The Senate

Standing Committee for the Scrutiny of Bills

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Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

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

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Introduction

Terms of reference

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

- undue trespass on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will often correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

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

General information

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

Chapter 1

Commentary on Bills

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

Agriculture and Water Resources Legislation Amendment Bill 2016

Purpose	This bill seeks to amend 13 portfolio Acts to: • cease four redundant statutory bodies; • remove unnecessary regulation; and • make technical amendments The bill also will repeal 12 Acts that are redundant
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 1 December 2016

Limitation on delegation of Secretary's power to make legislative instruments[1]

1.2 Item 28 of Schedule 1 proposes removing the ability of the Secretary to delegate his or her general rule-making power under section 106 of the *Farm Household Support Act 2014*. The explanatory memorandum notes that the proposed amendment responds to concerns raised by the Senate Standing Committee on Regulations and Ordinances.[2]

1.3 This committee has consistently drawn attention to legislation that allows delegation of administrative or legislative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. In its *Delegated Legislation Monitor No. 12 of 2014* the Regulations and Ordinances Committee noted the preference of this committee that 'the delegation of legislative power be only as broad as is strictly required' and therefore requested

1 Schedule 1, item 28, proposed subsection 101(3) of the *Farm Household Support Act 2014*.

2 Explanatory memorandum, p. 12.

'that the *Farm Household Support Act 2014* be amended to specifically exclude the delegation of the general rule-making power'.[3]

1.4 The committee therefore welcomes this proposed amendment which will ensure that the delegation of legislative power in this instance is appropriately limited.

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

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

Parliamentary scrutiny—removing requirements to table certain documents[4]

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

- funding agreements between the Commonwealth and Australian Livestock Export Corporation Limited and reports on compliance with the funding agreement;[5]
- the annual report of the Australian Livestock Export Corporation Limited;[6]
- funding contracts between the Commonwealth and Dairy Australia Limited;[7]
- the financial (annual) report of Dairy Australia Limited;[8]
- reports following the annual general meetings of Dairy Australia Limited;[9]
- funding contracts between the Commonwealth and Forest and Wood Products Australia Limited;[10] and
- funding contracts between the Commonwealth and Sugar Research Australia Limited.[11]

3 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 12 of 2014*, p. 16.

4 Schedule 1, items 58–66.

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

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

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

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

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

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

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

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

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

- **why the requirement for these documents to be tabled in Parliament is proposed to be removed; and**
- **whether each of the documents referred to above (at paragraph 1.6) will be made available online (including other legislative provisions, if any, which require the publishing of these documents online).**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they 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.*

Airports Amendment Bill 2016

Purpose	This bill seeks to amend the *Airports Act 1996* relating to master plans and major development plans to: • reduce administrative and compliance costs for operators; • create regulatory certainty for industry; and • effective regulatory oversight
Portfolio	Infrastructure and Transport
Introduced	House of Representatives on 1 December 2016

The committee has no comment on this bill.

Air Services Amendment Bill 2016

Purpose	This bill seeks to amend the law in relation to air services by: • setting clear requirements for consultation and reporting on the part of Airservices Australia in relation to aircraft noise; and • establishing an independent Aircraft Noise Ombudsman and an independent Community Aviation Advocate
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 28 November 2016

Broad regulation-making power[12]

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

1.10 The committee will generally have scrutiny concerns where an entire regulatory scheme and/or significant matters, such as immunity from civil proceedings,[13] are left to delegated legislation, unless a sound justification for the use of delegated legislation is provided.

1.11 Although proposed subsection 74B(2) sets out functions for the Ombudsman which must be included in the scheme and subsection 74B(3) provides that the scheme must provide for a number of specified matters, there is no information in the explanatory memorandum as to why the scheme should not be dealt with in the primary legislation.

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

> *Pending the Member'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.*

12 Schedule 1, item 8, proposed subsection 74B(1).

13 See proposed paragraph 74B(1)(i).

Australian Meat and Live-stock Industry (Amendment) (Tagging Live-stock) Bill 2016

Purpose	This bill seeks to amend the *Australian Meat and Live-stock Industry Act 1997* to ensure that all live-stock exported from Australia are fitted with an electronic tag and that all data from the tag is captured at all stages from the export supply chain
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 28 November 2016

The committee has no comment on this bill.

Charter of Budget Honesty Amendment (Regional Australia Statements) Bill 2016

Purpose	This bill seeks to amend *Charter of Budget Honesty Act 1998* to ensure that the framework for the conduct of Government fiscal policy includes an obligation to publicly release and table a regional Australia statement together with each budget economic and fiscal outlook report and each mid-year economic and fiscal outlook report
Portfolio/Sponsor	Ms Cathy McGowan MP
Introduced	House of Representatives on 28 November 2016

The committee has no comment on this bill.

Commonwealth Electoral Amendment (Donation Reform and Transparency) Bill 2016

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to: • reduce the disclosure threshold from 'more than $10,000' (indexed to the Consumer Price Index annually) to $1,000; • ensure that for the purposes of the $1,000 threshold and the disclosure of gifts, related political parties are treated as the one entity; • prohibit the receipt of a gift of foreign property and all anonymous gifts by registered political parties, candidates and members of a Senate group; • provide that public funding of election campaigning is limited to declared expenditure incurred by the eligible political party, candidate or Senate group, or the sum payable calculated on the number of first preference votes received where they have satisfied the four per cent threshold, whichever is the lesser; • provide for the recovery of gifts of foreign property that are not returned, anonymous gifts that are not returned and undisclosed gifts; and • introduce new offences and penalties and increase the penalties for existing offences
Sponsor	Senator Don Farrell
Introduced	Senate on 28 November 2016

Vicarious liability[14]

1.13 Vicarious liability is the liability imposed on one person for the wrongful act of another on the basis of the legal relationship between them. Proposed subsection 315(10B) deems officers of certain entities liable for an offence of unlawful receipt of a gift where the gift is received by the entity of which they are an officer. For example, if a registered political party unlawfully receives a gift this provision deems the registered officer, secretary or agent of the party liable for the unlawful receipt of gift offence. As such, this proposed provision imposes vicarious liability on these officers. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that 'vicarious, collective or deemed liability should only be used in situations where it can be strictly

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

justified…this is because it cuts across the fundamental principle that an individual should be responsible only for his or her own acts and omissions'.[15]

1.14 **The committee has consistently taken the view that vicarious liability should only be used where the consequences for the offence are so serious that the normal requirement for proof of fault can be put aside. As neither the statement of compatibility nor the explanatory memorandum addresses this issue, the committee requests the Senator's advice as to why vicarious liability has been imposed in this instance and whether the principles identified in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*[16] have been considered.**

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

Reversal of evidential burden of proof[17]

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

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

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

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

1.18 **As neither the statement of compatibility nor the explanatory memorandum addresses this issue, the committee requests the Senator's advice as to why offence-specific defences (which reverse the evidential burden of proof) have been used in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it**

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

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

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

explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[18]

> *Pending the Senator'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.*

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

Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

Purpose	This bill seeks to amend the *Competition and Consumer Act 2010* (the Act) to: • prohibit corporations with substantial market power from engaging in conduct that has the purpose of substantially lessening competition in markets in which they directly or indirectly participate; • repeal the telecommunications-specific anti-competitive conduct provisions of the Act
Portfolio/Sponsor	Treasury
Introduced	House of Representatives on 1 December 2016

The committee has no comment on this bill.

Customs and Other Legislation Amendment Bill 2016

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

Penalties in regulations[19]

1.19 Item 4 of Schedule 7 proposes to amend section 17 of the *Commerce (Trade Descriptions) Act 1905* to enable regulations made under the Act to prescribe penalties, not exceeding 50 penalty units, for offences against the regulations. This item represents a significant delegation of legislative power in that it allows regulations (which are not subject to the same level of parliamentary scrutiny as primary legislation) to impose a penalty. The committee's view is that significant matters, such as the imposition of penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.20 While the committee notes that this proposed provision conforms with the guidance in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that 'regulations should not be authorised to impose fines

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

exceeding 50 penalty units',[20] the committee still expects that any provisions which allow regulations to impose a penalty of any level will be justified in the explanatory memorandum.

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

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

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

Customs Tariff Amendment Bill 2016

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

Significant matters in delegated legislation[21]

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

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

1.24 The explanatory memorandum merely states that this proposed change will enable 'countries and places to be more easily updated when required'.[22] The committee's view is that significant matters, such as matters relating to the imposition of customs duty, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

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

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

22 Explanatory memorandum, p. 6.

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

Excise Levies Legislation Amendment (Honey) Bill 2016

Purpose	This bill seeks to amend the *Primary Industries (Excise) Levy Act 1999* to remove an obsolete provision whereby a buyer may give to the seller a certificate of the buyer's intention to export honey
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 1 December 2016

The committee has no comment on this bill.

Fair Work Amendment (Pay Protection) Bill 2016

Purpose	This bill seeks to amend the *Fair Work Act 2009* to extend protections for employees covered by an enterprise agreement to require employers to pay a base rate of pay, full rate of pay and any casual loading that is no less than the national minimum wage order or award
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 28 November 2016

The committee has no comment on this bill.

Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (No. 2)

Purpose	This bill seeks to amend the *Income Tax Rates Act 1986* to apply a 15 per cent income tax rate to working holiday maker taxable income on amounts up to $37,000, with ordinary tax rates for taxable income exceeding this amount
Portfolio	Treasury
Introduced	House of Representatives on 28 November 2016
Bill status	This bill received Royal Assent on 2 December 2016

The committee has no comment on this bill.

Migration Amendment (Putting Local Workers First) Bill 2016

Purpose	This bill seeks to amend the *Migration Act 1958* and *Migration Regulations 1994* to: • require employers nominating 457 visa workers under labour agreements, and as standard business sponsors, to meet certain labour market testing requirements; • require certain sponsors in specified sectors to employ their guest workers under a Labour Agreement; • introduce an Australian Jobs Test that requires employers to demonstrate their contribution to local employment and skills development as part of their application to sponsor temporary workers; • require the minister to publish policy guidelines relating to the negotiation of certain agreements; • require certain 457 visa applicants to hold a relevant licence or undertake a mandatory skills assessment
Portfolio/Sponsor	Mr Bill Shorten MP
Introduced	House of Representatives on 28 November 2016

The committee has no comment on this bill.

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Purpose	This bill seeks to amend the *Migration Act 1958* (the Act) to: • harmonise and streamline Part 5 and Part 7 of the Act relating to merits review of certain decisions; • make amendments to certain provisions in Part 5 of the Act to clarify the operation of those provisions; • clarify the requirements relating to notification of oral review decisions; and • make technical amendments to Part 7AA of the Act
Portfolio	Immigration and Border Protection
Introduced	30 November 2016

Limitation on merits review[23]

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

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

- that the Minister has issued a conclusive certificate in relation to the decision, on the basis that the Minister believes it would be contrary to the national interest to change or review the decision;
- that the decision to cancel a protection visa was made by the Minister personally;
- the decision is made in relation to a non-citizen who is not physically present in the migration zone when the decision is made; or

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

- that the decision is a fast track decision. A 'fast track decision' is a decision to refuse to grant a protection visa to certain applicants,[24] for which a very limited form of review is available under Part 7AA of the Act.

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

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

> *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.*

Access to material by merits review applicants[25]

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

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

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

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

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

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.

Enforcing notification and reason-giving requirements[26]

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

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

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Provision of written statements to merits review applicants[27]

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

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

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

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

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

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

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

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions and to delegate legislative powers inappropriately, in breach of principles 1(a)(iii) and 1(a)(iv) of the committee's terms of reference.*

Limitation on judicial review[28]

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

1.40 The explanatory memorandum states that 'it would be an inappropriate use of the Federal Circuit Court's time and resources to determine whether the dismissal decision has been correctly made under paragraph 362(1A)(b) prior to one of the three possible outcomes above' (i.e. prior to possible reinstatement or confirmation to dismiss) and that an applicant may still seek review of the decision to dismiss in the ordinary jurisdiction of the High Court.[29]

1.41 The committee notes this explanation, although it generally does not consider the potential impact of review on a court's time and resources or the fact that the constitutionally entrenched minimal level of judicial review is still available

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

29 Explanatory memorandum, p. 24.

in the High Court, to be sufficient justification for limiting the availability of judicial review in the lower courts (which is more accessible and less costly for review applicants).

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

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

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Merits review[30]

1.44 Item 53 seeks to insert a new section 358A into the Migration Act. The proposed section sets out how the AAT is to deal with new claims or evidence in respect of refugee review decisions in relation to a protection visa. This section substantially mirrors current section 423A of the Migration Act.

1.45 Current section 423A was inserted into the Migration Act following passage of the *Migration Amendment (Protection and Other Measures) Act 2015* (the Migration (Protection and Other Measures) Act). The committee commented on the insertion of section 423A in its *Tenth Report of 2014*[31] and takes this opportunity to restate its comments below.

1.46 The proposed section provides that, if an applicant raises a claim or presents evidence relevant to a protection visa not previously placed before the original decision-maker in relation to an application for review of a reviewable refugee decision, then the tribunal is required to draw an unfavourable inference about the credibility of the claim or evidence. However, this unfavourable inference is only to be drawn if the Tribunal is satisfied that the applicant does not have a reasonable explanation why the claim was not raised, or the evidence was not presented, before the primary decision was made. The explanatory memorandum to the bill that

30 Schedule 1, item 53, proposed section 358A.

31 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014,* 27 August 2014, pp 443–448.

became the Migration (Protection and Other Measures) Act stated that the purpose of this amendment was 'to ensure that protection visa applicants are forthcoming with all of their claims and evidence as soon as possible'.[32]

1.47 Merits review tribunals are, in general, given the task of making the 'correct or preferable' decision. In performing this function it has long been accepted that the critical question for a merits review tribunal is not whether the decision which the original decision-maker was the correct or preferable decision on the material before the original decision-maker. Rather, the question for a merits review tribunal is what is the correct or preferable decision on the material before the tribunal. This explains why the courts have concluded that a proper exercise of the function of merits review will, as a general rule, involve 'contemporaneous review' whereby applicants are entitled to introduce new facts to support their applications at the time of the tribunal hearing.[33]

1.48 Thus, limiting merits review tribunals to facts and claims presented in an original application is a significant departure from their typical and distinctive function. Although the courts have recognised that it may be that contemporaneous review is inappropriate given the nature of a particular decision-making power, it is not immediately apparent why the nature of decisions concerning protection visas would justify a departure from the normal approach to merits review, which derives from the overriding function of making the correct or preferable decision. Arguably, the importance of ensuring compliance with Australia's international obligations in relation to refugees indicates that departure from contemporaneous review in the context of merits review of decisions to refuse protection visas should be well justified in the explanatory memorandum.

1.49 The committee also previously noted that the appropriateness of the proposed amendment was difficult to evaluate given that the circumstances which may support the Tribunal being satisfied that there is a 'reasonable explanation' for the failure to raise a claim or present evidence to the original decision-maker remained unspecified in the legislation. The committee therefore sought the Minister's advice as to the justification for departing from the general approach to the role played by merits review.

1.50 In addition to the general response sought above, the committee also sought the Minister's advice on the following specific issues:

- The extent of any practical problem created for the Tribunal in dealing with claims raised and evidence presented during a review application which were not raised earlier by applicants.

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32 Explanatory memorandum to the Migration Amendment (Protection and Other Measures) Bill 2014, p. 14.

33 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

- Why any such problem could not be dealt with by a provision which allows rather than requires an adverse inference to be drawn. Such an approach would appear to be less likely to result in outcomes which depart from the general function of merits review to reach the correct and preferable decision by enabling the Tribunal to consider the appropriateness of its factual inferences in the individual circumstances of particular cases.
- Whether it is possible to give greater legislative guidance as to the meaning of 'reasonable explanation'. In this respect the committee notes that the explanatory memorandum did little to clarify what circumstances might legitimately lead the Tribunal to be satisfied that a reasonable explanation has been provided.

1.51 The Minister provided a detailed response to the committee outlining the justification for the proposed approach, noting practical considerations for the Tribunal, the meaning of 'reasonable explanation', the availability of natural justice and a rationale for requiring (rather than just allowing) an adverse inference to be drawn.[34]

1.52 Following consideration of the Minister's response in relation to the identical provision to that contained in this bill, the committee previously noted that it remained unclear why it was necessary to *require* the Tribunal to draw an unfavourable inference against the applicant in specified circumstances, but in light of the information provided the committee left the appropriateness of the provision to the consideration of the Senate as a whole.

1.53 **In light of the committee's previous consideration and correspondence with the Minister in relation to an identical provision to that contained in this bill, the committee draws the scrutiny concerns set out above to the attention of Senators and leaves to the Senate as a whole the appropriateness of requiring the Tribunal to draw an adverse inference about the credibility of a claim or evidence that a protection visa applicant raises that was not previously placed before the original decision-maker**.

> *The committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

34 The Minister's full response is available at Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, 27 August 2014, pp 445–448.

Passenger Movement Charge Amendment Bill (No. 2) 2016

Purpose	This bill seeks to amend the *Passenger Movement Charge Act 1978* to provide that the rate of passenger movement charge of $60 to apply from 1 July 2017 will not increase for a minimum period of five years from that date
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 28 November 2016
Bill status	This bill received Royal Assent on 2 December 2016

The committee has no comment on this bill.

Statute Update (A.C.T. Self-Government (Consequential Provisions) Regulations) Bill 2016

Purpose	This bill seeks to amend a number of Commonwealth Acts to incorporate modifications made by the *A.C.T. Self-Government (Consequential Provisions) Regulations* (the ASGR), and enable the repeal of certain provisions of the ASGR
Portfolio	Infrastructure and Regional Development
Introduced	House of Representatives on 30 November 2016

The committee has no comment on this bill.

