

**Senate Standing Committee  
for the Scrutiny of Bills**

**Annual Report 2017**

**March 2018**

© Commonwealth of Australia 2018

ISBN 978-1-76010-754-3

This document was produced by the Senate Standing Committee for the Scrutiny of Bills Secretariat and printed by the Senate Printing Unit, Parliament House, Canberra

# MEMBERSHIP OF THE COMMITTEE

## Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Jonathon Duniam	LP, Tasmania
Senator Jane Hume	LP, Victoria
Senator Janet Rice	AG, Victoria
Senator Murray Watt	ALP, Queensland

## Secretariat

Ms Anita Coles, Secretary

Mr Glenn Ryall, Principal Research Officer (until 13.10.17)

Mr Michael Sloane, Principal Research Officer (from 9.10.17)

Ms Ingrid Zappe, Legislative Research Officer

## Committee legal adviser

Associate Professor Leighton McDonald

## Committee contacts

PO Box 6100

Parliament House

Canberra ACT 2600

Phone: 02 6277 3050

Email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)

Website: [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny)



# TABLE OF CONTENTS

<b>Membership of the Committee</b> .....	iii
<b>Preface</b> .....	vii
<b>Chapter 1</b>	
<b>Introduction</b> .....	1
Background.....	1
Committee establishment.....	1
Committee membership .....	1
The committee’s scrutiny principles .....	2
The committee’s mode of operation .....	3
The committee’s workflow.....	4
Committee publications and resources .....	7
Interaction with other committees .....	8
Acknowledgements .....	10
<b>Chapter 2</b>	
<b>Work of the committee in 2017</b> .....	13
Statistics.....	13
Impact of the committee’s work in 2017 .....	14
<b>Chapter 3</b>	
<b>Case studies</b> .....	23
National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 .....	23
Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016.....	26
Regional Investment Corporation Bill 2017 .....	28
<b>Appendix 1</b>	
The committee’s scrutiny principles in detail.....	35



## **Preface**

This report discusses the work of the Senate Standing Committee for the Scrutiny of Bills during 2017. It gives an account of the operation of the committee during that year, including examples of the kinds of issues that arose under each of the five criteria against which the committee tests the legislation it scrutinises.





# Chapter 1

## Introduction

### Background

1.1 Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan 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.

### Committee establishment

1.2 The Scrutiny of Bills Committee was first established by a resolution of the Senate on 19 November 1981, following a report of the Senate's Constitutional and Legal Affairs Committee (tabled in November 1978). That report recommended the establishment of a new parliamentary committee to highlight provisions in bills which potentially affected individuals by interfering with their rights or by subjecting them to the exercise of an undue delegation of power.

1.3 The government of the day had considerable misgivings about this proposal, seeing it as having the potential to 'interfere' in the legislative process. Nevertheless, on the motion of Liberal Senator Alan Missen and Labor Senator Michael Tate, the committee was established on a trial basis in November 1981, was constituted on a discrete basis under a sessional order in May 1982 and became a permanent feature of the Senate committee system on 17 March 1987.

### Committee membership

1.4 Senate standing order 24(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members—three senators from the government party or parties and three from non-government parties (as nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators). In accordance with standing orders 24(4)

and 24(5), the chair of the committee is a member of the opposition, and the deputy chair is a government member.

1.5 Members of the committee during 2017 were:

### Chair

Senator Helen Polley	ALP, Tasmania	12.11.13 onwards <i>(Chair from 11.02.14)</i>
----------------------	---------------	--

### Deputy Chair

Senator John Williams	NATS, New South Wales	01.07.14 onwards
-----------------------	-----------------------	------------------

### Members

Senator Cory Bernardi	LP, South Australia	28.11.16 – 7.2.17
Senator Jonathon Duniam	LP, Tasmania	01.09.16 onwards
Senator Jane Hume	LP, Victoria	15.02.17 onwards
Senator Janet Rice	AG, Victoria	01.09.16 onwards
Senator Murray Watt	ALP, Queensland	01.09.16 onwards

### The committee's scrutiny principles

1.6 As noted above, the scope of the committee's interest in bills, and amendments to bills, is established by the principles outlined in Senate standing order 24(1)(a). Over the years the committee has primarily taken a case-by-case approach to articulating issues of concern and then communicating them through its correspondence with ministers and through its regular publications.

1.7 When applying each principle there are a number of well-established matters that the committee considers to be of concern. Therefore, when it is developing comments on the provisions of each new bill that comes before it for consideration, the committee takes its previous views on these matters into account, though it does not consider that it is constrained by them.

1.8 Some of the long-standing matters of concern identified by the committee over the years by reference to individual criteria are included in the diagram on page 3 and outlined in more detail in Appendix 1.

