application of the remedial power, including the ‘less favourable result’ test, may be considered to negate any potential benefits of the proposed regime (for example, a central rationale for the proposed power is to increase certainty in the administration of taxation laws—see explanatory memorandum, p. 14).**

Fourth, although the LA does include *general* consultation requirements, the committee would be assisted by more information about what consultation is, in practice, to be undertaken prior to the exercise of the remedial power. **In particular, the committee seeks the Minister's advice as to whether affected taxpayer(s) in each instance will be consulted.**

Noting the extraordinary nature of this proposed remedial power and the fact that breach of the LA consultation requirements does not result in the invalidity of a legislative instrument, **the committee also seeks the Minister's advice as to whether consideration has been given to:**

- **including more specific consultation requirements in the bill (for example, to provide that all relevant stakeholders must be consulted, a minimum period of consultation, and/or minimum advertising requirements, such as a requirement for including information about consultations on the ATO's website); and**
- **making compliance with these requirements a condition of the validity of the determination.**

Fifth, it appears that a determination modifying a taxation law may be given retrospective application (see explanatory memorandum, p. 49). Retrospective changes to the law may undermine public confidence in the legal system even if there are strong reasons to justify a particular change being applied from a date prior to commencement. In light of the fact that, in this instance, it is the determination of a non-elected official that may generate retrospective application, **the committee seeks the Minister's advice as to whether consideration has been given to including limits in the bill on the extent of retrospectivity allowed in determinations made under the remedial power (for example, that laws as modified may only be given retrospective operation for a limited time).**

Sixth, **the committee seeks the Minister's advice as to why the Minister's power to cause a review to be undertaken of the operation of the remedial power provisions within three to five years of them commencing is discretionary rather than mandatory. Given the extraordinary delegation of legislative power involved the committee considers that there should be a mandatory report provided to the Parliament within three years.**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Water Legislation Amendment (Sustainable Diversion Limit Adjustment) Bill 2016

Purpose	This bill amends the <i>Basin Plan 2012</i> to allow Basin States to notify a second package of sustainable diversion limit adjustment measures by 30 June 2017
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 15 September 2016

The committee has no comment on this bill.

Commentary on amendments and additional explanatory materials

Broadcasting Legislation Amendment (Media Reform) Bill 2016 *[Digest 4/16 and 6/16 – no comment]*

On 12 September 2016 the Minister for Justice (Mr Keenan) presented a replacement explanatory memorandum in the House of Representatives.

The committee has no comment on this replacement explanatory memorandum.

Scrutiny of Standing Appropriations

The committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

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

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

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

Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016 — Schedule 2, Part 2, Division 2, subitem 4(4)

Other relevant appropriation clauses in bills

Plebiscite (Same-Sex Marriage) Bill 2016 — Part 4, clause 40 – for particular purposes