Superannuation Amendment (PSSAP Membership) Bill 2016

Purpose	This bill seeks to amend the *Superannuation Act 2005* to enable certain members of the Public Sector Superannuation Accumulation Plan who move to non-Commonwealth employment to choose to remain a contributory member of the scheme
Portfolio	Finance
Introduced	House of Representatives on 1 December 2016

The committee has no comment on this bill.

Superannuation (Departing Australia Superannuation Payments Tax) Amendment Bill (No. 2) 2016

Purpose	This bill seeks to amend the *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007* to reduce the rate from 95 per cent to 65 per cent for the departing Australia superannuation payments tax that applies to amounts attributable to superannuation contributions made while a person was a working holiday maker
Portfolio	Treasury
Introduced	House of Representatives on 1 December 2016
Bill status	This bill received Royal Assent on 2 December 2016

The committee has no comment on this bill.

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

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

Broad delegation of legislative power[35]

1.54 Schedule 1 to the bill seeks to amend the *Therapeutic Goods Act 1989* (the TG Act) to enable sponsors of therapeutic goods to, 'in appropriate circumstances', make changes to information about their goods included in the Australian Register of Therapeutic Goods (the Register) by way of a notification to the Secretary, rather than by applying to seek the Secretary's approval for the variation. The main effect of including goods in the Register is that sponsors of those goods may lawfully import, export, manufacture and supply those goods.[36]

1.55 Items 1, 3 and 5 of Schedule 1 will have the effect that where a sponsor requests a variation to its entry on the Register, and the variation is of a kind specified in the regulations and meets the conditions prescribed in the regulations,

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

36 Explanatory memorandum, p. 11.

then the Secretary must vary the entry on the Register.[37] No further detail is provided as to what kind of variation, or type of conditions, may be prescribed.

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

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

Significant matters in delegated legislation[38]

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

1.58 Proposed subsection 41EWA(1) provides that 'the regulations may make provision for and in relation to empowering the Secretary to make conformity assessment body determinations'. As such, this provides a broad regulation-making power which leaves most of the elements of how Australian companies will be able to be designated as 'conformity assessment bodies' to delegated legislation (which is not subject to the same level of parliamentary scrutiny as primary legislation). Proposed subsection 41EWA(3) notes that the regulations may make provision for, among other things, the following matters:

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

1.59 Furthermore, proposed subsection 41EWA(5) enables the regulations to prescribe conditions that may apply to a conformity assessment body determination. Examples of the conditions that may be prescribed in future regulations are provided

37 Explanatory memorandum, pp 11–12.

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

in proposed subsection 41EWA(6) and include the power to enter, inspect and take recordings of premises and to require the production of information or documents.

1.60 Proposed subsection 41EWA(8) is intended to make it clear that despite the specific powers and activities permitted to be prescribed in new subsections 41EWA(3)–(7), none of these provisions are intended to limit the broad regulation making power in proposed subsection 41EWA(1).[39]

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

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

- **why it is considered necessary to leave most of the elements of this new scheme to delegated legislation;**
- **what sanctions it is envisaged may be imposed on bodies that breach conditions of a conformity assessment body determination;**
- **who it is envisaged may be designated as an 'authorised person' for the purposes of the conditions outlined in proposed subsection 41EWA(6) and whether limits on who may be designated as an 'authorised person' can be included on the face of the bill;**
- **the type of consultation that it is envisaged will be conducted prior to the making of regulations establishing the 'conformity assessment body determinations' scheme and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument); and**
- **how it is envisaged that the application and assessment fees will be calculated and whether the bill can be amended to provide greater legislative guidance as to how the fee amount is to be determined (including the method of indexation, if any) and/or to limit the fee that may be imposed by delegated legislation.[40]**

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39 Explanatory memorandum, pp 14–15.

40 For further discussion in relation to prescribing fees in delegated legislation see paragraphs 1.76–1.78.

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

Broad delegation of administrative powers[41]

1.63 Proposed subsection 41EWA(9) is intended to make it clear that while the Secretary is nominated as the person exercising powers or performing functions in connection with the designation of conformity assessment bodies, this does not preclude the regulations from allowing any or all of the Secretary's powers or functions to be delegated.[42]

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

- proposed subsection 25AAA(8)—delegation of the Secretary's functions and powers relating to therapeutic goods (priority applicant) determinations; and
- proposed subsections 57(8) and 57(9)—delegation of the powers of the Secretary under sections 19A, 32CO and 41HD of the TG Act.[43]

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

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

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

42 Explanatory memorandum, p. 15.

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

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

Strict liability offences[44]

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

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

1.69 The committee requests a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[45]

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

Consultation prior to making delegated legislation[46]

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

1.71 The repeal of subsection 10(4) would remove the requirement for the Minister to consult with a committee prior to making standards for medicines and other therapeutic goods. In explaining the repeal of this provision, the explanatory memorandum states that a committee known as the Therapeutic Goods Committee 'will cease to exist on 1 January 2017' and that it will be replaced by other statutory

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

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

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

committees with functions that include providing advice on a range of matters including standards for relevant types of therapeutic goods. The explanatory memorandum also notes that 'the Minister will have the option of consulting any one or more of the new replacement committees about matters that include standards'.[47]

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

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

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

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

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

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

47 Explanatory memorandum, p. 23.

Fees in delegated legislation[48]

1.76 Schedule 5 to the bill seeks to implement a recommendation of the Expert Panel Review of Medicines and Medical Devices Regulation in relation to providing review and appeal rights for persons who apply to have new ingredients permitted for use in listed complementary medicines. Currently, a person may apply to the Minister for a variation to the permissible ingredients legislative instrument made by the Minister under section 26BB of the TG Act. Items 1 and 2 seek to incorporate a new step for the Secretary to make a recommendation to the Minister about such variations in order to accommodate the provision of review and appeal rights for applicants for new ingredients.

1.77 The committee welcomes the addition of these review and appeal rights.[49] However, the committee notes that the bill provides that both an application and evaluation fee may be prescribed in the regulations. There is no guidance in the legislation as to how the fee amount might be determined, and no explanation has been provided as to why it is necessary to charge a fee for the application plus a fee for the evaluation itself. The committee understands it may be possible to explicitly state on the face of the bill that the amount of fee be limited to cost recovery,[50] to set a maximum limit on the fee that may be imposed, to prescribe a formula by which the fee amount is calculated or, in the case of indexation, to include the method of calculating indexation on the face of the bill. In some legislation a provision is included which provides that 'a fee must not be such as to amount to taxation'. Office of Parliamentary Counsel Drafting Direction 3.6 states that:

> AGS has advised that it is inherent in the concept of a 'fee' that the liability does not amount to taxation. However, it is quite common to put such a provision in anyway to avoid confusion and to emphasise the point that we are dealing with fees and not taxes. AGS has expressed the view that such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.[51]

1.78 While the committee notes that the setting of the level of fees is often left to delegated legislation, the committee requests the Minister's advice as to whether consideration has been given to providing greater legislative guidance as to how the fee amount (and the method of indexation, if any) is to be determined. The committee also requests the Minister's advice why it considered necessary to

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

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

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

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

provide for an application *and* an evaluation fee, rather than providing for only a single fee.

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

Reversal of evidential burden of proof[52]

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

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

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

1.82 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[53]

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

Privilege against self-incrimination[54]

1.83 Proposed section 41AG provides that a person is not excused from giving information or producing a document under a section 41AB notice on the ground that the giving of the information or the production of the document would tend to incriminate the person or expose the person to a penalty. This provision therefore

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

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

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

overrides the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.[55]

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

1.85 The committee requests the Minister's advice as to why it is proposed in the bill to abrogate the privilege against self-incrimination, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[56]

> *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.*

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

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

Transport Security Legislation Amendment Bill 2016

Purpose	This bill seeks to introduce regulation making powers in the Aviation Act that will enable aviation security screening to be undertaken on people, vehicles and goods operating within a restricted area or zone at a security controlled airport
Portfolio/Sponsor	Infrastructure and Regional Development
Introduced	House of Representatives on 1 December 2016

Broad delegation of administrative powers[57]

1.86 Items 7 and 8 will allow the Secretary of the Department of Infrastructure and Regional Development to, by writing, delegate most of his or her powers and functions under the *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) to *any* APS employee in the Department. Currently these delegations are limited to departmental officers at the Executive 2 level or above. These include some very significant powers and functions, including the giving of security directions or determinations of adverse aviation security status.[58]

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

57 Schedule 1, item 7, subsection 127(2) of the *Aviation Transport Security Act 2004* and Schedule 1, item 8, subsection 202(2) of the *Maritime Transport and Offshore Facilities Security Act 2003*.

58 See, for example, s 44(3) (Requirements for screening and clearing—written notices), ss 51 & 59 (Secretary may permit by class—weapons/prohibited items), s 67 (Secretary may give special security directions), s 74G (Secretary may determine that a person has an adverse aviation security status), and ss 109 & 111 (Secretary may require security compliance information/aviation security information) of the Aviation Act and s 22 (Secretary may declare maritime security level 2 or 3), ss 33, 36 & 36A (Secretary may give security directions), ss 88 & 100ZE (Secretary may delegate powers and functions), ss 99 & 100ZM (Secretary may give control directions), ss 125 & 132 (Secretary may permit by class—weapons/prohibited items), ss 136, 145D & 147 (Appointment of inspectors and duly authorised officers), and s 184 (Secretary may require security compliance information) of the Maritime Act. Please note these provisions are provided as examples only and are not an exhaustive list of the significant powers and functions within these Acts.

provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.88 The only explanation provided for allowing the delegation of most of the Secretary's functions to APS employees of any level is that it would 'give the Department greater administrative flexibility and capacity to process increased numbers of regulatory submissions from industry participants within statutory timeframes and to adapt administrative practices to changes in the security environment'.[59] The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

1.89 The committee requests the Minister's detailed advice as to why the bill proposes to allow most of the Secretary's powers and functions to be delegated to APS employees at any level. In particular, the committee notes that some very significant powers and functions will be able to be delegated to *any* APS employee and seeks the Minister's advice as to whether further exceptions to this broad delegation of administrative power could be added to subsection 127(2) of the Aviation Act and subsection 202(2) of the Maritime Act so that the delegation is more appropriately constrained.

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they 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.*

59 Explanatory memorandum, p. 2.

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

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

Significant penalties in delegated legislation[60]

1.90 Proposed section 981J will allow ASIC to make rules (delegated legislation) in relation to the reporting and reconciliation of derivative retail client money by financial services licensees. The explanatory memorandum provides the following justification for this delegation of legislative power:

> It is appropriate for the detail of the client money reporting requirements to be determined by ASIC in client money reporting rules, given the complexity involved in prescribing specific reporting requirements and the need to ensure the rules keep pace with market developments. Developing and maintaining an appropriate regulatory framework for derivative client money requires close continuous monitoring of derivative markets and the ability to update the reporting requirements at short notice, which ASIC is best positioned to undertake.[61]

60 Schedule 5, items 14 and 21, proposed sections 981J–981K, 981M and subsection 1317E(1) of the *Corporations Act 2001*.

61 Explanatory memorandum, pp 77–78.

1.91 The committee notes this explanation which emphasises the complexity and variability of derivative markets.

1.92 The committee also notes that contravention of the client money reporting rules may give rise to a civil penalty. Proposed subsection 981K(3) provides that the rules may include a civil penalty amount not exceeding $1 million. This represents a significant delegation of legislative power in that it allows rules (which are not subject to the same level of parliamentary scrutiny as primary legislation) to impose a very significant civil penalty. The committee's view is that significant matters, such as the imposition of penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.93 In this case, the explanatory memorandum notes that:

> A maximum penalty of $1 million reflects that misuse of retail client money is a serious matter that can result in significant monetary losses for affected retail investors and undermine confidence in Australian financial markets…it is important that penalties for breaches of the law in this area are sufficiently severe to have a genuine deterrent effect.[62]

1.94 The committee notes the explanation provided in the explanatory memorandum in relation to why rules can be made setting a maximum civil penalty of $1 million and the general explanation as to why the client money reporting rules are provided in delegation legislation. In light of this information, the committee leaves to the Senate as a whole the appropriateness of the proposed delegation of legislative power.

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

Consultation prior to making delegated legislation[63]

1.95 Proposed subsection 981L(1) provides that ASIC 'must not make a client money reporting rule [delegated legislation] unless ASIC has consulted the public about the proposed rule'. The explanatory memorandum notes that 'this ensures that stakeholders have the opportunity to review and comment on draft rules before they are made'.[64] Proposed subsection 981L(2) does not limit the ways in which ASIC may comply with the consultation obligation, however it provides that ASIC is taken to comply with the obligation if ASIC makes the proposed rule available on its website and invites the public to comment on it.

62 Explanatory memorandum, p. 81.

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

64 Explanatory memorandum, p. 80.

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

1.97 The committee therefore welcomes the inclusion of the consultation obligation in proposed subsections 981L(1)–(2). However, the committee notes that proposed subsection 981L(3) provides that a failure to comply with the consultation obligation does not invalidate the client money reporting rule. The importance of consultation in this instance is emphasised in the explanatory memorandum, which states that ASIC would be expected to consult the Office of the Australian Information Commissioner where proposed rules potentially involve the handling of personal information that could impact on the privacy of individuals.[65]

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

> *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.*

65 Explanatory memorandum, p. 80.

Commentary on amendments and explanatory materials

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

[Digest 6/16 – no response required]

1.99 On 29 November 2016 the Senate agreed to two Nick Xenophon Team and one Derryn Hinch's Justice Party amendments, and on 30 November 2016 agreed to one Derryn Hinch's Justice Party/Nick Xenophon Team amendment.

1.100 On 30 November 2016 the House of Representatives agreed to the Senate amendments and the bill was passed.

1.101 The committee notes that these amendments remove a provision of the bill (**item 2 of Schedule 1**) on which the committee had previously made scrutiny comments relating to the exclusion of judicial review.[1] The amendments therefore address the committee's scrutiny concerns in relation to this bill.

Building and Construction Industry (Improving Productivity) Bill 2013

[Digest 6/16 – no response required]

1.102 On 29 November 2016 the Senate agreed to the following amendments:

- one Opposition;
- three Nick Xenophon Team;
- three Derry Hinch's Justice Party/Jacqui Lambie Network/Culleton/Nick Xenophon Team;
- one Liberal Democratic Party/Derryn Hinch's Justice Party/Nick Xenophon Team; and
- one Derryn Hinch's Justice Party/Culleton.

1.103 On 30 November 2016 the Senate agreed to the following amendments:

- 10 Nick Xenophon Team/Derry Hinch's Justice Party;
- 29 Derryn Hinch's Justice Party/Nick Xenophon Team; and
- One Derryn Hinch's Justice Party.

1 Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2014*, 26 March 2014, pp 90–92.

1.104 On 30 November 2016 the House of Representatives agreed to the Senate amendments and the bill passed both Houses.

1.105 The committee notes that these amendments remove a provision of the bill (**subclause 7(4)**) on which the committee had previously made scrutiny comments relating to the reversal of the legal burden of proof.[2] The amendments therefore address the committee's scrutiny concerns in relation to this matter.

1.106 However, the committee also notes that the amendments do not address other scrutiny concerns that the committee had in relation to this bill.

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

[Digest 7/16 – Reports 10/16]

1.107 On 29 November 2016 the Minister for Employment (Senator Cash) tabled an addendum to the explanatory memorandum.

1.108 On 1 December 2016 the Senate agreed to 58 Government amendments, and the Attorney-General (Senator Brandis) tabled a supplementary explanatory memorandum.

1.109 The committee notes that **government amendments 12–15** will ensure that an applicant for a continuing detention order must give an offender a complete copy of the application within a reasonable period before a preliminary hearing for a continuing detention order. The amendments will also require an application for a continuing detention order to include any material, or a statement of facts, that the applicant is aware of that could reasonably be regarded as supporting a finding that the order should not be made. These amendments address the committee's scrutiny concerns in relation to the provision of sufficient information to offenders prior to the hearing of a continuing detention order application.[3]

1.110 **Government amendments 24–26** partly address the committee's scrutiny concerns in relation to confining the mandatory relevant considerations which the court must have regard to in making a continuing detention order.[4] The amendments confine the court's consideration of an offender's criminal history to prior conviction for relevant terrorist offences (and not their criminal history more broadly), although subsection 105A.8(2) provides that the Court may have regard to any other matter that it considers relevant (beyond the listed mandatory relevant considerations).

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2 Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2014*, 26 March 2014, pp 97–100.

3 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2016*, 30 November 2016, pp 639–641.

4 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2016*, 30 November 2016, pp 641–643.

1.111 The committee also notes that the amendments do not address other scrutiny concerns that the committee had in relation to this bill.

Fair Work (Registered Organisations) Amendment Bill 2016

[Digest 6/16 – no response required]

1.112 On 21 November 2016 the Senate agreed to 10 Government, nine Nick Xenophon Team/Derryn Hinch's Justice Party and 21 Derryn Hinch's Justice Party/ Nick Xenophon Team amendments, and the Minister for Employment (Senator Cash) tabled a supplementary explanatory memorandum.

1.113 The committee has no comment on these amendments or the supplementary explanatory memorandum.

Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (No. 2)

[Digest 1/17 – no comment]

1.114 On 30 November 2016 the Senate agreed to two Opposition requests for amendments.

1.115 On 1 December 2016 the House of Representatives did not make the Senate's requested amendments. On the same day the Senate did not press its requests and the bill was read a third time.

1.116 The committee has no comment on these requests for amendments.

Register of Foreign Ownership of Agricultural Land Amendment (Water) Bill 2016

[Digest 8/16 – no comment]

1.117 On 1 December 2016 the Senate agreed to one Liberal Democratic Party amendment. On the same day the House of Representatives agreed to the Senate amendment and the bill was passed.