## Summary of standing order 24 and examples of issues considered under each principle

1	2	3	4	5
Principle (i)	Principle (ii)	Principle (iii)	Principle (iv)	Principle (v)
Trespass unduly on personal rights and liberties	Inappropriately defined administrative powers	Appropriate review of decisions	Inappropriate delegation of legislative powers	Appropriate parliamentary scrutiny
Presumption of innocence	Broad delegation of administrative power (i.e. powers given to a large class of persons)	Exclusion of or limitation on merits review	Significant matters in delegated legislation	Adequacy of parliamentary oversight
Framing of criminal offences (i.e. reversal of burden of proof and broadly defined offences)	Broad discretionary power	Exclusion of or limitation on judicial review	Consultation prior to making delegated legislation	Delegated legislation not subject to disallowance
Privilege against self-incrimination		Procedural fairness	Power for delegated legislation to amend primary legislation (Henry VIII clause)	Incorporation of external material into the law
Coercive powers				
Retrospectivity				
Privacy				

### The committee's mode of operation

1.9 As noted above, the committee examines all bills that come before the Parliament against the five principles set out in Senate standing order 24(1)(a)<sup>1</sup> and usually meets each sitting week to consider them. 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 scrutiny principles. The policy content of the bill provides context for its scrutiny, but is not a primary consideration for the committee. In addition, while the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24(1)(a) it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

1.10 In undertaking its work the committee is supported by a secretariat comprised of a secretary, a principal research officer and a legislative research officer. The committee also obtains advice from a legal adviser who is appointed by the committee with the approval of the President of the Senate. The committee enjoyed the assistance of Associate Professor Leighton McDonald during 2017.

1 The five principles are discussed in detail in Appendix 1, with specific case studies in chapter 3.

## The committee's workflow

1.11 The committee's usual process for undertaking its work is shaped by the process for the passage of bills through the Parliament. (The main steps in the committee's work are outlined in the diagram on page 5.)

1.12 In the usual scrutiny process, after the introduction of bills into either the Senate or the House of Representatives, a copy of each bill, together with its explanatory memorandum and the minister's second reading speech, is provided to the committee's legal adviser. The legal adviser considers this material and provides a report against the committee's scrutiny principles. The secretariat is also involved in examining the bills as well as parliamentary amendments to bills. The work undertaken by the legal adviser and the secretariat provides the foundation for the committee's consideration of the legislative proposals before the Parliament.

1.13 Where a concern is raised about possible inconsistency with scrutiny principles, the committee's usual approach is to write to the responsible minister or other proposer seeking further information or requesting that consideration be given to amending the relevant provision.

1.14 Once a response is received, the committee reconsiders the relevant provisions and provides a further view on its compliance with the relevant scrutiny principle or principles and reports this to the Senate.

### ***Managing the committee's workload***

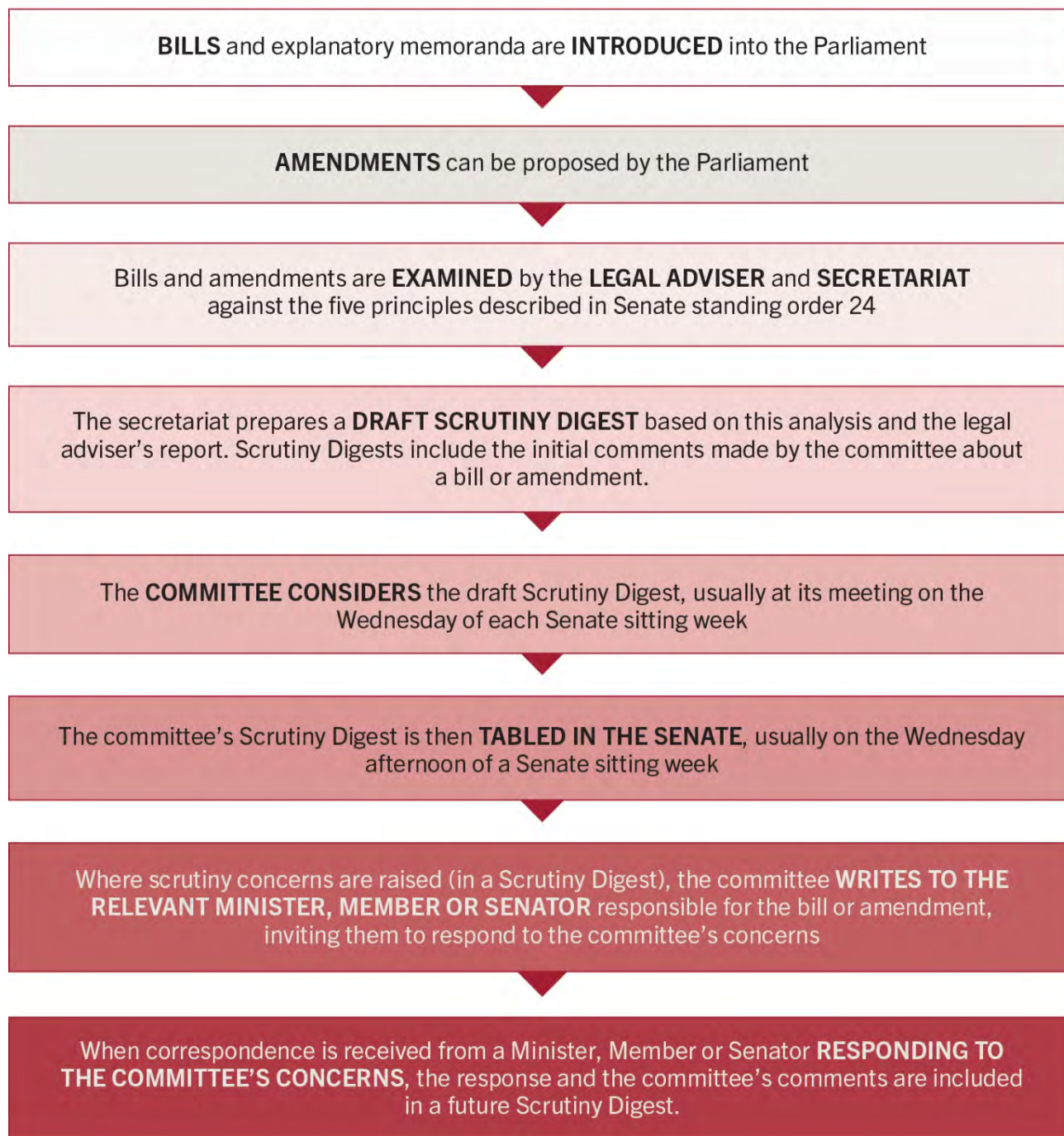
1.15 The committee works to ensure that, wherever possible, its comments on bills are available to senators prior to the passage of the bill. However, the ability for the committee to provide its final comments on a particular bill prior to passage often depends on the legislative timeframe and the timing of the minister's response. The committee notes that timeliness in providing responses to the committee is essential to an effective scrutiny process. For more information see paragraphs 1.18 to 1.23.