1.118 The committee has no comment on this amendment.

Statute Update (A.C.T. Self-Government (Consequential Provisions) Regulations) Bill 2016

[Digest 1/17 – no comment]

1.119 On 1 December 2016 the Minister for Small Business (Mr McCormack) presented a replacement explanatory memorandum in the House of Representatives to the bill.

1.120 The committee has no comment on this replacement explanatory memorandum.

VET Student Loans Bill 2016

[Digest 8/16 – Report 9/16]

1.121 On 30 November 2016 the Senate agreed to 25 Government amendments and four Opposition requests for amendments, and the Minister for Education and Training (Senator Birmingham) tabled a supplementary explanatory memorandum.

1.122 On 1 December 2016 the House of Representatives did not agree to make the Senate's requested amendments. On the same day the Senate did not press its requests and the bill was read a third time.

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

1.124 The supplementary explanatory memorandum notes that rules made under the bill will be able to set out matters that the Minister may or must take into account in specifying an external dispute resolution scheme, including matters such as the accessibility of the scheme to complainants, its independence from approved coursed providers, its fairness to affected parties, transparency of its operations, it efficiency, and its effectiveness at resolving disputes.[5]

1.125 New clause 42C provides that an approved course provider must comply with the external dispute resolution scheme. If a provider does not comply with the scheme administrative sanctions may be imposed on the provider, including suspension of loan payments, or suspension of cancellation of the provider's approval.

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

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

5 Supplementary explanatory memorandum, p. 3.

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

> *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.*

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

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

1.130 The supplementary explanatory memorandum notes that while it is not currently proposed to delegate any of the Secretary's powers under the bill to non-APS employees, it might be necessary in the future for the operator of an approved external dispute resolution scheme to require the production of information, or to be involved in reconsideration of reviewable decisions by an approved course provider.[6]

1.131 In the committee's *Ninth Report of 2016* the committee commented on the unamended version of clause 114 which only allowed the delegation of the Secretary's powers to APS employees of any level.[7] The committee notes that this amendment allows the Secretary's power to be delegated even further, i.e. to non-APS employees who are operators of an approved external dispute resolution scheme.

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6 Supplementary explanatory memorandum, p. 4.

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

VET Student Loans (Consequential Amendments and Transitional Provisions) Bill 2016

[Digest 8/16 – Report 9/16]

1.132 On 30 November 2016 the Senate agreed to two Opposition amendments, and on the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

1.133 The committee has no comment on these amendments.

Chapter 2

Commentary on ministerial responses

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

2.2 Correspondence relating to these matters is included at **Appendix 2.**

Corporations Amendment (Crowd-sourced Funding) Bill 2016

Purpose	This bill seeks to establish the regulatory framework to facilitate crowd-sourced funding offers by small unlisted public companies, provides new public companies that are eligible to crowd fund with temporary relief from reporting and corporate governance requirements that would normally apply and creates new exemption powers to provide emerging financial markets with a more tailored regulatory and licencing framework
Portfolio	Treasury
Introduced	House of Representatives on 24 November 2016 *This bill is a similar to a bill introduced in the previous Parliament*
Bill status	Before the House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.3 The committee dealt with this bill in *Alert Digest No. 10 of 2016*. The Treasurer responded to the committee's comments in a letter dated 15 December 2016. Set out below are extracts from the committee's initial scrutiny of the bill and the Treasurer's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Delegation of legislative power[1]

Initial scrutiny – extract

2.4 This bill seeks to amend the *Corporations Act 2001* to facilitate crowd-sourced funding (CSF) by small, unlisted public companies. The bill will establish

1 Schedule 1, item 14, paragraphs 738G(1)(c) and 738G(1)(f).

eligibility requirements for a company to fundraise via CSF, including disclosure requirements for CSF offers.

2.5 Proposed new subsection 738G(1) provides that CSF offers may be made if, among other things:

- 'the securities are of a class specified in the regulations' (proposed new paragraph 738G(1)(c)); and
- 'any other requirements specified in the regulations are satisfied in relation to the securities or the offer' (proposed new paragraph 738G(1)(f)).

2.6 In relation to proposed new paragraph 738G(1)(c), the explanatory memorandum (at p. 16) states that it is necessary to allow the class of securities eligible for crowd-funding to be specified in the regulations because 'the CSF regime is new and is expected to evolve quickly' and therefore 'there is a need to have flexibility to quickly adjust the type of securities that are eligible for crowd-funding'. Furthermore, it is suggested that the power is necessary so that 'the Government can quickly amend the types of securities available on crowd-funding platforms to prevent a systematic issue from arising and maintain investor confidence'. The committee thanks the Minister for including this additional information in the explanatory memorandum which was provided in response to the committee's comments on a similar version of this bill introduced in the previous Parliament (see *Second Report of 2016* at pp 64–72). In light of this explanation, the committee makes no further comment in relation to the delegation of legislative power in proposed new paragraph 738G(1)(c).

2.7 However, the committee takes this opportunity to note that there appears to be no information in the explanatory memorandum in relation to the broad power in proposed new paragraph 738G(1)(f) which, as noted above, allows the regulations to prescribe other requirements in relation to the securities or the CSF offer. The committee consistently expects that where important matters are left to be specified in regulations (rather than being included on the face of the primary legislation) the explanatory materials should clearly explain the rationale for the delegation of legislative power. The committee therefore seeks the Treasurer's advice as to the rationale for allowing the regulations to prescribe other requirements in relation to the securities or the CSF offer, including examples of circumstances in which it is envisaged that this power may be used.

Treasurer's response

2.8 The Treasurer advised:

> The Committee has identified proposed paragraph 738G(1)(f) in Schedule 1, item 14 in the Bill as a delegation of legislative power as it provides for regulations to specify additional requirements that need to be satisfied in order to make an eligible crowd-sourced funding (CSF) offer. The regulation making power in paragraph 738G(1)(f) has been included in the Bill for similar reasons to the regulation making power in paragraph

738G(1)(c) which the Committee accepted in its *Alert Digest No 10 of 2016* (as explained in page 16 of the explanatory memorandum). Any regulations prescribing additional eligibility requirements would be subject to disallowance and thus subject to parliamentary scrutiny.

Paragraph 738G(1)(f) has been included in the Bill because the CSF regime establishes a new and innovative financial market in Australia that is expected to evolve rapidly. The regulation making power will give the Government the flexibility to quickly prescribe additional eligibility requirements for CSF offers if required, depending on how the market develops. As the market develops, there may be offers made that are not appropriate for the CSF regime, given the reduced disclosure requirements. Similarly, there may be offers made by companies using structures or arrangements that should not be made under the CSF regime. If this were to happen, it is important for the Government to be able to quickly prescribe additional eligibility requirements to prevent these types of offers from being made under the CSF regime. The regulation making power is therefore an important aspect of the investor protections included as part of the CSF regime as it will allow the Government to prevent certain types of offers from being made, protecting investors and thereby helping build the necessary investor confidence in the market as it develops.

In addition, the regulation making powers in paragraphs 738G(1)(c) and 738G(1)(f) will give the Government flexibility to extend CSF offers to different types of securities as the market develops. Once the market becomes established, it may be desirable for the regime to be extended to other types of securities. The current eligibility requirements may not however be appropriate for these securities. The regulation making power will enable other eligibility requirements to be prescribed which would facilitate the extension of the CSF regime, helping the market grow and mature.

Committee comment

2.9 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the regulation making power is necessary as there may be a need for flexibility, and a quick response, to prescribe additional eligibility requirements for CSF offers, and different types of securities, depending on how the market develops.

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

2.11 In light of the information provided and the fact that the regulations will be subject to parliamentary disallowance, the committee makes no further comment on this matter.

Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016

Purpose	This bill seeks to amend the *Corporations Act 2001* (Corporations Act) to raise the education, training and ethical standards of financial advisers by: • requiring relevant providers to hold a degree; • undertake a professional year; • pass an exam; and undertake continuous professional development and comply with a Code of Ethics
Portfolio	Treasury
Introduced	House of Representatives on 23 November 2016
Bill status	Before the House of Representatives
Scrutiny principles	Standing Order 24(1)(a) (i), (iii), (iv) and (v)

2.12 The committee dealt with this bill in *Alert Digest No. 10 of 2016*. The Minister responded to the committee's comments in a letter dated 15 December 2016. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Judicial review of decisions of the standards body

Initial scrutiny – extract

2.13 The bill provides for the establishment of a new standards body to develop education standards and a Code of Ethics for financial advisers. There is no explanation in the explanatory materials as to whether decisions of the standards body will be subject to judicial review. The committee notes that the *Administrative Decisions (Judicial Review) Act 1977* does not apply to decisions of a legislative nature and the corporate status of the standards body (see proposed new section 921X) may mean that it does not qualify as an 'officer of the Commonwealth' and therefore it may not be susceptible to review under section 39B of the *Judiciary Act 1903* or section 75(v) of the Constitution.

2.14 Noting the significance of decisions to be made by the standards body (discussed below), the committee seeks the Minister's advice as to whether, and

under what jurisdiction, the standards body's decisions, including legislative instruments, will be subject to judicial review.

Minister's response

2.15 The Minister advised:

> The Government considers, based on legal advice received by the Treasury, that the directors of the standards body are 'officers of the Commonwealth'. Therefore judicial review of the body's legislative instruments and administrative decisions is available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Australian Constitution.
>
> In addition, the standard body's administrative decisions are reviewable under the *Administrative Decisions (Judicial Review) Act 1977.*

Committee comment

2.16 The committee thanks the Minister for this response and notes that the standard body's administrative decisions will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

2.17 The committee notes the Minister's advice that the government has received legal advice indicating that the directors of the standards body are 'officers of the Commonwealth' and therefore judicial review of the body's administrative decisions and legislative instruments would be available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution.

2.18 Under proposed subsection 921X(1) of the bill the Minister may, by notifiable instrument, declare a body corporate to be the standards body. As the bill is currently drafted, it appears that the standards body itself will be the relevant decision-maker under the Act. Thus, even if the directors of the body are classified as officers of the Commonwealth, unless they make decisions in their capacity as directors, it is not clear that the fact they may be officers of the Commonwealth would make the body corporate (i.e. the standards body itself) subject to review for its decisions under section 39B of the Judiciary Act and section 75(v) of the Constitution. It is also not clear that the courts would accept that any exclusion of the standards body from the definition of officer of the Commonwealth could be avoided by allowing its directors to be named as respondents. It is therefore not clear to the committee that the standards body's decisions of a legislative character would be subject to judicial review.

2.19 Noting the significance of decisions to be made by the standards body, the committee draws the fact that it is not clear that all of the body's decisions will be subject to judicial review to the attention of the Senate.

Delegation of legislative power—provisions allowing delegated legislation to modify the operation of primary legislation[2]

Initial scrutiny – extract

2.20 Proposed new section 921U sets out the functions of the standards body. Among other things, the functions of the standards body include making legislative instruments in relation to:

- education standards and a Code of Ethics for financial advisers (proposed new subsection 921U(2));
- modifying the operation of the Corporations Act in relation to requirements for financial advisers whose Continuing Professional Development year changes (proposed new subsections 921U(3) and (4)); and
- the requirements for supervision of provisional providers (proposed new subsection 921U(5)).

2.21 The committee notes that proposed section 921U may be characterised as a framework provision, in that it allows the proposed standards body to provide for many important details of the new regulatory scheme for financial advisers to be set out in a legislative instrument, rather than on the face of the bill. In relation to proposed new subsection 921U(5) the explanatory memorandum (at p. 20) states that 'this approach ensures that specific technical requirements are set by the body with specialist knowledge and the requirements can be more easily updated when practices change'.

2.22 In light of this explanation and the fact that that legislative instruments made by the standards body will be subject to parliamentary disallowance, the committee leaves the general question of whether the delegation of legislative power in subsection 921U(5) is appropriate to the Senate as a whole.

2.23 However, proposed new subsections 921U(3) and (4) may be characterised as Henry VIII clauses as together they allow the operation of the Corporations Act to be modified by delegated legislation. The committee has consistently commented on such provisions as they may subvert the appropriate relationship between the Parliament and the Executive branch of government. There does not appear to be an explanation for this approach in the explanatory materials.

2.24 The committee seeks the Minister's advice as to the rationale for allowing legislative instruments to modify the operation of the Corporations Act, including examples of the circumstances in which it is envisaged that this power may be used.

Minister's response

2.25 The Minister advised:

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2 Schedule 1, item 12, proposed new section 921U.

The Bill sets out the general professional, education and training requirements for financial advisers but grants the standards body the power to determine the specific details by legislative instrument. This delegation of legislative power was recommended by the 2014 Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry (the Inquiry). The Inquiry noted that a co-regulatory approach with an independent industry-funded standards body will promote stakeholder engagement and assist with the professionalisation of the industry. Standards in other professions, including law, are set by specialist bodies and this approach provides flexibility and allows technical details (e.g. the list of approved degrees) to be easily updated.

There are multiple checks on the body's exercise of delegated power, including that the body's legislative instruments are disallowable by Parliament and the Minister may direct the body to modify its standards or revoke the body's nomination as the standards body.

…

Subsections 921U(3)-(4) allow the body to modify the operation of the Bill only when it is determining the CPD requirements under subparagraph 921U(2)(a)(iv). In practice, this means that the scope of the standard body's modification power is limited to varying the requirement to report breaches of the CPD requirement within 30 business days of the end of the CPD year.

The power in subsections 921U(3)-(4) is designed to address situations where a financial adviser's CPD year changes. A financial adviser's CPD year may change when:

- the licensee changes CPD years; or
- a financial adviser changes licensees and the new licensee has a different CPD year to the former licensee.

In situations where the financial adviser's CPD year changes, the CPD reporting requirement may operate harshly. For example, if the CPD year changed from 1 April to 1 July, the licensee would need to report twice within a 3 month period. The power in subsections 921U(3)-(4) gives the body the discretion to exempt the licensee in situations where the strict operation of the law results in an excessive administrative burden.

The standard body's use of its discretion is subject to a number of safeguards to prevent abuse, including that its modified requirements will be in legislative instruments that are disallowable by Parliament.

Committee comment

2.26 The committee thanks the Minister for this response. The committee notes the Minister's advice that the power to modify the operation of the Corporations Act

is limited to varying the requirement to report breaches of the CPD requirements. The committee also notes the Minister's advice as to why these powers are necessary, including the examples as to why a financial adviser's CPD year might change and how, in such cases, the CPD reporting requirements might operate harshly.

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

2.28 On the basis of the information provided, the committee makes no further comment on this matter.

Judicial review—consultation[3]

Initial scrutiny – extract

2.29 Proposed new subsection 921U(6) provides that prior to making or reviewing a legislative instrument the standards body must consult financial services licensees and providers, associations representing consumers of financial services, professional associations, the Australian Security and Investment Commission (ASIC) and the Treasury, and any other person or body that the standards body considers it appropriate to consult. Proposed new subsection 921U(7) and the explanatory memorandum (at p. 66) confirm that the standards body will satisfy this consultation requirement by making the proposed legislative instrument available on its website and inviting persons to comment on it. However, proposed new subsection 921U(8) provides that if the standards body fails to comply with the consultation requirement, the legislative instrument nonetheless remains valid and enforceable.

2.30 The effect of proposed new subsection 921U(8) is that judicial review for a failure by the standards body to comply with the consultation obligations in proposed new subsection 921U(6) will lack utility. Noting this, and the significance of the matters to be determined by the standards body by legislative instrument, the committee seeks the Minister's advice as to the rationale for including proposed new subsection 921U(8) and whether there is an alternative mechanism (other than judicial review) through which the consultation requirements will be enforced.

Minister's response

2.31 The Minister advised:

> The Government expects the body to consult extensively with stakeholders in performing its functions and for this reason has included consultation

3 Schedule 1, item 12, proposed new subsection 921U(8).

requirements in the primary legislation. Subsection 921U(8) is designed to promote certainty by ensuring that technical failures to comply with the consultation requirement do not affect the validity of the body's standards. It also provides the body with the flexibility to use targeted consultation with all affected stakeholders in appropriate situations.

There are multiple safeguards to ensure that the body undertakes proper consultation, including that the legislative instruments are disallowable by the Parliament and the Minister may direct the body or revoke the body's nomination. Further, the board of the body may, as with other Commonwealth agencies, be called to appear before Parliamentary Committees to explain its actions.

Committee comment

2.32 The committee thanks the Minister for this response. The committee notes the Minister's advice that proposed subsection 921U(8) is designed to promote certainty and provide flexibility on the approach to consultation. The committee also notes the Minister's advice that there are safeguards to ensure proper consultation, including that legislative instruments are disallowable, the Minister can direct the standards body or revoke its nomination and the board may be called before parliamentary committees.

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

2.34 While the committee welcomes the safeguards mentioned by the Minister, the committee notes that they do not offer a direct method to enforce the consultation requirements. Although the instrument may be disallowable, it may be difficult for parliamentarians to know whether appropriate consultation has taken place within the timeframe for disallowance. There is also no requirement for the Minister to direct the standards body to comply with the consultation requirements and a parliamentary committee would not have the power to direct that consultation be undertaken before an instrument is made.

2.35 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding review of any failure by the standards body to appropriately consult.

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

Parliamentary scrutiny—fees[4]

Initial scrutiny – extract

2.37 Proposed new subsection 921U(9) provides that 'the standards body may charge fees for things done in performing its functions'. The explanatory memorandum (at p. 66) suggests that the standards body may, for example, choose to charge a fee for individuals to sit the proposed exam. Furthermore, the explanatory memorandum states that 'the body is not required, or expected, to recover all of its costs by charging a fee for service'. However, the legislation sets no limits on the amount of fee that could be charged by the standards body.

2.38 The committee notes that the power provided to the standards body to charge fees is broad and unconstrained and therefore seeks the Minister's advice as to whether guidance or limitations in relation to charging of fees by the standards body can be included on the face of the bill.

Minister's response

2.39 The Minister advised:

> Subsection 921U(9) allows the standards body to charge fees for its services in the same way as other companies. This is not a taxing power enacted in accordance with section 55 of the Australian Constitution and the courts have established that fees must not exceed the value of what is acquired *(Air Caledonie International v Commonwealth* (1988) 165 CLR 462). The Bill also prohibits the standards body from being operated for profit (subparagraph 921X(2)(c)(ii)).
>
> If the Minister considers the body's fees to be inappropriate, the Minister may direct the body to lower its fees. As the new body would be a Commonwealth company, it will also be subject to any aspect of the Government Charging Framework that the Minister for Finance elects to apply to the body via a government policy order.

Committee comment

2.40 The committee thanks the Minister for this response. The committee notes the Minister's advice that the bill prohibits the standards body from being operated for profit, that the Minister would have the power to direct the body to lower its fees and the standards body may be subject to elements of the Government Charging Framework.

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4 Schedule 1, item 12, proposed new subsection 921U(9)

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

2.42 On the basis of the information provided, the committee makes no further comment on this matter.

Reversal of evidential burden of proof[5]

Initial scrutiny – extract

2.43 Proposed subsection 922M(2) introduces an exception to an existing offence of failing to comply with an obligation to notify ASIC, and proposed subsections 923C(3)–(6) introduce exceptions to the new restrictions on the use of the terms 'financial adviser' and 'financial planner'. Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.44 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (see in particular pp 50–52).

2.45 As neither the statement of compatibility nor the explanatory memorandum address this issue the committee seeks a justification from the Minister as to why the items propose to reverse the evidential burden of proof which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50–52).

Minister's response

2.46 The Minister advised:

> The Bill does not reverse the evidential burden of proof but includes a non-operative note to alert the reader to the reversal of the evidential burden of proof for all exceptions, exemptions, excuses, qualifications and justifications in subsection 13.3 of the *Criminal Code Act 1995.*

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5 Schedule 1, items 16 and 17, subsections 922M(2) and 923C(3)–(6).

> The Criminal Code reverses the evidential burden of proof for exemptions because the relevant facts are peculiarly within the defendant's knowledge. For example, subsection 922M(2) states that a defendant is not required to notify ASIC of certain information about their financial adviser if the defendant reasonably believes that the information was provided by another licensee. Information about whether the defendant believed that another licensee had lodged the notice is peculiarly within the defendant's knowledge. Similarly, subsections 923C(3)-(6) provide financial advisers with a justification for using a restricted title when they are providing advice only to wholesale or in-house clients. Again, the defendant is able to adduce evidence about their client's identity more easily than ASIC.
>
> Subsections 922M(2) and 923C(3)-(6) replicate existing provisions in the corporations legislation (see subsection 922M(2) of Schedule 8D to the *Corporations Regulations 2001* and Division 10 of Chapter 7 of the Corporations Act).

Committee comment

2.47 The committee thanks the Minister for this response and notes the statement that the bill does not reverse the evidential burden of proof as this is reversed by the provisions of the *Criminal Code*. The committee notes that in fact the *Criminal Code* provides that any defendant wishing to rely on an exception bears an evidential burden. As such, any provision that provides for exceptions to an offence is, itself, reversing the burden of proof. That is, the *Criminal Code* reverses the evidential burden of proof as soon as an offence provision provides for an exception to the offence. As set out in the *Guide to Framing Commonwealth Offences*,[6] where an offence-specific defence is created the explanatory material should explain the reasons for placing the burden of proof on the defendant.

2.48 The committee notes the Minister's advice that the exception in subsection 922M(2) applies 'if the defendant reasonably believes that the information was provided by another licensee' and this belief is peculiarly within the defendant's knowledge. The committee accepts that this information is likely to be peculiarly within the defendant's knowledge, however, it may be noted that there is another exception that applies, namely that 'the information is already entered on the Register of Relevant Providers'.[7] This does not appear to be a matter peculiarly within the knowledge of the defendant. The committee also notes that the *Guide to Framing Commonwealth Offences* states that offence-specific defences should only be included where it is peculiarly within the knowledge of the defendant *and* it would be significantly more difficult and costly for the prosecution to disprove than

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

7 See proposed subsection 922M(2) read together with proposed paragraph 922F(3)(b).

for the defendant to establish the matter.[8] This was not addressed in the Minister's response.

2.49 The committee also notes the Minister's advice in relation to the exceptions in subsections 923C(3)–(6), that 'the defendant is able to adduce evidence about their client's identity more easily than ASIC'. However, the committee notes that the *Guide to Framing Commonwealth Offences* states that the fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself a sound justification for placing a burden of proof on a defendant.[9] Similarly, the committee considers that it is not a sound justification for reversing the burden of proof simply because the defendant may be able to prove a matter more easily than the prosecution. The presumption of innocence requires the prosecution to prove every element of an offence relevant to a person's guilt. The committee's consistent approach is that any departure from this fundamental principle should be fully justified in the explanatory material accompanying a bill.

2.50 In this case it appears that the reversals of the evidential burden of proof in proposed subsections 922M(2) and 923C(3)–(6) may not be framed in accordance with the relevant principles set out in the *Guide to Framing Commonwealth Offences*.

2.51 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the reversal of the evidential burden of proof to the consideration of the Senate as a whole.

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

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

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

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

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

2.52 The committee dealt with this bill in *Alert Digest No. 10 of 2016*. The Minister responded to the committee's comments in a letter dated 22 December 2016. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Reversal of evidential burden of proof[10]

Initial scrutiny – extract

2.53 Items 6 and 95 of Schedule 1 introduce new exceptions to existing offences. Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.54 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (see in particular pp 50–52).

2.55 As neither the statement of compatibility nor the explanatory memorandum address this issue the committee seeks a justification from the Minister as to why the items propose to reverse the evidential burden of proof which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50–52).

10 Schedule 1, items 6 and 95.

Minister's response

2.56 The Minister advised:

> Subsections 45(1) and (2) of the *Surveillance Devices Act 2004* (SDA) create offences in relation to using, recording, communicating or publishing information that is protected information obtained under the SDA. Subsection 45(4) of the SDA creates exceptions to these offences. There is currently an exception relating to communicating information to foreign countries in relation to a mutual assistance in criminal matters request.
>
> Items 6 and 95 insert additional circumstances in subsection 45(4) of the SDA in which an offence created in subsections 45(1) or (2) of the SDA does not apply. The amendments broaden the current exception in subsection 45(4) of the SDA, which covers communication of information to foreign countries, to also cover communications to the International Criminal Court and international war crimes tribunals in international crime cooperation matters.
>
> Given communications to foreign countries, the International Criminal Court and international war crimes tribunals in international crime cooperation matters are confidential, these matters would be peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. For this reason it would be for the defendant to raise evidence as to the application of these exceptions.

Committee comment

2.57 The committee thanks the Minister for this response. The committee notes the Minister's advice that the relevant communications will be confidential and therefore peculiarly within the knowledge of the defendant and significantly more difficult and costly for the prosecution to disprove.

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

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

Right to liberty[11]

Initial scrutiny – extract

2.60 Items 1 and 2 of Schedule 3 provide that where a person has been released on bail and a surrender or temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant.

2.61 The explanatory materials state that the provision gives courts the power to remand the person into custody (pp 23 and 162–163). However, the provision is more than an enabling provision; it is phrased as an obligation to commit the person to prison, without any discretion as to whether this is appropriate in all the circumstances.

2.62 The explanatory memorandum states that it is appropriate that the person be committed to prison to await surrender as an extradition country has a period of two months in which to effect surrender and '[c]orrectional facilities are the only viable option for periods of custody of this duration' (p. 162). The statement of compatibility states that without this provision the police may need to place the person in a remand centre, for a period of up to two months, yet remand centres 'do not have adequate facilities to hold a person for longer than a few days' (p. 24). The statement of compatibility also states that the power to remand a person pending extradition proceedings is necessary as reporting and other bail conditions 'are not always sufficient to prevent individuals who wish to evade extradition by absconding'. It also goes on to provide that the *Extradition Act 1988* makes bail available in special circumstances which ensures that 'where circumstances justifying bail exist, the person will not be kept in prison during the extradition process' (p. 24). However, it is unclear how these existing bail provisions fit with the amendments which require the magistrate, judge or court to commit a person, already on bail, to prison to await surrender under the warrant.

2.63 The committee seeks the Minister's advice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail process under the *Extradition Act 1988* fits with the amendments proposed by this bill.

Minister's response

2.64 The Minister advised:

> In the extradition context, a magistrate must not release a person on bail unless there are special circumstances justifying such release. This ensures the *Extradition Act 1988* (the Extradition Act) is suitably flexible to accommodate exceptional circumstances that may necessitate granting a

11 Schedule 3, items 1 and 2.

person bail, such as where the person is in extremely poor health. This presumption against bail is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country.

The amendments to sections 26 and 35 of the Extradition Act address the logistics for the execution of a surrender warrant when a person is on bail and a surrender warrant has been issued to surrender the person to an extradition country. The surrender warrant is the instrument that empowers the police to bring an eligible person into custody to await transportation out of Australia.

The Extradition Act currently provides that where a surrender warrant has been issued for a person on bail any police officer may take the person into custody to take them before a magistrate, eligible Federal Circuit Court Judge or relevant court in order to discharge bail recognisances. Following the discharge of bail recognisances the magistrate, eligible Federal Circuit Court Judge or relevant court must then release the person into the custody of any police officer to await surrender. The Extradition Act does not provide for a person to apply to have their bail extended while they await surrender to the extradition country once a surrender warrant has been issued.

The amendments to sections 26 and 35 do not affect existing bail processes under the Extradition Act. It remains the case that bail is no longer available on the execution of a surrender warrant. The amendments are framed as an obligation because the Act requires that the person be remanded to ensure they can be surrendered. The relevant change would allow the person to be remanded in a corrections facility, rather than police custody, to facilitate appropriate remand arrangements where surrender is not immediately possible.

If the person wants to challenge the surrender determination by way of judicial review, the person is able to make a new bail application under section 49C of the Extradition Act to the relevant review or appellate Court. Under section 49C(2) of the Extradition Act a grant of bail by a review or appellate court terminates each time such a court has upheld the surrender determination.

Committee comment

2.65 The committee thanks the Minister for this response. The committee notes the Minister's advice that the proposed amendments do not affect existing bail processes under the Extradition Act. The committee notes the advice that under the current provisions bail is not available on the execution of a surrender warrant and that the changes proposed would allow the affected person to be remanded in a corrections facility rather than police custody, which would 'facilitate appropriate remand arrangements where surrender is not immediately possible'. The committee also notes the Minister's advice that if a person wants to challenge the surrender

determination they are still able to make a new bail application under the Extradition Act.

2.66 The committee notes there are scrutiny concerns with the existing presumptions against bail in the Extradition Act for persons awaiting surrender. It is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption.

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

2.68 In light of the information provided, the committee leaves to the Senate as a whole the general question of the appropriateness of requiring a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant.

Broad delegation of administrative powers[12]

Initial scrutiny – extract

2.69 Item 3 of Schedule 4 proposes repealing section 26 of the *Foreign Evidence Act 1994* and replacing it with a new, substantially similar, provision. The section as it currently stands provides that the Attorney-General and an authorised officer can certify that a specified document or thing was obtained as a result of a request made to a foreign country by or on behalf of the Attorney-General. This certificate provides prima facie evidence to a court of the matters stated in the certificate. Subsection (3) (as it currently stands) defines an authorised officer for this purpose as a person who is a Senior Executive Service (SES) level employee (or acting SES) in the Attorney-General's Department. The bill proposes to omit subsection (3) (and allow the Attorney-General to issue the evidentiary certificate). The explanatory memorandum (at p. 164) states that the reason for the omission of subsection (3) is that it is now proposed to rely on the delegation of the Attorney-General's power under section 17 of the *Law Officers Act 1964*. The explanatory memorandum states that a delegation under this provision 'would be to a person with an appropriate level of seniority, not below the executive level, who has a close involvement in the matters to be certified'.

2.70 However, section 17 of the *Law Officers Act 1964* relevantly provides that the Attorney-General can delegate his or her powers to any person holding the office

12 Schedule 4, item 3.

specified in the instrument of delegation. There does not appear to be any limit on the level or type of employee who may be specified in the instrument of delegation.

2.71 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.

2.72 Where broad delegations are made (either through the bill or through other legislation), the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

2.73 In this case, the explanatory memorandum (at p. 164) states the reason for removing the limit on the power of delegation as allowing for 'reliability, flexibility and promptness, with sufficient oversight'. However, it is not clear to the committee why the bill proposes removing any detail regarding the office-holder who may be delegated this important function. The explanatory memorandum states that the delegation will not be to persons below the executive level, yet there is nothing on the face of the bill (or in section 17 of the *Law Officers Act 1964*) which restricts the delegation in this way.

2.74 The committee seeks the Minister's detailed justification for the rationale for removing the limit on the delegation of the Attorney-General's power to issue an evidentiary certificate and whether the delegation could be confined on the face of the legislation to Australian Public Service employees not below the executive level.

Minister's response

2.75 The Minister advised:

> The matters that are certified in the certificate are of a routine and administrative nature. The certificate will state that material was received from a foreign country in response to a request made by or on behalf of the Attorney-General. That is, it is solely attesting to the physical receipt of evidence by the Australian Central Authority (the Attorney-General's Department) from a requested foreign country.
>
> Given the routine and administrative nature of this task, it is proposed that the officer issuing the certificate need not be limited to Senior Executive Service (SES) officers, but should also include certain other officers of the Attorney-General's Department. The person certifying the material is more likely to have direct knowledge of the matters to be certified than an SES officer, having received the evidence through a communications service such as a courier, Australia Post or email and being directly involved in the management of the case. In addition, there is often an urgent need to certify material for use in Australian proceedings; the amendment will provide for more flexibility in this procedural matter by allowing a broader

range of officials to certify the material in a timely way. This will be a more efficient method of certifying material that is appropriate in the circumstances.

The delegation of powers under the *Law Officers Act 1964* is consistent with the delegation of powers in other laws administered by the Attorney-General, including the *Extradition Act 1988* and the *Evidence Act 1995.*

Under the *Law Officers Act 1964* it is a matter for the Attorney-General to specify to whom the delegation is made; in practice, the instrument of delegation specifies particular position numbers so will be limited to only certain positions the Attorney-General considers appropriate in the circumstances. In practice the Attorney-General's Department would only propose certain executive level position numbers within the relevant Departmental business unit be specified.

Committee comment

2.76 The committee thanks the Minister for this response. The committee notes the Minister's advice that the matters to be certified are routine and administrative and certification should be able to be done by other officers of the Attorney-General's Department (AGD) rather than SES officers. The committee also notes the Minister's advice that in practice AGD 'would only propose certain executive level positions' be specified.

2.77 However, the committee reiterates that there is nothing in the bill or in the *Law Officers Act 1964* which would restrict the delegation to executive level positions. While the committee appreciates that the matters to be certified are routine and administrative, it notes that the certification of such matters constitutes prima facie evidence to a court of the matters stated in the certificate. As such, the committee considers there should be some limit on the level of delegation as to who can certify such matters. The committee considers applying this to executive level positions and above may be appropriate, but is concerned that the bill does not limit the delegation in this way.

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

2.79 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of removing the restrictions on the delegation of the Attorney-General's power to certify certain matters.

Retrospective application[13]

Initial scrutiny – extract

2.80 Items 1 and 2 of Schedule 4 provide that the *Foreign Evidence Act 1994* applies to proceedings conducted in State or Territory courts in relation to the external territories and the Jervis Bay Territory, and ensures that the part of that Act applying to certain proceeds of crime proceedings will apply to prescribed external territories. Item 6 of Schedule 4 provides that these amendments will apply in relation to proceedings that commence before or after commencement of the item.

2.81 There is no discussion in the explanatory materials as to whether applying these amendments to proceedings that occur before the item commences (which has a retrospective application) will cause anyone any hardship or detriment.

2.82 The committee seeks the Minister's advice as to whether retrospectively applying amendments relating to the application of the *Foreign Evidence Act 1994* to proceedings under a law of the external territories and Jervis Bay causes any person any detriment or hardship.

Minister's response

2.83 The Minister advised:

> The amendments in items 1 and 2 are procedural in scope and do not have the effect of criminalising or penalising conduct which was otherwise lawful prior to the amendments. The amendments merely provide a process for adducing foreign material in certain criminal and related proceedings and will not cause any person any detriment or hardship.

Committee comment

2.84 The committee thanks the Minister for this response. The committee notes the Minister's advice that the amendments are procedural in scope and will not cause any person any detriment or hardship.

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

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

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13 Schedule 4, item 6.

Retrospective application[14]

Initial scrutiny – extract

2.87 Item 2 of Schedule 5 inserts the word 'child complainant' into an existing provision of the *Crimes Act 1914*, which has the effect of extending the existing offence of publishing any matter identifying child witnesses or vulnerable adult complainants without the leave of the court, to also cover the publication of information identifying a child complainant. Item 4 of this Schedule provides that these amendments apply in relation to proceedings instituted after commencement of the item regardless of when the alleged offences were committed. As such, it applies in relation to offences committed before commencement of the item (but to proceedings initiated after commencement). It is not clear to the committee whether, in applying this to offences that occurred before commencement and in circumstances where the existing offence is being extended, this imposes retrospective criminal liability.

2.88 The committee seeks the Minister's advice as to whether applying the amendments to proceedings instituted after commencement but relating to offences that may have been committed before commencement, in circumstances where the amendments extend an existing criminal offence, effectively imposes retrospective criminal liability, and if so, what is the justification for doing so.