1.16 During 2017, the committee adopted the practice of publishing on its website a list of bills on which it had sought advice from the responsible minister but had either not yet received a response or received a response but not yet finally reported.<sup>2</sup> Where it would assist timely scrutiny of legislation before the Senate, the committee also published ministerial responses on its website, together with its preliminary comments, prior to the tabling of its regular *Scrutiny Digest*.

---

2 Senate Standing Committee for the Scrutiny of Bills, *Ministerial Responses*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Ministerial\\_Responses](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Ministerial_Responses)

## Committee's Work Flow



### ***Timeliness of ministerial responses: amendment to standing order 24***

1.17 In response to an increase in the rate of late responses in 2016, the Chair, on behalf of the committee, proposed on 29 November 2016 to temporarily amend standing order 24 so as to allow any senator to question a minister about why the minister had not provided a timely response to the committee's request for

information in relation to a bill.<sup>3</sup> The Senate agreed to this proposal on 29 November 2016 and the order was effective from 20 March 2017.

1.18 As a result of the temporary order the committee noted a significant improvement in the responsiveness of ministers to its requests for information during 2017. For example, the proportion of ministerial responses that were late (that is, not provided within the timeframe set by the committee) was 36 per cent in 2015 and 44 per cent in 2016, but had fallen to 22 per cent by November 2017.<sup>4</sup>

1.19 In addition, a greater proportion of responses to the committee's scrutiny concerns had been received before debate on the bill, helping to ensure that the final scrutiny concerns raised by the committee were available when the bill was under consideration. For example, the proportion of ministerial responses received by the committee after the relevant bill had passed both Houses of Parliament was 18 per cent in 2015 and 14 per cent in 2016, but had fallen to five per cent by November 2017.<sup>5</sup> In addition to this statistical evidence, interactions between the committee's secretariat and departmental and ministerial staff supported the view that this measure had led to greater efforts at all levels to meet the timeframes for ministerial responses set by the committee.

1.20 The committee considered that the improvement in the timeliness of responses during 2017 demonstrated the effectiveness of the temporary amendment to the standing orders and that it had significantly assisted the committee, and therefore the Senate, in its scrutiny work. On this basis, the committee resolved in November 2017 that standing order 24 should be amended to establish on an ongoing basis the ability of all senators to seek information on late responses from responsible ministers.

1.21 The committee also considered that the practice it had adopted of publishing a list of bills in relation to which it had sought advice from the responsible minister but not yet finally reported, further contributed to improved ministerial responsiveness and should also become an ongoing requirement of standing order 24.

1.22 In *Scrutiny Digest 13 of 2017*, the committee recommended that standing order 24 be amended to establish on an ongoing basis the procedure by which any senator may ask a minister for an explanation as to why a response had not been provided to the committee and the requirement that the committee maintain on its website a list of bills in relation to which the committee had sought advice from the

---

3 *Journals of the Senate*, No. 21, 29 November 2016, pp. 656-657.

4 This figure includes responses received up to 8 November 2017.

5 This figure includes responses received up to 8 November 2017.

responsible minister and not yet received a response.<sup>6</sup> The Senate agreed to this proposal on 29 November 2017.<sup>7</sup>

1.23 Throughout 2017, the committee continued its practice of reporting on ministerial responsiveness on a quarterly basis in its *Scrutiny Digest*, in parallel with its new practice of publishing on its website a list of bills on which it has sought advice but either not yet received a response or received a response but not yet finally reported. However, the committee resolved in February 2018 to discontinue its quarterly reporting in the *Scrutiny Digest* on the basis that its website now contains more up-to-date information.

## Committee publications and resources

### *Scrutiny Digest*

1.24 From the first sitting week of 2017 onwards, the committee has published its scrutiny comments in a single document known as the *Scrutiny Digest*. This document replaced both the *Alert Digest* and the *Report*, through which the committee had published its scrutiny comments from its commencement in 1981 until the end of 2016. The *Alert Digest* contained the committee's initial comments on a bill, while the *Report* contained the committee's further comments once correspondence addressing its original concerns had been received from responsible ministers and other proposers of legislation. The *Scrutiny Digest* contains both initial and follow-up scrutiny comments and incorporates a number of stylistic and format changes to the committee's previous publications.<sup>8</sup>

1.25 The committee considers a draft *Scrutiny Digest* at its regular meeting on the Wednesday morning of each Senate sitting week and, once agreed, the *Scrutiny Digest* is tabled in the Senate, generally on the afternoon of the same day.