Minister's response

2.89 The Minister advised:

> The prohibition on retrospective criminal laws contained in article 15 of the International Covenant on Civil and Political Rights does not generally extend to retrospective changes to other measures, such as procedure, provided they do not affect the punishment to which an offender is liable.
>
> Schedule 5, Item 4 is an application provision which proposes the non-publication offence in section 15YR of the *Crimes Act 1914* apply in relation to proceedings instituted after the commencement of Schedule 5, regardless of when the offences committed, or alleged to have been committed, occurred.
>
> While this will mean the protections against publication may apply in proceedings for acts committed prior to the entry into force of Schedule 5, the provision does not affect the elements or penalties of any offence, nor does it criminalise or penalise conduct which was otherwise lawful prior to the commencement of Schedule 5. The provision does not impose retrospective criminal liability.
>
> Schedule 5, Item 4 engages with human rights in a reasonable and proportionate way and does not trespass unduly on personal rights and liberties.

14 Schedule 5, item 4.

Committee comment

2.90 The committee thanks the Minister for this response. The committee notes the Minister's advice that the provision does not affect the elements or penalties of any offence and does not criminalise or penalise conduct which was otherwise lawful prior to the commencement of Schedule 5.

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

2.92 On the basis of the information provided, the committee makes no further comment on this matter.

Delegation of legislative power—incorporation of external material into the law[15]

Initial scrutiny – extract

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

2.94 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).

2.95 The explanatory memorandum (at p. 179) states that the drug and alcohol testing provisions in sections 40LA, 40M and 40N are applicable only to AFP appointees, and not the general public. Further, the explanatory memorandum notes that the relevant standards as in force from time to time will be available on request

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

to AFP appointees and 'the standards are available to the public for purchase from SAI Global Limited'. Finally, the explanatory memorandum states that allowing the AFP to incorporate the relevant standards for alcohol and drug testing as in force from time to time allows the AFP to keep pace with scientific and technology advances and ensures that it is able to employ the most appropriate procedures for conducting drug testing.

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

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

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

Minister's response

2.99 The Minister advised:

> Subsection 40P(2) of the *Australian Federal Police Act 1979* (the Act) will allow regulations made for the purposes of section 40LA, 40M and 40N of the Act to incorporate any matter contained in a standard published by, or on behalf of, Standards Australia or Standards Australia/Standards New Zealand as in force at a particular time or as in force from time to time.
>
> The new subsection will ensure the Australian Federal Police (AFP) is able to employ the most up to date standards for its internal alcohol and drug testing applicable to AFP appointees, allowing it to keep pace with scientific and technological advances.

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

As noted by the Committee, concerns arise when external materials incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law. However, any detriment caused by incorporated material not being freely and readily available to the public at large must be balanced against the benefit gained from utilising that incorporated material. The proposed amendment strikes an appropriate balance.

Copyright restrictions

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

The benefit of incorporating the relevant standard

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

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

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

The incorporation of the most current standard supports the integrity of the results and ensures there is no discrepancy between the procedures and testing methods used by the company contracted to conduct drug tests and the standard referenced in the AFP Regulations.

The effect of the standard not being made freely available to the public at large

The drug and alcohol testing provisions in section 40LA, 40M and 40N are applicable only to AFP appointees, and not the general public. That is, the incorporation of the standard does not impact the general public. Moreover, the incorporation of the standard does not create obligations with which AFP appointees must comply. Rather, it ensures that collection procedures and testing methods utilised by the AFP accord with industry best practice.

As noted, the relevant standard will be made freely and readily available to the only persons directly affected by the law. Any detriment caused by the standard not being freely and readily available to the public at large is thereby minimised.

The proposed amendments strike an appropriate balance

The benefit of incorporating standards published by Standards Australia and Standards Australia/Standards New Zealand into the law is clear; it ensures the AFP applies robust, best-practice alcohol and drug testing procedures to its appointees. Imposing a different standard, one that may be freely and readily available to the public at large, may require departing from the industry accepted best-practice encompassed within standards published by Standards Australia and Standards Australia/Standards New Zealand.

The Government considers that the benefit gained from ensuring best-practice testing procedures are used outweighs the minimal detriment caused by the standard not being freely and readily available to persons not directly affected by the law.

Committee comment

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

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

2.102 The committee also notes the Minister's advice that the standards will not be made freely and readily available to the public at large as the relevant standard is copyright protected by Standards Australia, which has provided SAI Global Ltd with exclusive distributor rights. The committee also notes the advice that under the current AFP subscription agreement with SAI Global the AFP is not permitted to copy, distribute or allow access to any third party and that these terms and conditions are not unique to the AFP's agreement, as they are incorporated into all subscriptions. As a result, the relevant standards will only be available to members of the public if a fee is paid to SAI Global.

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

2.104 The committee takes this opportunity to reiterate that it is fundamental principle of the rule of the law that every person subject to the law should be able to freely and readily access its terms. As a result, the committee will have scrutiny concerns when external materials that are incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law.

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

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

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

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

Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016

Purpose	This bill seeks to: • allow for cost recovery for permitting activities under the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*; and • make a number of administrative amendments
Portfolio	Environment and Energy
Introduced	House of Representatives on 24 November 2016
Bill status	Before the House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(ii) and (iv)

2.108 The committee dealt with this bill in *Alert Digest No. 10 of 2016*. The Minister responded to the committee's comments in a letter dated 20 December 2016. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Delegation of legislative power—setting level of fee by regulation[16]

Initial scrutiny – extract

2.109 Item 6 will remove the current $8000 cap on the fee amount that may be prescribed under the regulations for permit applications for the export, import and transit of hazardous waste.

2.110 The explanatory memorandum (at pp 6–7) states that the amendment will allow the permit fees to be adjusted to reflect the costs incurred by the department in assessing permit applications and that removing the cap will allow the fee to be fully cost recovered in the future.

2.111 The committee notes this explanation that the intention of the amendment is to allow a level of fee to be set that is linked to cost recovery. However, the committee notes that there is no limit on the amount of fee that may be prescribed on the face of the bill.

2.112 As the setting of the amount of fees is a significant matter, the committee seeks the Minister's advice as to whether the bill can be amended to provide greater

16 Schedule 1, item 6, subsection 32(1).

legislative guidance as to how the fee amount is to be determined and/or to limit the fee that may be imposed.

2.113 In this regard, the committee notes that a higher cap could be introduced rather than simply removing the $8000 cap altogether. For example, the committee notes that there is statutory cap on the amount of levy able to be imposed on permit applications in paragraph 9(1)(b) of the related Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016, and seeks the Minister's advice as to why a similar approach cannot be adopted in relation to placing a limit on the permit fee.

Minister's response

2.114 The Minister advised:

> As the setting of the amount of fees is a significant matter, the Committee has requested advice as to whether the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016 (the Amendment Bill) can be amended to provide greater legislative guidance as to how the fee amount is to be determined and/or to limit the fee that may be imposed. The Committee has also sought advice as to whether a higher cap could be introduced, rather than removing the existing $8000 cap altogether.
>
> Subsection 32(1) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Act) currently enables the regulations to prescribe the fees to be paid for the processing of hazardous waste permit applications and notices. The amount or rate of the fee must be reasonably related to the expenses incurred or to be incurred by the Commonwealth in relation to the application or notice to which it relates (section 32(4) of the Act).
>
> In this instance, the fees to be prescribed in the regulations have been determined by an assessment of the direct costs to the Department of the Environment and Energy (the Department) of providing the permit service that can be linked to particular permit applications, such as the staff hours required to process applications. The method by which the fee amounts have been calculated is outlined in the Cost Recovery Implementation Statement (the CRIS)[17], which was prepared in consultation with relevant industry stakeholders. The CRIS was prepared in accordance with the Australian Government's Cost Recovery Guidelines, which also require cost recovery arrangements to remain under review.[18]
>
> It is not considered necessary to include guidance in the Bill regarding the determination of the fees, or a higher cap for the fees. Current drafting practice does not require the formulation for how the fee amount is

17 See the Department of the Environment and Energy's Cost Recovery Implementation Statement, approved by Minister Hunt on 27 April 2016, at http://www.environment.gov.au/about-us/accountabilityreporting/cost-recovery.

18 Department of Finance, *Australian Government Cost Recovery Guidelines,* Resource Management Guide No. 304, July 2014 - Third edition, p. 7.

determined to be legislated in statute. Any future changes to the amount of the fees prescribed would be considered following the preparation of a Cost Recovery Implementation Statement and stakeholder engagement.

Committee comment

2.115 The committee thanks the Minister for this response. In particular, the committee notes the Minister's advice that under section 32(4) of the Act the amount or rate of the fee must be reasonably related to the expenses incurred (or to be incurred) by the Commonwealth in relation to the application or notice to which it relates.

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

2.117 The committee also draws this delegation of legislative power in relation to the setting of the level of fees to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

2.118 In light of the information provided by the Minister the committee makes no further comment in relation to this matter.

Delegation of legislative power—indexation of fee by regulation[19]

Initial scrutiny – extract

2.119 Item 7 proposes to insert a new subsection 32(7) which will allow the fees referred to above to be indexed by a method prescribed in the regulations.

2.120 The explanatory memorandum (at p. 7) states that the annual indexation of the application fees will be based on the Consumer Price Index (CPI) to ensure that fees remain up to date. However, there is no guidance in relation to the method of indexation to be used on the face of the bill.

2.121 As different methods of indexation can result in different rates of increase in the level of fees, the committee seeks the Minister's advice as to whether the bill can be amended to specify the method of indexation to be used.

2.122 In this regard, the committee notes that subclauses 9(2)–(7) of the related Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016 provide a statutory basis for calculating indexation by CPI in relation to the levy on permit applications and seeks advice as to why a similar approach cannot be adopted in relation to the indexation of the permit fee.

19 Schedule 1, item 7, proposed new subsection 32(7).

Minister's response

2.123 The Minister advised:

> As different methods of indexation can result in different rates of increase in the level of fees, the Committee has requested advice as to whether the Bill can be amended to specify the method of indexation to be used, given the basis for calculating indexation is specified in the Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016 (the Levy Bill).
>
> The proposed insertion of section 32(7) will enable the permit and notice fees to be indexed by a method prescribed by the regulations. This approach was taken to ensure that all relevant information regarding the amount of the fees for applications and notices, and the method for their indexation, is situated in the same place. This ensures that those persons who are subject to these fees do not have to access multiple documents to ascertain the amount payable.
>
> Consistent with this approach, the amount of the levy and the method for calculating its indexations, will be specified in the Levy Bill. It was necessary to specify these amounts in the Levy Bill, rather than in regulations made for the purposes of the Levy Bill, to reflect the current drafting practice that the details of a tax be set out in the taxation Act rather than regulations.

Committee comment

2.124 The committee thanks the Minister for this response. The committee notes the Minister's advice in relation to why a different drafting approach is taken in the Levy Bill.

2.125 In light of the Minister's advice that under section 32(4) of the Act the amount or rate of the fee must be reasonably related to the expenses incurred (or to be incurred) by the Commonwealth the committee makes no further comment in relation to this matter.

Insufficiently defined administrative power—delegation of administrative powers[20]

Initial scrutiny – extract

2.126 Item 14 of the bill seeks to amend section 60 so that the Minister may delegate any or all of the Minister's functions and powers under the Act to an Australian Public Service employee who holds, or is acting in, an Executive Level 2 position in the Department. As such, Executive Level 2 officers will be able to exercise all of the Minister's functions and powers under the Act (previously this delegation

20 Schedule 1, item 14, section 60.

was limited to the Secretary and Senior Executive Service (SES) employees). In addition, item 14 also seeks to insert a new subsection 60(2) which provides that in performing functions or exercising powers under a delegation the delegate must comply with any directions of the Minister. The explanatory memorandum (at p. 8) states that the purpose of this provision is to allow the Minister to direct an Executive Level 2 employee that they may only exercise decision-making powers in relation to certain types of decisions.

2.127 The committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons. 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. While this provision does limit the category of people to Executive Level 2 officers in the department, the committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

2.128 The committee notes that the explanatory memorandum (at p. 9) states that the rationale for broadening the category of persons to whom the Minister's powers and functions under the Act may be delegated is to 'ensure that permit processing and decisions can be made more efficiently and effectively, and reduce any delay costs to business'.

2.129 While the committee notes this explanation, the desire for administrative efficiency may not, of itself, be a sufficient justification for delegating administrative powers to a broad range of people. The committee notes that the rationale for proposed new section 60(2) in the explanatory memorandum seems to indicate that it may be possible to limit the decision-making powers of Executive Level 2 officers to certain types of decisions.

2.130 The committee therefore seeks the Minister's advice as to whether a limitation on the categories of powers and functions that may be exercised by Executive Level 2 officials can be included on the face of the bill.

Minister's response

2.131 The Minister advised:

> The Committee has requested advice as to whether the limitation on the categories of powers and functions that may be exercised by Executive Level 2 officers can be included on the face of the Bill.
>
> Item 14 has been drafted to refer to an Australian Public Service employee who holds, or is acting in, an Executive Level 2, or equivalent position, in the Department. Further, it is my intention to only delegate my powers and functions to Executive Level 2 employees within the Department who have day-to-day responsibility for the administration of the Act. The arrangement whereby such Executive Level 2 employees are delegated my powers and functions would be formalised in an Instrument of Delegation under the Act. This approach is consistent with the administration of EPBC

Act, under which certain powers are allocated to Executive Level 2 employees through an Instrument of Delegation, rather than by specifying these powers in the EPBC Act or regulations.

This approach will enable Executive Level 2 officers to exercise my functions and powers under the Act where it is appropriate for decisions to be made at this level. This may include:

- Purely administrative actions that are required under the Act, some for which the statutory response times are short but do not influence how hazardous wastes are to be managed, such as the notification and acknowledgement of permit applications.
- Permitting decisions that are routine in nature, non-controversial and low-risk.

This will not prevent significant decisions being made by persons of a higher classification.

The proposed amendments will provide for more efficient administration of the Hazardous Waste Act by facilitating decision-making at a level that is appropriate to the circumstances, thus reducing unnecessary delays to permit applicants for routine, high-volume administrative actions and decisions, while ensuring that non-routine decisions are made by senior officers or the Minister, as appropriate. This approach is also consistent with the Australian Administrative Law Guide which documents that it may be appropriate for junior officers to make decisions involving a limited exercise of discretion, or under legislative provisions that give rise to a high volume of decisions to be made.

Any decision made under the Act will continue to be reviewable by the Administrative Appeals Tribunal.

Committee comment

2.132 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is the intention to only delegate functions and powers under the Act to Executive Level 2 employees with day-to-day responsibility for the administration of the Act where it is appropriate, including in relation to purely administrative actions and permitting routine, non-controversial and low-risk decisions to be made. The committee also notes the Minister's advice that this will provide for more efficient administration of the Act and reduce unnecessary delays to permit applications.

2.133 The committee reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, a limit is set on the scope and type of powers that might be delegated. While the committee notes the Minister's advice as to how it is intended this power will be exercised, there is nothing on the face of the bill to limit it in the way set out in the response.

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

2.135 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of enabling all of the Minister's powers and functions to be delegated to Executive Level 2 employees.

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

Purpose	This bill seeks to prevent unauthorised maritime arrivals who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 from making a valid application for an Australian visa
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 8 November 2016
Bill status	Before Senate
Scrutiny principle	Standing Order 24(1)(a)(i)

2.136 The committee dealt with this bill in *Alert Digest No. 9 of 2016*. The Minister responded to the committee's comments in a letter dated 22 December 2016. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Retrospective application[21]

Initial scrutiny – extract

2.137 The purpose of this bill is to prevent unauthorised maritime arrivals (UMAs) and transitory persons who were taken to a regional processing country after 19 July 2013 (and who were at least 18 years of age at that time) from making a valid application for an Australian visa. Together these persons are included in the definition of a 'member of the designated regional processing cohort'. This bar applies whether the person is in Australia or outside Australia, or whether they are a lawful non-citizen (i.e. they hold a visa in Australia) or an unlawful non-citizen.

2.138 As stated in the explanatory memorandum, the purpose of the amendments is to ensure that a member of the regional processing cohort is not eligible to apply for an Australian visa of any kind. In relation to UMAs and transitory people, the Minister has a discretionary power to lift the relevant bar on making an application if he or she thinks it is in the public interest to do so. This power may be exercised in individual cases (see subsections 46A(2AB) and 46B(2AB)) or, by legislative instrument, by reference to a 'class' of persons (see subsections 46A(2AC) and

21 Items 1, 4 and 13, proposed subsections 5(1), 46A(2AA) and 46B(2AA).

46B(2AC)). The power is non-delegable and non-compellable. Further, as the explanatory memorandum emphasises, it is for the Minister to determine what is in the 'public interest' (at p. 7).

2.139 The amendments sought to be made apply only in relation to applications made after the commencement of the bill (subject to an exception relating to applicants who are outside of Australia—see discussion under item 36 below). However, the substantive provisions, by defining a 'member of a designated regional processing cohort' as being those adults who were transferred to Nauru or Papua New Guinea after 19 July 2013, ensures the provisions have a retrospective application in relation to these persons. The explanatory memorandum states that the 'date of 19 July 2013 is the date when Regional Resettlement Arrangement between Australia and Papua New Guinea (PNG) was signed' and that the 'effect of this arrangement was that any UMA entering Australia after this date, who is found to be a refugee, would be resettled in PNG or another participating regional processing country' (explanatory memorandum p. 5).

2.140 The bar on making a valid visa application operates quite differently on people who were taken to a regional processing country prior to the bill commencing and those who may be taken to a regional processing country after commencement.

2.141 In relation to adults who may be transferred to a regional processing centre *after* the Act commences, this bill will put them on notice that if they seek to arrive in Australia in defined circumstances then they will be barred for life from making a valid application for an Australian visa.