1.26 Chapter 1 of the draft *Scrutiny Digest* is prepared by the secretariat on the basis of the legal adviser's report and the secretariat's examination of bills and parliamentary amendments, and contains a brief outline of each of the bills introduced in the previous sitting week, as well as any comments the committee wishes to make. Comments are identified by reference to the relevant principles in standing order 24. When concerns are raised by the committee and outlined in chapter 1 of the *Scrutiny Digest*, correspondence is forwarded to the minister or proposer responsible for the bill inviting him or her to respond to the committee's concerns. Ministers generally seek advice from their department before responding.

---

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2017*, 15 November 2017, pp. 164-165.

7 *Journals of the Senate*, No. 74, 29 November 2017, pp. 2372-2373.

8 *Scrutiny Digests*, as well as *Alert Digests* and *Reports* dating back to 1998, are available from the committee's website at [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny).

1.27 The committee generally requests that any response from a minister be received in sufficient time for it to be scrutinised and circulated to members for consideration before the next committee meeting. As noted above, the committee aims to report to the Senate prior to the Senate's detailed consideration of bills so that its views can be taken into account before passage.

1.28 When a minister or other proposer responds to a concern raised in the *Scrutiny Digest*, the secretariat produces for the committee's consideration an entry for chapter 2 of the draft *Scrutiny Digest*, which contains the relevant extract of the committee's original comments on the bill, the text of the minister's response, and any further comments the committee wishes to make.

### ***Scrutiny News***

1.29 The committee secretariat prepares a brief *Scrutiny News* publication each sitting week which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list.<sup>9</sup> *Scrutiny News* highlights recent comments drawn from material in the committee's *Scrutiny Digest*, with a particular focus on information that may be useful when bills are debated and to raise awareness about the committee's scrutiny principles.

## **Interaction with other committees**

### ***Legislative scrutiny committees***

1.30 The Scrutiny of Bills Committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The work of the three committees is complementary in many respects. The committee therefore monitors the work of the two other legislative scrutiny committees—the Senate Regulations and Ordinances Committee and the Parliamentary Joint Committee on Human Rights (PJCHR)—and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

1.31 The committee regularly draws certain matters to the attention of the Regulations and Ordinances Committee, including provisions of bills which authorise a significant delegation of legislative power or seek to modify the usual disallowance processes for legislative instruments.<sup>10</sup> When the committee draws such provisions to the attention of the Regulations and Ordinances Committee, that committee will

---

9 Current and previous editions of *Scrutiny News*, as well as information about subscribing to the scrutiny mailing list, are available from the committee's website at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Scrutiny\\_News](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News).

10 In 2017 the committee drew 33 bills to the attention of the Regulations and Ordinances Committee.



consider the Scrutiny of Bills Committee's comments as part of their examination of any legislative instruments made under the relevant authorising provision.

1.32 For example, in November 2017 the committee requested an explanation from the Minister for Social Services as to why important matters relating to the operation of the proposed Commonwealth redress scheme for institutional child sexual abuse were to be left to delegated legislation.<sup>11</sup> The minister responded by stating that flexibility is required to allow the scheme to adjust to the differing needs of survivors and participating institutions, and to enable the quick implementation of changes to the scheme. The committee concluded that it may be appropriate that the bill be amended and drew its concerns to the attention to the Regulations and Ordinances Committee.<sup>12</sup>

1.33 Similarly, in August 2017 the committee requested advice from the Minister for Immigration and Border Protection as to why it was proposed to leave the classification of types of information as protected, such that recording or disclosing it would amount to an offence subject to two years imprisonment, to delegated legislation.<sup>13</sup> The minister responded with examples of the types of information that may be prescribed and stated that requiring greater parliamentary scrutiny—beyond that afforded by the usual disallowance procedures—would defeat the aim of allowing the secretary to act swiftly to protect information. The committee concluded its consideration of the bill by drawing its concerns to the attention of the Regulations and Ordinances Committee.<sup>14</sup>

1.34 During 2017 the legislative scrutiny committees also cooperated to address a number of other matters of joint concern. For example, in February 2017 the Chairs of the Scrutiny of Bills and Regulations and Ordinances Committees wrote to the Minister for Industry, Innovation and Science seeking information in relation to the accessibility of Australian Standards that have been incorporated by reference into legislation. This correspondence led to a meeting between the two committee's secretariats and officials from the Department of Industry, Innovation and Science and Standards Australia. The committees were informed by the department in November 2017 that access to Australian Standards had been restored for non-commercial research and study purposes through the National Library and state and territory libraries.

---

11 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2017*, 15 November 2017, pp. 8-11.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, pp. 8-19.

13 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2017*, 16 August 2017, pp. 3-4.

14 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, pp. 33-36.

1.35 In August 2017, the committee cooperated with the Regulations and Ordinances Committee and the PJCHR to provide a joint submission to the review of the sunseting framework for legislative instruments under the *Legislation Act 2003*. This submission made a number of recommendations on matters of concern to the legislative scrutiny committees. The Attorney-General tabled the final report of the review in the Senate on 13 November 2017.<sup>15</sup>

1.36 The committee will continue to work closely with the Regulations and Ordinances Committee and the PJCHR where appropriate in the future.