2.142 However, for those who on commencement of the Act will, by definition, already be included in the regional processing cohort, the bill does not place them on notice in a similar way. Rather, the bill prevents people within the cohort who were taken to a regional processing country prior to the commencement of the bill from making a valid visa application. Those people cannot avoid the adverse consequences that apply through the operation of the bill and were not aware that this law was applicable at the time they sought to make the journey to Australia.

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

2.144 The statement of compatibility states that one of the purposes of the bill is to further discourage 'persons from attempting hazardous boat journeys with the assistance of people smugglers and encouraging them to pursue regular migration pathways instead' (statement of compatibility pp 21–22). However, for people who have already undertaken such a journey, it seems that the proposed law can only play a punitive, rather than deterrent, function.

2.145 The explanatory materials emphasise that from 19 July 2013 people have been on notice that unauthorised maritime arrivals would not be resettled in

Australia, because on that date the Regional Resettlement Arrangement between Australia and PNG was signed (explanatory memorandum p. 5 and statement of compatibility p. 21). However, the extent to which the Arrangement has any status in Australian law is unclear. In addition, the amendments in this bill go beyond measures needed to ensure that 'these people would not be resettled in Australia' (statement of compatibility p. 21). The amendments in the bill ensure that not only will people within the relevant cohort be prevented from settling in Australia, they will also be prevented from applying for *any* type of Australian visa (including, for example, a visitor or business visa).

2.146 Although the bill does provide the Minister with a broad discretionary power to raise the bar on applications, this does not ameliorate the retrospective application of the law. This is a broad personal discretionary power that applies only where the Minister considers it is in the 'public interest' to allow the person to make a valid application. No other legislative guidance is provided as to when it may be appropriate for the Minister to use this power.

2.147 The retrospective effect of these laws may have a particularly adverse effect on young people. The statement of compatibility states that the bill 'recognises that children may not be able to make decisions on their own behalf and may have been subject to regional processing through the decision of their parents' (p. 23). Although those who were under 18 at the time they were taken to a regional processing country are not within the cohort to which the law will apply, there may be cases where young adults taken to the regional processing centre were children at the time relevant decisions leading them to seek to travel to Australia were made. This is not addressed in the explanatory materials and does not appear to be adequately reflected in the bill.

2.148 The committee considers that the bill, in imposing a lifetime visa bar on adults who were transferred to a regional processing country after 19 July 2013, has a retrospective application. In assessing bills from a scrutiny perspective, the committee has consistently highlighted that it is a basic value of the rule of law that, in general, laws should only operate prospectively, as people should be able to guide their actions on the basis of fair notice about the legal rules and requirements applicable to them. In light of this and the committee's comments above, the committee does not consider that the explanatory materials provide sufficient justification as to the fairness of the approach in applying the law retrospectively. The committee therefore seeks a detailed justification from the Minister for the retrospective application of these amendments.

2.149 The committee also considers that the bill, in applying to anyone aged 18 at the time of transfer to a regional processing country, may, from a scrutiny perspective, have particularly adverse consequences for those who were children at the time the decision was made to seek to travel to Australia. The committee seeks the Minister's advice as to whether consideration has been given to the

consequences for young people of this bill, in light of the committee's comments above.

Minister's response

2.150 The Minister advised:

> The new bars created by the Bill will effectively codify existing government policy announced on 19 July 2013 that nobody transferred to a regional processing country after that date would be settled in Australia. The Australian Government has consistently said that people in regional processing countries will never be settled in Australia. This Bill will give full effect to this policy.
>
> The new bar will not apply to people who were less than 18 years old at the time they were initially transferred to a regional processing country after 19 July 2013, or to babies born in Australia or in a regional processing country to parents who have been transferred to a regional processing country. This recognises that children may not be able to make decisions on their own behalf and may have been subject to regional processing through the decisions of their parents to travel illegally to Australia by boat.
>
> The proposed legislative amendments will include flexibility for the Minister to personally lift the bar where the Minister thinks it is in the public interest to do so. This could include allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interest of affected children and/or their age at the time a decision to travel illegally to Australia was made.

Committee comment

2.151 The committee notes the Minister's statement that the bill gives effect to the government's policy that nobody transferred to a regional settlement country after 19 July 2013 would be settled in Australia.

2.152 The Minister also states that the new bar does not apply to people who were less than 18 years old when initially transferred to a regional processing country, recognising that children may not be able to make decisions on their own behalf. The Minister also advised that the proposed amendments will include the power for the Minister to lift the bar personally where he or she thinks it is in the public interest to do so, including the possibility of considering the age of a person at the time a decision was made to travel to Australia. The committee thanks the Minister for this information but notes that the response does not provide additional information to that provided in the explanatory memorandum to address with specificity the committee's concerns.

2.153 The committee reiterates its earlier statements that it is a basic value of the rule of law that, in general, laws should only operate prospectively (not

retrospectively). This is because people should be able to guide their actions on the basis of fair notice about the legal rules and requirements that will apply to them (and not on the basis of government policy). While a power to lift the bar in individual circumstances is welcome, as this is a personal, discretionary, non-compellable power, and so from a scrutiny perspective, does not constitute a significant safeguard. In addition, the committee reiterates that while the Minister advises that the government policy is that no one would be 'settled' in Australia, the bill ensures that not only will people within the relevant cohort be prevented from settling in Australia, they will also be prevented from applying for any type of Australian visa (including, for example, a visitor or business visa).

2.154 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the retrospective application of the bar on making a valid visa application.

Retrospective application[22]

Initial scrutiny – extract

2.155 Item 36 is an application provision which provides that, in relation to an applicant outside of Australia, the amendments will apply to any application for a visa made after the bill was introduced in the House of Representatives (but before the Act commences), so long as the application was not finally determined before commencement.

2.156 The explanatory memorandum suggests that the retrospective application of these provisions is required to prevent 'members of the designated regional processing cohort from attempting to circumvent the amendments by lodging an offshore visa application after introduction of the Bill and before the commencement of Schedule 1' (p. 19).

2.157 However, introduction of the bill into the House of Representatives is not the same as the commencement of an Act of Parliament. At the time the bill was introduced, the relevant law did not impose a permanent lifetime ban on visa applications to Australia. For the reasons set out above, for those who have already sought to enter Australia, notice of the intention to enact this law does not operate as a deterrent, as the relevant actions have already been undertaken.

2.158 The committee notes the retrospective application of item 36 in that it applies the bar on visas to applications made from outside of Australia after the bill was introduced in the House of Representatives (but before commencement of this Act). In light of the discussion above, the committee draws its scrutiny concerns as to

22 Item 36.

the appropriateness of the retrospective application of this item to the attention of Senators and leaves consideration of this issue to the Senate as a whole.

Minister's response

2.159 The Minister advised:

> The retrospective element only applies to applications that are made after introduction of the Bill into Parliament that are undecided when the legislation commences. This element of the legislation was made clear in the Explanatory Memorandum that accompanied the Bill. This is to prevent members of the regional processing cohort from circumventing the Government's policy by making a visa application before the Bill commences.
>
> The new bars created by the Bill will apply retrospectively to some applications made outside Australia by people who were aged over 18 when transferred to a regional processing country after 19 July 2013. Applications made after the Bill is introduced into Parliament that have not been decided before commencement of the Bill, if passed, will become invalid. This is to prevent members of the affected cohort from circumventing the Government's policy by lodging a visa application before the Bill commences. The bar applies to people who were transferred after 19 July 2013 because those persons have been on notice since that date that it is the Government's policy that they will never be settled in Australia.
>
> People in the affected cohort who are in Australia are already barred by existing laws from making a visa application unless the Minister permits them to make an application. The new bars created by the Bill will apply prospectively to applications made after the commencement of the Bill by persons in Australia.
>
> The new bar will not apply to people who were less than 18 years old at the time they were initially transferred to a regional processing country after 19 July 2013, or to babies born in Australia or in a regional processing country to parents who have been transferred to a regional processing country. This recognises that children may not be able to make decisions on their own behalf and may have been subject to regional processing through the decisions of their parents to travel illegally to Australia by boat.
>
> While being excluded from the new visa application bar, children will still be subject to the existing bars that will prevent them from making an application for a visa while in Australia unless they are permitted to do so by the Minister.
>
> The proposed legislative amendments will include flexibility for the Minister to personally lift the bar where the Minister thinks it is in the public interest to do so. This could include allowing a valid application for a visa on a case by case basis and in consideration of the individual

circumstances of the case, including the best interest of affected children and/or their age at the time a decision to travel illegally to Australia was made.

Committee comment

2.160 The committee thanks the Minister for this response. The committee notes the Minister's advice that the retrospective application of these provisions are intended to prevent members of the affected cohort from 'circumventing the Government's policy by lodging a visa application before the Bill commences'.

2.161 The committee reiterates its long-standing scrutiny concern that provisions that retrospectively apply provisions to the date of the announcement of the bill (i.e. 'legislation by press release') challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively).

2.162 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the retrospective application of this item.

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

Purpose	This bill seeks to enable the Secretary of the Department of Veterans' Affairs to authorise the use of computer programmes to: • make decisions and determinations; • exercise powers or comply with obligations; and • do anything else related to making decisions and determinations or exercising powers or complying with obligations
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 24 November 2016
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(ii)

2.163 The committee dealt with this bill in *Alert Digest No. 10 of 2016*. The Minister responded to the committee's comments in a letter dated 12 December 2016. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Broad discretionary power—disclosure of information[23]

Initial scrutiny – extract

2.164 Items 1, 7 and 10 of Schedule 2 insert a provision into each of the *Military Rehabilitation and Compensation Act 2004, Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and the *Veterans' Entitlement Act 1986*, respectively, that would enable the Secretary to certify that it is necessary in the public interest to 'disclose any information obtained by any person in the performance of that person's duties [under the relevant Act] to such persons and for such purposes as the Secretary determines'.

2.165 The explanatory memorandum (at p. 11) provides examples of circumstances in which it might be appropriate for the Secretary to disclose information, such as 'where there is a threat to life, health or welfare, for the enforcement of laws, in

23 Schedule 2, items 1, 7 and 10, proposed new sections 409A, 151B and 131A.

relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices'.

2.166 The statement of compatibility (at p. 4) notes that several safeguards have been incorporated into the bill in relation to the disclosure of information under these provisions. These include that:

- the Secretary must act in accordance with rules the Minister makes about how the power is exercised;
- the powers of the Minister and Secretary cannot be delegated to anyone; and
- before disclosing personal information about a person, the Secretary must notify the person, give the person a reasonable opportunity to make written comments on the proposed disclosure and consider any written comments made by the person (if the Secretary fails to comply with these requirements he or she commits an offence).

2.167 The committee notes these safeguards, however it remains the case that there is no limitation on the face of the bill in relation to the breadth of the Secretary's power to certify that the disclosure of information is in the public interest (other than the notification requirement in relation to personal information described above). While the Secretary must act in accordance with any rules that the Minister makes about how the power is to be exercised there is no requirement for the Minister to actually make rules for this purpose.

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

- why (at least high-level) rules or guidance about the exercise of the Secretary's disclosure power cannot be included in the primary legislation; and
- why there is no duty on the Minister to make rules regulating the exercise of the Secretary's power (i.e. the committee seeks advice as to why the proposed subsections have been drafted to provide that the Minister *may* make these rules, rather than requiring that the Minister *must* make rules to guide the exercise of this significant power).

Minister's response

2.169 The Minister advised:

> I am pleased to provide my advice in relation to the two issues identified by the Standing Committee for the Scrutiny of Bills and thank the Committee for the opportunity to provide this further information.
>
> I would like to advise the Committee that I intend to make rules that will appropriately limit the circumstances in which the Secretary of the Department of Veterans' Affairs (the Secretary) will be able to exercise the

proposed public interest disclosure power and that the Secretary will not be able to exercise the proposed public interest disclosure power until those rules are in place.

I would also like to advise the Committee that my Office has been working very closely with the Office of the Hon Amanda Rishworth MP, the Shadow Minister for Veterans' Affairs, to develop the content of these rules.

As noted in the Explanatory Memorandum, items 1, 7 and 10 of Schedule 2 of the Digital Readiness Bill are modelled on paragraph 208(1)(a) of the *Social Security Administration Act 1999.* That public interest disclosure provision has been in operation for 17 years and has not, as far as I am aware, been the cause of any concern or Parliamentary inquiry, nor has the Privacy Commissioner raised any concern about the operation of the provision.

The Department of Human Services and the Department of Social Service make public interest disclosures without having rules or guidance in the primary legislation.

When the Committee examined the Social Security (Administration) Bill 1999 (as it then was) in its fourteenth report of 1999 and in the Scrutiny of Bills Alert Digest No 9 of 1999, it did not raise similar concerns about why rules or guidance about the exercise of the Secretary's disclosure power cannot be included in the primary legislation and why there is no duty on the Minister to make rules regulating the exercise of the Secretary's power.

At least thirteen versions of the Social Security Public Interest Certificate Guidelines have been made. I understand that more versions have been made but that, earlier (revoked) versions are not available on the Federal Register of Legislation. Most recently, the Guidelines were amended in 2015 (from a 2014 version) to ensure that information can be disclosed to assist Commonwealth, State and Territory law enforcement agencies with the making, or proposed or possible making, of a proceeds of crime order or supporting or enforcing a proceeds of crime order.

It is important that, where new circumstances arise necessitating the disclosure of information (such as in relation to proceeds of crime orders), the Minister for Veterans' Affairs is able to respond quickly and flexibly to deal with changing circumstances.

Were the rules or guidance located in the primary legislation, the Minister for Veterans' Affairs would be less able to quickly respond to evolving circumstances, owing to the length time required for the Parliament to pass legislation and also due to the competing relative priorities of the Parliament.

Equivalent rules made under legislative instrument have been effectively operating in relation to public interest disclosures for the Department of Social Services and the Department of Human Services. The rules would take the form of a disallowable instrument, thus ensuring appropriate Parliamentary scrutiny of the rules.

> As I noted above, I intend to make rules that will limit the circumstances in which the Secretary will be able to exercise the proposed public interest disclosure power and the Secretary will not be able to exercise the proposed public interest disclosure power until those rules are in place. Work on developing the content of the rules is well underway in consultation with the Shadow Minister and I thank Ms Rishworth for her continued constructive engagement on veterans' affairs issues.
>
> The Social Security rules are also discretionary, but, as can be seen from the frequent amendment history, Ministers have ensured that appropriate rules are in place to limit the circumstances in which a proposed public interest disclosure may be made.
>
> Thank you again for raising these issues in relation to the Digital Readiness Bill with me. I trust that my advice addresses the Committee's concerns and would be happy to provide any further information the Committee considers useful.

Committee comment

2.170 The committee thanks the Minister for this response. The committee notes the Minister's advice that he intends to make rules appropriately limiting the circumstances in which the Secretary can exercise the proposed public interest disclosure power, and that similar rules have previously been made under similar existing legislation. The committee also notes the Minister's advice that if the rules or guidance were to be located in the primary legislation the Minister would be less able to quickly respond to evolving circumstances.

2.171 The Minister's advised that rules will be made to appropriately limit the circumstances as to when the power can be exercised, and that the Secretary will not be able to exercise the proposed public interest disclosure power until those rules are in place. However, the committee notes that bill provides that Secretary must 'act in accordance with any rules made',[24] but this only applies if rules are made, and there is no legal requirement that rules be in place before the provisions in the bill become operative.[25]

2.172 The committee considers that the disclosure of *any* information obtained in the course of the performance of a Secretary's duties under legislation to *any* person for *any* purpose, is a significant matter that should be appropriately defined or limited in primary legislation. While the committee appreciates that this power has existed for a number of years, this does not alleviate the committee's scrutiny concerns in relation to the provisions in this bill.

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24 See Schedule 2, item 1, proposed subsection 409A(2).

25 See Schedule 2, item 1, proposed subsection 409A(3) which provides that the Minister 'may' make rules.

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

2.174 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the broad discretionary power of the Secretary to disclose information.

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

Chapter 3

Scrutiny of standing appropriations

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

(iv) inappropriately delegate legislative powers; or

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

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

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

Nil

Other relevant appropriation clauses in bills

Nil

Senator Helen Polley (Chair)

Appendix 1
Ministerial responsiveness

Responsiveness to requests for further information

The committee has resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process as the committee frequently writes to the minister, senator or member who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the government (requests to ministers) and (2) non-government bills.

Ministerial responsiveness from 10 November 2016

Bill	Portfolio	Correspondence	
		Due	**Received**
Corporations Amendment (Crowd-sourced Funding) Bill 2016	Treasury	15/12/16	15/12/16
Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016	Treasury	15/12/16	14/12/16
Counter-Terrorism Legislation Amendment Bill (No. 1) 2016	Attorney-General		
Further response		24/11/16	21/11/16
Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016	Justice	15/12/16	22/12/16
Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016	Attorney-General	27/10/16	28/11/16
Further response		15/12/16	*Not yet received*
Criminal Code Amendment (War Crimes) Bill 2016	Attorney-General	24/11/16	22/11/16
Fairer Paid Parental Leave Bill 2016	Social Services	01/02/17*	*Not yet received*
Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016	Environment and Energy	15/12/16	20/12/16

Bill	Portfolio	Correspondence	
		Due	Received
Industry Research and Development Amendment (Innovation and Science Australia) Bill 2016	Industry, Innovation and Science	16/11/16	13/11/16
Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016	Justice	24/11/16	23/11/16
Migration Amendment (Visa Revalidation and Other Measures) Bill 2016	Immigration and Border Protection	24/11/16	25/11/16
Migration Legislation Amendment (Regional Processing Cohort) Bill 2016	Immigration and Border Protection	15/12/16	22/12/16
Narcotic Drugs Legislation Amendment Bill 2016 *Further response*	Health	24/11/16	23/11/16
Privacy Amendment (Re-identification Offence) Bill 2016	Attorney-General	24/11/16	23/11/16
Seafarers and Other Legislation Amendment Bill 2016	Employment	08/02/17*	07/02/17
Seafarers Safety and Compensation Levies Collection Bill 2016	Employment	08/02/17*	07/02/17
Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016	Social Services	24/11/16	21/11/16
VET Student Loans (Charges) Bill 2016	Education and Training	24/11/16	21/11/16
VET Student Loans Bill 2016	Education and Training	24/11/16	21/11/16
Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016	Veterans' Affairs	15/12/16	12/12/16

**Revised due date*

Appendix 2
Ministerial correspondence

TREASURER

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

Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) of 1 December 2016 concerning the Corporations Amendment (Crowd-sourced Funding) Bill 2016 (the Bill). The Committee commented on the delegation of legislative power.