### ***Legislative standing committees***

1.37 In addition to its interactions with the Regulations and Ordinances Committee and the PJCHR, the committee also assists the work of the Senate's eight legislative standing committees. In May 2017 the committee resolved that, where the committee has received ministerial correspondence responding to its scrutiny concerns on a bill that is listed for debate before the committee is due to table its next *Scrutiny Digest*, the correspondence may be published on the committee's webpage along with the committee's preliminary comments on the correspondence. The committee agreed to expand the terms of this resolution in June so as to also allow for early publication of ministerial correspondence where another parliamentary committee is due to report on a bill prior to the tabling of the next *Scrutiny Digest*.

1.38 Following these resolutions, the committee received requests from legislation committee secretariats for early publication of ministerial responses and the committee's preliminary comments in relation to eight bills.<sup>16</sup>

### **Acknowledgements**

1.39 The committee wishes to acknowledge the work and assistance of its legal adviser Associate Professor Leighton McDonald.

---

15 Section 60 of the *Legislation Act 2003* requires that a review of sunseting arrangements for legislative instruments (as set out in Part 4 of Chapter 3 of the *Legislation Act*) be conducted in 2017. The joint submission of the legislative scrutiny committees is available at Attorney-General's Department, *Review of the Sunseting Framework under the Legislation Act 2003*, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/Review-of-the-sunseting-framework-under-the-legislation-act-2003.aspx#submissions>.

16 These requests for early publication related to the following bills: Commercial Broadcasting (Tax) Bill 2017; Migration Amendment (Validation of Decisions) Bill 2017; Regional Investment Corporation Bill 2017; Social Services Legislation Amendment (Payment Integrity) Bill 2017, Social Services Legislation Amendment (Welfare Reform) Bill 2017; Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017, Telecommunications (Regional Broadband Scheme) Charge Bill 2017; and Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017.

---

1.40 The committee also wishes to acknowledge the assistance of ministers and other proposers of bills, departments and agencies during the reporting period. Their responsiveness to the committee—which improved significantly during 2017, as detailed above—is critical to the legislative process as it ensures that the committee can perform its scrutiny function effectively.



## Chapter 2

### Work of the committee in 2017

2.1 This chapter provides information about the work of the committee during 2017, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills.

#### Statistics

2.2 Each year the committee usually analyses around 200 to 250 bills. The table below sets out the bills scrutinised by the committee from 2015 to 2017. Due to the federal election in 2016 the numbers of bills considered by the committee in that year was slightly lower than in 2015 or 2017.

2.3 The table also outlines statistics in relation to the number of bills and amendments for which the committee had comments.

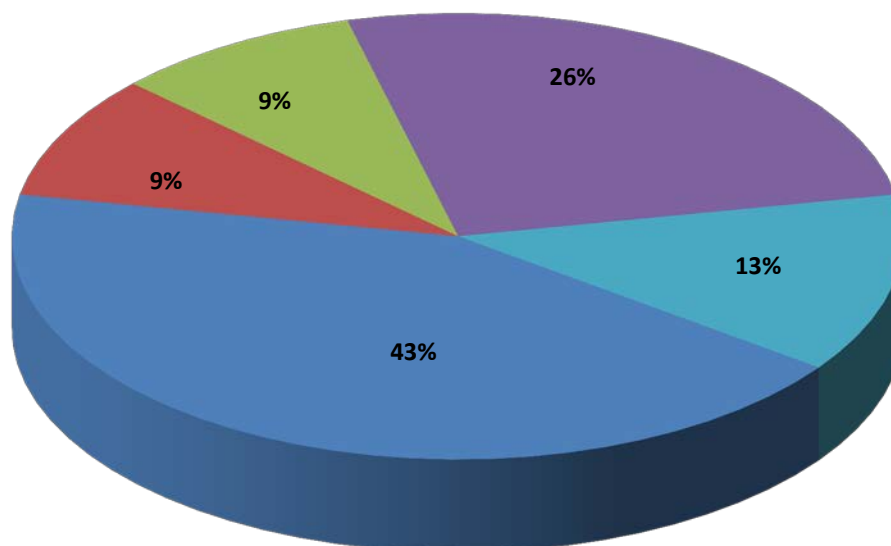
2.4 The committee commented on 119 bills in 2017, this compares to 81 bills in 2016 and 87 in 2015. In relation to amendments to bills, the committee commented on 25 amendments (or groups of amendments) in 2017, compared to 12 in 2016 and 21 in 2015.

Year	Bills considered	Bills commented on	Amendments to bills considered	Amendments to bills commented on
2015	223	87	49	21
2016	192	81	24	12
2017	266	119	61	25

2.5 The chart on page 14 provides a breakdown of the committee's comments on bills by the five principles set out in standing order 24(1)(a). The accompanying table sets out the specific issues on which the committee commented under each of these five broad principles.

2.6 The chart shows, consistent with previous years, that the most common principle on which the committee commented in 2017 was principle (i) relating to possible undue trespass on personal rights and liberties (48 per cent). During 2017 principle (iv), relating to the inappropriate delegation of legislative power, was the next most common principle commented on by the committee (27 per cent). This was the highest percentage of comments made in relation to principle (iv) in the past four years.

**Scrutiny comments on bills by principle under standing order  
24(1)(a)  
January to December 2017**



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

### **Impact of the committee's work in 2017**

2.7 The work of the committee in scrutinising bills against the five principles outlined above assists and improves parliamentary consideration of legislation in a number of important ways, including:

- amendments to legislation;
- improved explanatory material;
- more informed consideration of issues in legislation committee reports;
- more informed debate in the Senate and committees; and
- more comprehensive Parliamentary Library Bills Digests.

2.8 As noted above, since the committee's establishment over 35 years ago it has developed a consistent position in relation to several long-standing matters of concern. It may be expected that the committee's consistent commentary has had a positive impact on the number of bills introduced into the Parliament that raise these types of scrutiny concerns.

### ***Impact prior to the introduction of bills into the Parliament***

2.9 While difficult to quantify, it is clear that, prior to the introduction of bills into the Parliament, the Scrutiny of Bills Committee has an 'unseen influence' on the development of bills through the legislative drafting process. Legislative drafters often refer to the reports and long-standing scrutiny concerns of the committee when they are advising instructing departments and agencies and therefore many provisions that may have been of concern under the committee's scrutiny principles may not be included in the final text of bills that come before the Parliament.<sup>1</sup>

2.10 Underpinning this 'unseen influence' is formal guidance available to agencies and departments as part of the legislative drafting process. The *Legislation Handbook*,<sup>2</sup> *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,<sup>3</sup> and *OPC Drafting Directions*<sup>4</sup> all draw attention to long-standing scrutiny concerns of the committee to ensure that these concerns are considered as part of the legislative drafting process. The long-standing concerns relate to a large number of matters, including:

- retrospectivity;
- absolute and strict liability offences;
- excessive delegation of legislative power;
- entry, search and seizure powers; and
- penalty provisions.

2.11 In relation to the adequacy of explanatory memoranda accompanying bills, OPC Drafting Direction 4.1 advises legislative drafters to:

...alert your instructors to any requested provisions that are likely to be of interest to the [Scrutiny of Bills] Committee, and advise your instructors to set out clearly in the explanatory memorandum the reasons for such provisions.<sup>5</sup>

---

1 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 4<sup>th</sup> ed, 2012, p. 167.

2 *Legislation Handbook*, Department of the Prime Minister and Cabinet, February 2017, available at <https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf>.

3 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, available at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

4 OPC Drafting Directions Series, Office of Parliamentary Counsel, available at [http://www.opc.gov.au/about/draft\\_directions.htm](http://www.opc.gov.au/about/draft_directions.htm).

5 OPC Drafting Direction 4.1, *Dealing with instructors*, 29 February 2016, p. 3.

2.12 In 2017 OPC revised Drafting Direction No. 1.3—Commencement provisions, which draws attention to a number of scrutiny concerns of the committee, including delayed, non-time limited and retrospective commencement provisions.<sup>6</sup>

### **Amendments to legislation**

2.13 One of the most noticeable outcomes of the committee's scrutiny of bills is amendments to legislation arising from the committee's work. Amendments may be moved by any senator directly in response to the committee's comments, or as a result of a recommendation of a Senate legislation committee which, in turn, explicitly drew on this committee's comments. Alternatively, amendments which reflect the committee's comments can be moved by a senator without any direct acknowledgment of the committee's work, or there may have been a cumulative impact if a similar point was also made in another forum (such as a legislation committee inquiry)—it is therefore difficult to gauge with complete accuracy the impact the committee has in terms of amendments to legislation.

2.14 However, it is clear that some amendments are moved that directly address the committee's concerns in relation to particular matters. For example, the committee expressed scrutiny concerns about a broad public interest disclosure power in the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2017. In response, government amendments were moved in the House of Representatives to require rules to be made to regulate the exercise of the power by the secretary. The committee welcomed these amendments, but stated that it still held scrutiny concerns about the disclosure power. Further government amendments were subsequently moved in the Senate, which removed all of the public interest disclosure powers from the bill and thereby addressed the committee's remaining scrutiny concerns.<sup>7</sup>

2.15 The committee also expressed scrutiny concerns about provisions allowing for both the method of calculating a charge and the maximum amount of the charge to be determined by delegated legislation in the National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017. The minister undertook to address these concerns by proposing amendments to require that the minister be satisfied the amount of the charge will be no more than is required to cover the Commonwealth's likely costs and the determination of charges be subject to disallowance.<sup>8</sup>

---

6 Office of Parliamentary Counsel, *Drafting Direction No. 1.3—Commencement provisions*, January 2017, [http://www.opc.gov.au/about/docs/drafting\\_series/DD1.3.pdf](http://www.opc.gov.au/about/docs/drafting_series/DD1.3.pdf).

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, pp. 65-6. The committee's scrutiny concerns with this bill, and subsequent amendments, are discussed further in chapter 3 at paragraphs 3.14–3.26.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 43.



2.16 Finally, the committee expressed scrutiny concerns about numerous provisions in the Social Services Legislation Amendment (Welfare Reform) Bill 2017, including one that sought to provide that the secretary had no duty to consider exercising a power to determine that a person is not subject to the income management regime if the secretary is satisfied that being subject to the regime poses a serious risk to the person's mental, physical or emotional wellbeing. The committee expressed concern that, even if the secretary were made aware of facts indicating that subjecting a person to income management may put their wellbeing at serious risk, there would be no duty on the secretary to consider granting an exemption, and that such 'no-duty-to-consider' clauses may diminish the efficacy of judicial review in certain circumstances. In response, the minister agreed to amend this provision, and government amendments were subsequently made that effectively removed the 'no-duty-to-consider' clause.<sup>9</sup>

### ***Improved explanatory material***

2.17 The committee regularly requests that additional information be included in explanatory memoranda to ensure that provisions of bills on which the committee has commented are adequately explained. The committee's intention in requesting that important information be included in explanatory memoranda is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill.