I appreciate the Committee's consideration of the Bill and have attached a detailed response below.

I trust this information will be of assistance to you.

The Hon Scott Morrison MP
15 / 12 / 2016

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

ATTACHMENT

Delegation of legislative power – Schedule 1, item 14, proposed paragraph 738G(1)(c) and 738G(1)(f)

The Committee has identified proposed paragraph 738G(1)(f) in Schedule 1, item 14 in the Bill as a delegation of legislative power as it provides for regulations to specify additional requirements that need to be satisfied in order to make an eligible crowd-sourced funding (CSF) offer. The regulation making power in paragraph 738G(1)(f) has been included in the Bill for similar reasons to the regulation making power in paragraph 738G(1)(c) which the Committee accepted in its *Alert Digest No 10 of 2016* (as explained in page 16 of the explanatory memorandum). Any regulations prescribing additional eligibility requirements would be subject to disallowance and thus subject to parliamentary scrutiny.

Paragraph 738G(1)(f) has been included in the Bill because the CSF regime establishes a new and innovative financial market in Australia that is expected to evolve rapidly. The regulation making power will give the Government the flexibility to quickly prescribe additional eligibility requirements for CSF offers if required, depending on how the market develops. As the market develops, there may be offers made that are not appropriate for the CSF regime, given the reduced disclosure requirements. Similarly, there may be offers made by companies using structures or arrangements that should not be made under the CSF regime. If this were to happen, it is important for the Government to be able to quickly prescribe additional eligibility requirements to prevent these types of offers from being made under the CSF regime. The regulation making power is therefore an important aspect of the investor protections included as part of the CSF regime as it will allow the Government to prevent certain types of offers from being made, protecting investors and thereby helping build the necessary investor confidence in the market as it develops.

In addition, the regulation making powers in paragraphs 738G(1)(c) and 738G(1)(f) will give the Government flexibility to extend CSF offers to different types of securities as the market develops. Once the market becomes established, it may be desirable for the regime to be extended to other types of securities. The current eligibility requirements may not however be appropriate for these securities. The regulation making power will enable other eligibility requirements to be prescribed which would facilitate the extension of the CSF regime, helping the market grow and mature.

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

14 DEC 2016

Ref: MC16-020924

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

Dear Senator Polley

Thank you for your letter of 1 December 2016 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 (the Bill). The Committee commented in its Alert Digest No 10 of 2016 on the availability of judicial review, the functions of the standards body in section 921U of the Bill, and the reversal of the evidential burden of proof.

Please find my responses to your questions and concerns in the attached information.

I appreciate the Committee's consideration of the Bill and I trust this information will be of assistance to you.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434

ATTACHMENT

Section 921X: Right to judicial review

Committee's Question:

Noting the significance of decisions to be made by the standards body (discussed below), the committee seeks the Minister's advice as to whether, and under what jurisdiction, the standards body's decisions, including legislative instruments, will be subject to judicial review.

Response:

The Government considers, based on legal advice received by the Treasury, that the directors of the standards body are 'officers of the Commonwealth'. Therefore judicial review of the body's legislative instruments and administrative decisions is available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Australian Constitution.

In addition, the standard body's administrative decisions are reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

Section 921U: Delegation of legislative power to standards body

Committee's Comment:

In light of this explanation and the fact that that legislative instruments made by the standards body will be subject to parliamentary disallowance, the committee leaves the general question of whether the delegation of legislative power in subsection 921U(5) is appropriate to the Senate as a whole.

Response:

The Bill sets out the general professional, education and training requirements for financial advisers but grants the standards body the power to determine the specific details by legislative instrument. This delegation of legislative power was recommended by the 2014 Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry (the Inquiry). The Inquiry noted that a co-regulatory approach with an independent industry-funded standards body will promote stakeholder engagement and assist with the professionalisation of the industry. Standards in other professions, including law, are set by specialist bodies and this approach provides flexibility and allows technical details (e.g. the list of approved degrees) to be easily updated.

There are multiple checks on the body's exercise of delegated power, including that the body's legislative instruments are disallowable by Parliament and the Minister may direct the body to modify its standards or revoke the body's nomination as the standards body.

Subsections 921U(3)-(4): Standards body's power to modify the continuing professional development (CPD) requirements

Committee's Question:

The committee seeks the Minister's advice as to the rationale for allowing legislative instruments to modify the operation of the Corporations Act, including examples of the circumstances in which it is envisaged that this power may be used.

Response:

Subsections 921U(3)-(4) allow the body to modify the operation of the Bill only when it is determining the CPD requirements under subparagraph 921U(2)(a)(iv). In practice, this means that the scope of the standard body's modification power is limited to varying the requirement to report breaches of the CPD requirement within 30 business days of the end of the CPD year.

The power in subsections 921U(3)-(4) is designed to address situations where a financial adviser's CPD year changes. A financial adviser's CPD year may change when:

- the licensee changes CPD years; or
- a financial adviser changes licensees and the new licensee has a different CPD year to the former licensee.

In situations where the financial adviser's CPD year changes, the CPD reporting requirement may operate harshly. For example, if the CPD year changed from 1 April to 1 July, the licensee would need to report twice within a 3 month period. The power in subsections 921U(3)-(4) gives the body the discretion to exempt the licensee in situations where the strict operation of the law results in an excessive administrative burden.

The standard body's use of its discretion is subject to a number of safeguards to prevent abuse, including that its modified requirements will be in legislative instruments that are disallowable by Parliament.

Subsection 921U(8) – Body's failure to consult does not affect validity

Committee's Question:

Noting this, and the significance of the matters to be determined by the standards body by legislative instrument, the committee seeks the Minister's advice as to the rationale for including proposed new subsection 921U(8) [which states that a failure to comply with the consultation requirements does not affect the validity of the legislative instrument] and whether there is an alternative mechanism (other than judicial review) through which the consultation requirements will be enforced.

Response:

The Government expects the body to consult extensively with stakeholders in performing its functions and for this reason has included consultation requirements in the primary legislation. Subsection 921U(8) is designed to promote certainty by ensuring that technical failures to comply with the consultation requirement do not affect the validity of the body's standards. It also provides the body with the flexibility to use targeted consultation with all affected stakeholders in appropriate situations.

There are multiple safeguards to ensure that the body undertakes proper consultation, including that the legislative instruments are disallowable by the Parliament and the Minister may direct the body or revoke the body's nomination. Further, the board of the body may, as with other Commonwealth agencies, be called to appear before Parliamentary Committees to explain its actions.

Subsection 921U(9) – Constraints on the body's power to charge fees for its services

Committee's Question:

The committee notes that the power provided to the standards body to charge fees is broad and unconstrained and therefore seeks the Minister's advice as to whether guidance or limitations in relation to charging of fees by the standards body can be included on the face of the bill.

Response:

Subsection 921U(9) allows the standards body to charge fees for its services in the same way as other companies. This is not a taxing power enacted in accordance with section 55 of the Australian Constitution and the courts have established that fees must not exceed the value of what is acquired (*Air Caledonie International v Commonwealth* (1988) 165 CLR 462). The Bill also prohibits the standards body from being operated for profit (subparagraph 921X(2)(c)(ii)).

If the Minister considers the body's fees to be inappropriate, the Minister may direct the body to lower its fees. As the new body would be a Commonwealth company, it will also be subject to any aspect of the Government Charging Framework that the Minister for Finance elects to apply to the body via a government policy order.

Subsections 922M(2) and 923C(3)-(6) – Reversal of the evidential burden of proof

Committee's Question

As neither the statement of compatibility nor the explanatory memorandum address this issue the committee seeks a justification from the Minister as to why the items propose to reverse the evidential burden of proof which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Response:

The Bill does not reverse the evidential burden of proof but includes a non-operative note to alert the reader to the reversal of the evidential burden of proof for all exceptions, exemptions, excuses, qualifications and justifications in subsection 13.3 of the *Criminal Code Act 1995*.

The Criminal Code reverses the evidential burden of proof for exemptions because the relevant facts are peculiarly within the defendant's knowledge. For example, subsection 922M(2) states that a defendant is not required to notify ASIC of certain information about their financial adviser if the defendant reasonably believes that the information was provided by another licensee. Information about whether the defendant believed that another licensee had lodged the notice is peculiarly within the defendant's knowledge. Similarly, subsections 923C(3)-(6) provide financial advisers with a justification for using a restricted title when they are providing advice only to wholesale or in-house clients. Again, the defendant is able to adduce evidence about their client's identity more easily than ASIC.

Subsections 922M(2) and 923C(3)-(6) replicate existing provisions in the corporations legislation (see subsection 922M(2) of Schedule 8D to the *Corporations Regulations 2001* and Division 10 of Chapter 7 of the Corporations Act).

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS16-018228

22 DEC 2016

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600
<scrutiny.sen@aph.gov.au>

Dear Chair

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

Thank you for your letter of 1 December 2016 regarding the Senate Standing Committee for the Scrutiny of Bill's consideration of the above Bill in *Alert Digest No. 10 of 2016*.

I enclose my response to this request, which I trust will assist the Committee in its consideration of the Bill.

Should your office require any further information, the responsible adviser for this matter in my office is Adrian Barrett, who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Encl: Response to request for further information from the Senate Standing Committee for the Scrutiny of Bills—Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Enclosure

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

Reversal of evidential burden of proof

Schedule 1, items 6 and 95

Items 6 and 95 of Schedule 1 introduce new exceptions to existing offences. Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (see in particular pp 50–52).

As neither the statement of compatibility nor the explanatory memorandum address this issue the committee seeks a justification from the Minister as to why the items propose to reverse the evidential burden of proof which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50–52).

Minister for Justice's response:

Subsections 45(1) and (2) of the *Surveillance Devices Act 2004* (SDA) create offences in relation to using, recording, communicating or publishing information that is protected information obtained under the SDA. Subsection 45(4) of the SDA creates exceptions to these offences. There is currently an exception relating to communicating information to foreign countries in relation to a mutual assistance in criminal matters request.

Items 6 and 95 insert additional circumstances in subsection 45(4) of the SDA in which an offence created in subsections 45(1) or (2) of the SDA does not apply. The amendments broaden the current exception in subsection 45(4) of the SDA, which covers communication of information to foreign countries, to also cover communications to the International Criminal Court and international war crimes tribunals in international crime cooperation matters.

Given communications to foreign countries, the International Criminal Court and international war crimes tribunals in international crime cooperation matters are confidential, these matters would be peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. For this reason it would be for the defendant to raise evidence as to the application of these exceptions.

Right to liberty

Schedule 3, Items 1 and 2

Items 1 and 2 of Schedule 3 provide that where a person has been released on bail and a surrender or temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant.

The explanatory materials state that the provision gives courts the power to remand the person into custody (pp 23 and 162–163). However, the provision is more than an enabling provision; it is phrased as an obligation to commit the person to prison, without any discretion as to whether this is appropriate in all the circumstances.

The explanatory memorandum states that it is appropriate that the person be committed to prison to await surrender as an extradition country has a period of two months in which to effect surrender and '[c]orrectional facilities are the only viable option for periods of custody of this duration' (p. 162). The statement of compatibility states that without this provision the police may need to place the person in a remand centre, for a period of up to two months, yet remand centres 'do not have adequate facilities to hold a person for longer than a few days' (p. 24). The statement of compatibility also states that the power to remand a person pending extradition proceedings is necessary as reporting and other bail conditions 'are not always sufficient to prevent individuals who wish to evade extradition by absconding'. It also goes on to provide that the *Extradition Act 1988* makes bail available in special circumstances which ensures that 'where circumstances justifying bail exist, the person will not be kept in prison during the extradition process' (p. 24). However, it is unclear how these existing bail provisions fit with the amendments which require the magistrate, judge or court to commit a person, already on bail, to prison to await surrender under the warrant.

The committee seeks the Minister's advice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail process under the *Extradition Act 1988* fits with the amendments proposed by this bill.

Minister for Justice's response:

In the extradition context, a magistrate must not release a person on bail unless there are special circumstances justifying such release. This ensures the *Extradition Act 1988* (the Extradition Act) is suitably flexible to accommodate exceptional circumstances that may necessitate granting a person bail, such as where the person is in extremely poor health. This presumption against bail is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country.

The amendments to sections 26 and 35 of the Extradition Act address the logistics for the execution of a surrender warrant when a person is on bail and a surrender warrant has been issued to surrender the person to an extradition country. The surrender warrant is the instrument that empowers the police to bring an eligible person into custody to await transportation out of Australia.

The Extradition Act currently provides that where a surrender warrant has been issued for a person on bail any police officer may take the person into custody to take them before a magistrate, eligible Federal Circuit Court Judge or relevant court in order to discharge bail recognisances. Following the discharge of bail recognisances the magistrate, eligible Federal Circuit Court Judge or relevant court must then release the person into the custody of any police officer to await surrender. The Extradition Act does not provide for a person to apply to have their bail extended while they await surrender to the extradition country once a surrender warrant has been issued.

The amendments to sections 26 and 35 do not affect existing bail processes under the Extradition Act. It remains the case that bail is no longer available on the execution of a surrender warrant. The amendments are framed as an obligation because the Act requires that the person be remanded to ensure they can be surrendered. The relevant change would allow the person to be remanded in a corrections facility, rather than police custody, to facilitate appropriate remand arrangements where surrender is not immediately possible.

If the person wants to challenge the surrender determination by way of judicial review, the person is able to make a new bail application under section 49C of the Extradition Act to the relevant review or appellate Court. Under section 49C(2) of the Extradition Act a grant of bail by a review or appellate court terminates each time such a court has upheld the surrender determination.

Broad delegation of administrative powers

Schedule 4, item 3

Item 3 of Schedule 4 proposes repealing section 26 of the *Foreign Evidence Act 1994* and replacing it with a new, substantially similar, provision. The section as it currently stands provides that the Attorney-General and an authorised officer can certify that a specified document or thing was obtained as a result of a request made to a foreign country by or on behalf of the Attorney-General. This certificate provides prima facie evidence to a court of the matters stated in the certificate. Subsection (3) (as it currently stands) defines an authorised officer for this purpose as a person who is a Senior Executive Service (SES) level employee (or acting SES) in the Attorney-General's Department. The bill proposes to omit subsection (3) (and allow the Attorney-General to issue the evidentiary certificate). The explanatory memorandum (at p. 164) states that the reason for the omission of subsection (3) is that it is now proposed to rely on the delegation of the Attorney-General's power under section 17 of the *Law Officers Act 1964*. The explanatory memorandum states that a delegation under this provision 'would be to a person with an appropriate level of seniority, not below the executive level, who has a close involvement in the matters to be certified'.

However, section 17 of the *Law Officers Act 1964* relevantly provides that the Attorney-General can delegate his or her powers to any person holding the office specified in the instrument of delegation. There does not appear to be any limit on the level or type of employee who may be specified in the instrument of delegation.

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 (either through the bill or through other legislation), the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

In this case, the explanatory memorandum (at p. 164) states the reason for removing the limit on the power of delegation as allowing for 'reliability, flexibility and promptness, with sufficient oversight'. However, it is not clear to the committee why the bill proposes removing any detail regarding the office-holder who may be delegated this important function. The explanatory memorandum states that the delegation will not be to persons below the executive level, yet there is nothing on the face of the bill (or in section 17 of the *Law Officers Act 1964*) which restricts the delegation in this way.

The committee seeks the Minister's detailed justification for the rationale for removing the limit on the delegation of the Attorney-General's power to issue an evidentiary certificate and whether the delegation could be confined on the face of the legislation to Australian Public Service employees not below the executive level.

Minister for Justice's response:

The matters that are certified in the certificate are of a routine and administrative nature. The certificate will state that material was received from a foreign country in response to a request

made by or on behalf of the Attorney-General. That is, it is solely attesting to the physical receipt of evidence by the Australian Central Authority (the Attorney-General's Department) from a requested foreign country.

Given the routine and administrative nature of this task, it is proposed that the officer issuing the certificate need not be limited to Senior Executive Service (SES) officers, but should also include certain other officers of the Attorney-General's Department. The person certifying the material is more likely to have direct knowledge of the matters to be certified than an SES officer, having received the evidence through a communications service such as a courier, Australia Post or email and being directly involved in the management of the case. In addition, there is often an urgent need to certify material for use in Australian proceedings; the amendment will provide for more flexibility in this procedural matter by allowing a broader range of officials to certify the material in a timely way. This will be a more efficient method of certifying material that is appropriate in the circumstances.

The delegation of powers under the *Law Officers Act 1964* is consistent with the delegation of powers in other laws administered by the Attorney-General, including the *Extradition Act 1988* and the *Evidence Act 1995*.

Under the *Law Officers Act 1964* it is a matter for the Attorney-General to specify to whom the delegation is made; in practice, the instrument of delegation specifies particular position numbers so will be limited to only certain positions the Attorney-General considers appropriate in the circumstances. In practice the Attorney-General's Department would only propose certain executive level position numbers within the relevant Departmental business unit be specified.

Retrospective application

Schedule 4, item 6

Items 1 and 2 of Schedule 4 provide that the *Foreign Evidence Act 1994* applies to proceedings conducted in State or Territory courts in relation to the external territories and the Jervis Bay Territory, and ensures that the part of that Act applying to certain proceeds of crime proceedings will apply to prescribed external territories. Item 6 of Schedule 4 provides that these amendments will apply in relation to proceedings that commence before or after commencement of the item.