2.18 In addition, the committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions.

2.19 In relation to the scrutiny process, a comprehensive explanatory memorandum can provide the foundation for avoiding adverse scrutiny committee comment because whether or not a provision is of concern often depends on the context and circumstances. An explanatory memorandum should demonstrate that the proposed policy approach reflects an informed choice that is appropriately justified.

---

9 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, pp. 91-93; and *Scrutiny Digest 12 of 2017*, 18 October 2017, p. 70.

2.20 In the amendments section of each *Scrutiny Digest* the committee provides commentary on updated explanatory material. In 2017, additional information was included in 18 explanatory memoranda in response to the committee's comments.<sup>10</sup>

### ***Use in legislation committee reports***

2.21 The committee routinely forwards its comments on bills to Senate legislation committees so that these committees may take the Scrutiny of Bills Committee's comments into consideration during their inquiries into particular bills. This practice is reflected in standing order 25(2A) which provides that:

The legislation committees, when examining bills or draft bills, shall take into account any comments on the bills published by the Standing Committee for the Scrutiny of Bills.

2.22 Two examples of the consideration of this committee's comments in legislation committee reports during 2017 are outlined below.

### ***Telecommunications (Regional Broadband Scheme) Charge Bill 2017***

2.23 On 6 September 2017, the Environment and Communications Legislation Committee tabled its report on the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and the Telecommunications (Regional Broadband Scheme) Charge Bill 2017. The report considered several matters raised by this committee, including:

- Modified disallowance procedures—reduction of parliamentary scrutiny as a result of the reversal of the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* in relation to a proposed industry charge;
- Significant matters in delegated legislation—reduction of parliamentary oversight of the setting of taxation rates by allowing the alteration of a rate of taxation by legislative instrument; and

---

10 See addenda to explanatory memoranda for the following bills: Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017; Civil Law and Justice Legislation Amendment Bill 2017; Competition and Consumer Amendment (Competition Policy Review) Bill 2017; Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016; Industrial Chemicals Bill 2017 and five related bills; Native Title Amendment (Indigenous Land Use Agreements) Bill 2017; National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017; Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016; Petroleum and Other Fuels Reporting Bill 2017; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017; Social Services Legislation Amendment (Cashless Debit Card) Bill 2017; Therapeutic Goods (Charges) Amendment Bill 2017; and Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016.

- Exemption from disallowance—allowing ACMA and the ACCC to declare, by notifiable instrument, additional government agencies to which they may disclose certain information.<sup>11</sup>

2.24 The Environment and Communications Legislation Committee supported the comments made by the Scrutiny of Bills Committee and recommended that the charges bill be amended so as to accord with the usual disallowance procedure.<sup>12</sup> In response, the government, supported this recommendation and undertook to propose amendments to this effect.<sup>13</sup>

#### *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017*

2.25 On 16 October 2017 the Legal and Constitutional Affairs Legislation Committee tabled its report on the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017. The report considered several aspects of the bill raised by this committee, including:

- Coercive powers—allowing the seizure of physical currency or bearer negotiable instruments by police and customs officers without a warrant in certain circumstances;
- Significant matters in delegated legislation—leaving to delegated legislation significant matters such as the grounds on which suspension decisions may be made, the criteria for determining applications for renewal and whether decisions to suspend or not renew registration should be subject to review; and
- Strict liability offences—penalising persons lacking fault in respect of providing a digital currency exchange service without being registered.<sup>14</sup>

2.26 The Legal and Constitutional Affairs Legislation Committee noted each of the concerns raised by the Scrutiny of Bills Committee in its conclusion.<sup>15</sup>

---

11 Senate Environment and Communications Legislation Committee, *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 [Provisions] and Telecommunications (Regional Broadband Scheme) Charge Bill 2017 [Provisions]*, 6 September 2017, pp. 35-43.

12 Senate Environment and Communications Legislation Committee, *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 [Provisions] and Telecommunications (Regional Broadband Scheme) Charge Bill 2017 [Provisions]*, 6 September 2017, p. 41.

13 Australian Government, *Australian Government response to the Senate Environment and Communications Legislation Committee report: Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 [Provisions] Telecommunications (Regional Broadband Scheme) Charge Bill 2017 [Provisions]*, January 2018, p. 5.

14 Senate Legal and Constitutional Affairs Legislation Committee, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 [Provisions]*, October 2017, pp. 11-19.

### **Debate in the Senate and committees**

2.27 The committee's comments on bills are regularly referred to in debate in the Senate. For example, the committee's comments were substantively discussed in 2017 during consideration of the following bills:

- Australian Border Force Amendment (Protected Information) Bill 2017;<sup>16</sup>
- Defence Legislation Amendment (Instrument Making) Bill 2017;<sup>17</sup>
- Fair Work Amendment (Corrupting Benefits) Bill 2017;<sup>18</sup>
- National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017;<sup>19</sup>
- National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017;<sup>20</sup>
- Regional Investment Corporation Bill 2017;<sup>21</sup>
- Social Services Legislation Amendment (Cashless Debit Card) Bill 2017;<sup>22</sup>
- Social Services Legislation Amendment (Welfare Reform) Bill 2017;<sup>23</sup>
- Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016;<sup>24</sup>
- Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016;<sup>25</sup> and
- Veteran's Affairs Legislation Amendment (Omnibus) Bill 2017.<sup>26</sup>

---

15 Senate Legal and Constitutional Affairs Legislation Committee, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 [Provisions]*, October 2017, pp. 21-22.