There is no discussion in the explanatory materials as to whether applying these amendments to proceedings that occur before the item commences (which has a retrospective application) will cause anyone any hardship or detriment.

The committee seeks the Minister's advice as to whether retrospectively applying amendments relating to the application of the *Foreign Evidence Act 1994* to proceedings under a law of the external territories and Jervis Bay causes any person any detriment or hardship.

Minister for Justice's response:

The amendments in items 1 and 2 are procedural in scope and do not have the effect of criminalising or penalising conduct which was otherwise lawful prior to the amendments. The amendments merely provide a process for adducing foreign material in certain criminal and related proceedings and will not cause any person any detriment or hardship.

Retrospective application

Schedule 5, item 4

Item 2 of Schedule 5 inserts the word 'child complainant' into an existing provision of the *Crimes Act 1914*, which has the effect of extending the existing offence of publishing any matter identifying child witnesses or vulnerable adult complainants without the leave of the court, to also cover the publication of information identifying a child complainant. Item 4 of this Schedule provides that these amendments apply in relation to proceedings instituted after commencement of the item regardless of when the alleged offences were committed. As such, it applies in relation to offences committed before commencement of the item (but to proceedings initiated after commencement). It is not clear to the committee whether, in applying this to offences that occurred before commencement and in circumstances where the existing offence is being extended, this imposes retrospective criminal liability.

The committee seeks the Minister's advice as to whether applying the amendments to proceedings instituted after commencement but relating to offences that may have been committed before commencement, in circumstances where the amendments extend an existing criminal offence, effectively imposes retrospective criminal liability, and if so, what is the justification for doing so.

Minister for Justice's response:

The prohibition on retrospective criminal laws contained in article 15 of the International Covenant on Civil and Political Rights does not generally extend to retrospective changes to other measures, such as procedure, provided they do not affect the punishment to which an offender is liable.

Schedule 5, Item 4 is an application provision which proposes the non-publication offence in section 15YR of the *Crimes Act 1914* apply in relation to proceedings instituted after the commencement of Schedule 5, regardless of when the offences committed, or alleged to have been committed, occurred.

While this will mean the protections against publication may apply in proceedings for acts committed prior to the entry into force of Schedule 5, the provision does not affect the elements or penalties of any offence, nor does it criminalise or penalise conduct which was otherwise lawful prior to the commencement of Schedule 5. The provision does not impose retrospective criminal liability.

Schedule 5, Item 4 engages with human rights in a reasonable and proportionate way and does not trespass unduly on personal rights and liberties.

Delegation of legislative power—incorporation of external material into the law

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

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

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).

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

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

The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue: *Access to Australian Standards Adopted in Delegated Legislation* (June 2016). This report comprehensively outlines the significant scrutiny concerns associated with

the incorporation of material by reference, particularly where the incorporated material is not freely available.

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

Minister for Justice's Response:

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

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

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

As noted by the Committee, concerns arise when external materials incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law. However, any detriment caused by incorporated material not being freely and readily available to the public at large must be balanced against the benefit gained from utilising that incorporated material. The proposed amendment strikes an appropriate balance.

Copyright restrictions

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

The benefit of incorporating the relevant standard

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

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

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

The incorporation of the most current standard supports the integrity of the results and ensures there is no discrepancy between the procedures and testing methods used by the company contracted to conduct drug tests and the standard referenced in the AFP Regulations.

The effect of the standard not being made freely available to the public at large

The drug and alcohol testing provisions in section 40LA, 40M and 40N are applicable only to AFP appointees, and not the general public. That is, the incorporation of the standard does not impact the general public. Moreover, the incorporation of the standard does not create obligations with which AFP appointees must comply. Rather, it ensures that collection procedures and testing methods utilised by the AFP accord with industry best practice.

As noted, the relevant standard will be made freely and readily available to the only persons directly affected by the law. Any detriment caused by the standard not being freely and readily available to the public at large is thereby minimised.

The proposed amendments strike an appropriate balance

The benefit of incorporating standards published by Standards Australia and Standards Australia/Standards New Zealand into the law is clear; it ensures the AFP applies robust, best-practice alcohol and drug testing procedures to its appointees. Imposing a different standard, one that may be freely and readily available to the public at large, may require departing from the industry accepted best-practice encompassed within standards published by Standards Australia and Standards Australia/Standards New Zealand.

The Government considers that the benefit gained from ensuring best-practice testing procedures are used outweighs the minimal detriment caused by the standard not being freely and readily available to persons not directly affected by the law.

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

20 DEC 2016

MC16-027090

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

Dear Senator Polley

Thank you for your letter seeking advice in relation to the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016.

My response addressing the issues raised in the Committee's *Alert Digest No. 10 of 2016*, in relation to setting the level of fees, the indexation of fees, and delegation of legislative power, is at Attachment A.

I note that the Committee has indicated in the Digest that the other two issues raised, namely the requirement for particulars to be specified in the regulations, and the appropriateness of removing the text of the Basel Convention from the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, have been left to the Senate as a whole to consider.

Yours sincerely

JOSH FRYDENBERG

Attachment A

Reply to the Standing Committee for the Scrutiny of Bills Alert Digest No.10 of 2016 about the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016

1. Schedule 1, item 6, proposed new subsection 32(1) – setting level of fee by regulation

As the setting of the amount of fees is a significant matter, the Committee has requested advice as to whether the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016 (the Amendment Bill) can be amended to provide greater legislative guidance as to how the fee amount is to be determined and/or to limit the fee that may be imposed. The Committee has also sought advice as to whether a higher cap could be introduced, rather than removing the existing $8000 cap altogether.

Subsection 32(1) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Act) currently enables the regulations to prescribe the fees to be paid for the processing of hazardous waste permit applications and notices. The amount or rate of the fee must be reasonably related to the expenses incurred or to be incurred by the Commonwealth in relation to the application or notice to which it relates (section 32(4) of the Act).

In this instance, the fees to be prescribed in the regulations have been determined by an assessment of the direct costs to the Department of the Environment and Energy (the Department) of providing the permit service that can be linked to particular permit applications, such as the staff hours required to process applications. The method by which the fee amounts have been calculated is outlined in the Cost Recovery Implementation Statement (the CRIS)[1], which was prepared in consultation with relevant industry stakeholders. The CRIS was prepared in accordance with the Australian Government's Cost Recovery Guidelines, which also require cost recovery arrangements to remain under review.[2]

It is not considered necessary to include guidance in the Bill regarding the determination of the fees, or a higher cap for the fees. Current drafting practice does not require the formulation for how the fee amount is determined to be legislated in statute. Any future changes to the amount of the fees prescribed would be considered following the preparation of a Cost Recovery Implementation Statement and stakeholder engagement.

2. Schedule 1, item 7, proposed new subsection 32(7) – Indexation of fee by regulation

As different methods of indexation can result in different rates of increase in the level of fees, the Committee has requested advice as to whether the Bill can be amended to specify the method of indexation to be used, given the basis for calculating indexation is specified in the Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016 (the Levy Bill).

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[1] See the Department of the Environment and Energy's Cost Recovery Implementation Statement, approved by Minister Hunt on 27 April 2016, at http://www.environment.gov.au/about-us/accountability-reporting/cost-recovery.

[2] Department of Finance, *Australian Government Cost Recovery Guidelines,* Resource Management Guide No. 304, July 2014 – Third edition, p. 7.

The proposed insertion of section 32(7) will enable the permit and notice fees to be indexed by a method prescribed by the regulations. This approach was taken to ensure that all relevant information regarding the amount of the fees for applications and notices, and the method for their indexation, is situated in the same place. This ensures that those persons who are subject to these fees do not have to access multiple documents to ascertain the amount payable.

Consistent with this approach, the amount of the levy and the method for calculating its indexations, will be specified in the Levy Bill. It was necessary to specify these amounts in the Levy Bill, rather than in regulations made for the purposes of the Levy Bill, to reflect the current drafting practice that the details of a tax be set out in the taxation Act rather than regulations.

3. Schedule 1, item 14, section 60 – delegation of administrative powers

The Committee has requested advice as to whether the limitation on the categories of powers and functions that may be exercised by Executive Level 2 officers can be included on the face of the Bill.

Item 14 has been drafted to refer to an Australian Public Service employee who holds, or is acting in, an Executive Level 2, or equivalent position, in the Department. Further, it is my intention to only delegate my powers and functions to Executive Level 2 employees within the Department who have day-to-day responsibility for the administration of the Act. The arrangement whereby such Executive Level 2 employees are delegated my powers and functions would be formalised in an Instrument of Delegation under the Act. This approach is consistent with the administration of EPBC Act, under which certain powers are allocated to Executive Level 2 employees through an Instrument of Delegation, rather than by specifying these powers in the EPBC Act or regulations.

This approach will enable Executive Level 2 officers to exercise my functions and powers under the Act where it is appropriate for decisions to be made at this level. This may include:

- Purely administrative actions that are required under the Act, some for which the statutory response times are short but do not influence how hazardous wastes are to be managed, such as the notification and acknowledgement of permit applications.
- Permitting decisions that are routine in nature, non-controversial and low-risk.

This will not prevent significant decisions being made by persons of a higher classification.

The proposed amendments will provide for more efficient administration of the Hazardous Waste Act by facilitating decision-making at a level that is appropriate to the circumstances, thus reducing unnecessary delays to permit applicants for routine, high-volume administrative actions and decisions, while ensuring that non-routine decisions are made by senior officers or the Minister, as appropriate. This approach is also consistent with the Australian Administrative Law Guide which documents that it may be appropriate for junior officers to make decisions involving a limited exercise of discretion, or under legislative provisions that give rise to a high volume of decisions to be made.

Any decision made under the Act will continue to be reviewable by the Administrative Appeals Tribunal.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS16-004520

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

Dear Senator

Thank you for your correspondence of 24 November 2016 in relation to comments made in the Committee's *Alert Digest No. 9 of 2016* concerning the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016.

I would like to provide the following advice to the Committee as a result of the comments in the Alert Digest, at Attachment A.

Thank you for considering this advice. The contact officer in my Department is Pip De Veau, General Counsel, Legal Division who can be contacted on (02) 6264 3058.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON 22/12/16

Attachment A

Retrospective application
(Items 1, 4 and 13, proposed subsections 5(1), 46A(2AA) and 46B (2AA))

The committee considers that the bill, in imposing a lifetime visa bar on adults who were transferred to a regional processing country after 19 July 2013, has a retrospective application. In assessing bills from a scrutiny perspective, the committee has consistently highlighted that it is a basic value of the rule of law that, in general, laws should only operate prospectively, as people should be able to guide their actions on the basis of fair notice about the legal rules and requirements applicable to them. In light of this and the committee's comments above, the committee does not consider that the explanatory materials provide sufficient justification as to the fairness of the approach in applying the law retrospectively. The committee therefore seeks a detailed justification from the Minister for the retrospective application of these amendments.
The committee also considers that the bill, in applying to anyone aged 18 at the time of transfer to a regional processing country, may, from a scrutiny perspective, have particularly adverse consequences for those who were children at the time the decision was made to seek to travel to Australia. The committee seeks the Minister's advice as to whether consideration has been given to the consequences for young people of this bill, in light of the committee's comments above.

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

The new bars created by the Bill will effectively codify existing government policy announced on 19 July 2013 that nobody transferred to a regional processing country after that date would be settled in Australia. The Australian Government has consistently said that people in regional processing countries will never be settled in Australia. This Bill will give full effect to this policy.

The new bar will not apply to people who were less than 18 years old at the time they were initially transferred to a regional processing country after 19 July 2013, or to babies born in Australia or in a regional processing country to parents who have been transferred to a regional processing country. This recognises that children may not be able to make decisions on their own behalf and may have been subject to regional processing through the decisions of their parents to travel illegally to Australia by boat

The proposed legislative amendments will include flexibility for the Minister to personally lift the bar where the Minister thinks it is in the public interest to do so. This could include allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interest of affected children and/or their age at the time a decision to travel illegally to Australia was made.

Retrospective application
(Item 36)

The committee notes the retrospective application of item 36 in that it applies the bar on visas to applications made from outside of Australia after the bill was introduced in the House of Representatives (but before commencement of this Act). In light of the discussion above, the committee draws its scrutiny concerns as to the appropriateness of the retrospective application of this item to the attention of Senators and leaves consideration of this issue 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.

The retrospective element only applies to applications that are made after introduction of the Bill into Parliament that are undecided when the legislation commences. This element of the legislation was made clear in the Explanatory Memorandum that accompanied the Bill. This is to prevent members of the regional processing cohort from circumventing the Government's policy by making a visa application before the Bill commences.

The new bars created by the Bill will apply retrospectively to some applications made outside Australia by people who were aged over 18 when transferred to a regional processing country after 19 July 2013. Applications made after the Bill is introduced into Parliament that have not been decided before commencement of the Bill, if passed, will become invalid. This is to prevent members of the affected cohort from circumventing the Government's policy by lodging a visa application before the Bill commences. The bar applies to people who were transferred after 19 July 2013 because those persons have been on notice since that date that it is the Government's policy that they will never be settled in Australia.

People in the affected cohort who are in Australia are already barred by existing laws from making a visa application unless the Minister permits them to make an application. The new bars created by the Bill will apply prospectively to applications made after the commencement of the Bill by persons in Australia.

The new bar will not apply to people who were less than 18 years old at the time they were initially transferred to a regional processing country after 19 July 2013, or to babies born in Australia or in a regional processing country to parents who have been transferred to a regional processing country. This recognises that children may not be able to make decisions on their own behalf and may have been subject to regional processing through the decisions of their parents to travel illegally to Australia by boat.

While being excluded from the new visa application bar, children will still be subject to the existing bars that will prevent them from making an application for a visa while in Australia unless they are permitted to do so by the Minister.

The proposed legislative amendments will include flexibility for the Minister to personally lift the bar where the Minister thinks it is in the public interest to do so. This could include allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interest of affected children and/or their age at the time a decision to travel illegally to Australia was made.

The Hon Dan Tehan MP

Minister for Veterans' Affairs
Minister for Defence Personnel
Minister Assisting the Prime Minister for Cyber Security
Minister Assisting the Prime Minister for the Centenary of ANZAC

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MS16-001006

1 2 DEC 2016

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Dear Senator Polley Helen,

Thank you for the letter from your Committee Secretary, dated 1 December 2016, requesting information about issues identified with the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016* (Digital Readiness Bill.)

I am pleased to provide my advice in relation to the two issues identified by the Standing Committee for the Scrutiny of Bills and thank the Committee for the opportunity to provide this further information.

I would like to advise the Committee that I intend to make rules that will appropriately limit the circumstances in which the Secretary of the Department of Veterans' Affairs (the Secretary) will be able to exercise the proposed public interest disclosure power and that the Secretary will not be able to exercise the proposed public interest disclosure power until those rules are in place.

I would also like to advise the Committee that my Office has been working very closely with the Office of the Hon Amanda Rishworth MP, the Shadow Minister for Veterans' Affairs, to develop the content of these rules.

As noted in the Explanatory Memorandum, items 1, 7 and 10 of Schedule 2 of the Digital Readiness Bill are modelled on paragraph 208(1)(a) of the *Social Security Administration Act 1999*. That public interest disclosure provision has been in operation for 17 years and has

not, as far as I am aware, been the cause of any concern or Parliamentary inquiry, nor has the Privacy Commissioner raised any concern about the operation of the provision.

The Department of Human Services and the Department of Social Service make public interest disclosures without having rules or guidance in the primary legislation.

When the Committee examined the Social Security (Administration) Bill 1999 (as it then was) in its fourteenth report of 1999 and in the Scrutiny of Bills Alert Digest No 9 of 1999, it did not raise similar concerns about why rules or guidance about the exercise of the Secretary's disclosure power cannot be included in the primary legislation and why there is no duty on the Minister to make rules regulating the exercise of the Secretary's power.

At least thirteen versions of the Social Security Public Interest Certificate Guidelines have been made. I understand that more versions have been made but that, earlier (revoked) versions are not available on the Federal Register of Legislation. Most recently, the Guidelines were amended in 2015 (from a 2014 version) to ensure that information can be disclosed to assist Commonwealth, State and Territory law enforcement agencies with the making, or proposed or possible making, of a proceeds of crime order or supporting or enforcing a proceeds of crime order.

It is important that, where new circumstances arise necessitating the disclosure of information (such as in relation to proceeds of crime orders), the Minister for Veterans' Affairs is able to respond quickly and flexibly to deal with changing circumstances.

Were the rules or guidance located in the primary legislation, the Minister for Veterans' Affairs would be less able to quickly respond to evolving circumstances, owing to the length of time required for the Parliament to pass legislation and also due to the competing relative priorities of the Parliament.

Equivalent rules made under legislative instrument have been effectively operating in relation to public interest disclosures for the Department of Social Services and the Department of Human Services. The rules would take the form of a disallowable instrument, thus ensuring appropriate Parliamentary scrutiny of the rules.

As I noted above, I intend to make rules that will limit the circumstances in which the Secretary will be able to exercise the proposed public interest disclosure power and the Secretary will not be able to exercise the proposed public interest disclosure power until those rules are in place. Work on developing the content of the rules is well underway in consultation with the Shadow Minister and I thank Ms Rishworth for her continued constructive engagement on veterans' affairs issues.

The Social Security rules are also discretionary, but, as can be seen from the frequent amendment history, Ministers have ensured that appropriate rules are in place to limit the circumstances in which a proposed public interest disclosure may be made.

Thank you again for raising these issues in relation to the Digital Readiness Bill with me. I trust that my advice addresses the Committee's concerns and would be happy to provide any further information the Committee considers useful.