16 *Senate Hansard*, 16 October 2017, pp. 7459-7473.

17 *Senate Hansard*, 16 November 2017, pp. 8667-8671.

18 *Senate Hansard*, 8 August 2017, pp. 4922-4930, 5009-5029, and 9 August 2017, pp. 5155-5174, 5288-5295.

19 *Senate Hansard*, 29 November 2017, pp. 9260-9283.

20 *House of Representatives Hansard*, 20 June 2017, pp. 6994-6995.

21 *House of Representatives Hansard*, 15 August 2017, pp. 8547-8552 and 17 August 2017, pp. 8843-8870; *Senate Hansard*, 18 October 2017, pp. 7807-7850.

22 *House of Representatives Hansard*, 26 October 2017, pp. 12165-12183.

23 *House of Representatives Hansard*, 6 September 2017, pp. 9517-9548; *Senate Hansard*, 7 December 2017, pp. 10026-10064.

24 *House of Representatives Hansard*, 27 March 2017, pp. 3159-3177, 3210-3213.

25 *House of Representatives Hansard*, 2 March 2017, pp. 2128-2156; *Senate Hansard*, 20 March 2017, pp. 1331-1360 and 27 March 2017, pp. 2316-2329.

26 *Senate Hansard*, 15 November 2017, pp. 8457-8488.

---

***Use in Parliamentary Library Bills Digests***

2.28 The Parliamentary Library prepares Bills Digests to assist senators, members and others in understanding the key matters in many bills introduced into the Parliament. These Bills Digests regularly canvass issues raised by the Scrutiny of Bills Committee, thereby assisting interested senators and members in assessing key issues raised by this committee.



## Chapter 3

### Case studies

3.1 Case studies that provide examples of the committee's work help to illustrate:

- the committee's approach to its scrutiny role;
- the committee's role in identifying matters of concern as assessed against the scrutiny principles outlined in standing order 24(1)(a) and obtaining relevant information which informs the legislative process; and
- the committee's role in providing the foundation for amendments to provisions and improvements to the content of explanatory material.

3.2 This chapter includes examples of the committee's work during 2017 involving each principle. The case studies include instances of significant legislation considered during the year and highlight issues of continuing interest into the future, including:

- undue trespass upon personal rights and liberties;
- inappropriate delegation of legislative power;
- insufficiently defined administrative powers; and
- inadequate parliamentary scrutiny of legislative powers.

#### **National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017**

---

**SCRUTINY SNAPSHOT: The committee will continue to draw attention to bills that seek to retrospectively validate the imposition of a pecuniary burden or that delegate to the executive the power to set the rate of a tax**

*Standing order 24(1)(a)(i) – trespass unduly on personal rights and liberties*

*Standing order 24(1)(a)(iv) – inappropriate delegation of legislative power*

---

3.1 This bill sought to amend the *National Vocational Education and Training Regulator (Charges) Act 2012* to impose a National Vocational Education and Training (VET) Regulator annual registration charge as a tax. The explanatory memorandum stated that the charges accrued would fund the Australian Skills Quality Authority's (ASQA's) broadened regulatory activities.

3.2 The committee commented on two issues arising in the bill:

- retrospective validation of the imposition of a fee; and

- inclusion of significant matters relating to setting the rate of a tax in delegated legislation.

### ***Retrospective validation of fees***

3.3 The bill sought to validate any annual registration fees collected by the ASQA prior to the commencement of the bill in order to mitigate any constitutional risk arising as a result of the charges potentially being characterised as a tax.

3.4 The committee noted that it is a fundamental principle that no pecuniary burden be imposed on individuals without clear and distinct legal authority. From a scrutiny perspective, retrospective validation of the imposition of fees, charges and taxes undermines this principle.<sup>1</sup>

3.5 The committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of the retrospective validation of annual registration monies collected by ASQA that may have been invalidly levied.<sup>2</sup>

### ***Significant matters in delegated legislation***

3.6 Proposed section 6B of the bill provided that the amount of the annual registration charge would be determined by the minister in a legislative instrument. Before determining a charge, the minister would be required to obtain the Ministerial Council's agreement as to the amount of the charge.<sup>3</sup>

3.7 The committee expressed concern that no guidance was provided in the bill as to the method of calculation of the charge, nor was a maximum charge specified. The committee reiterated its view that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The committee further noted that while the bill required the amount of the taxation in this instance to be agreed between Commonwealth and state and territory executive governments, this did not negate the fact that this provision represented a significant delegation of the Parliament's legislative powers.<sup>4</sup>

3.3 The committee expressed a preference that the bill not proceed in the form it was in and that, instead, a bill imposing the charge as a tax be introduced into the Parliament each year following agreement by the Ministerial Council. Failing this, the committee suggested that the method of calculation of the charge and a maximum

---

1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 29.

2 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 29.

3 'Ministerial Council' is defined in section 3 of the *National Vocational Education and Training Regulator Act 2011* as the 'body established by the Council of Australian Governments to deal with training and skills'.

4 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 28.



charge should be provided on the face of the primary legislation, and also suggested several measures that might be adopted to increase parliamentary oversight of the levying of the charge, including:

- requiring the positive approval of each House of Parliament before a new instrument comes into effect;
- providing that the instruments do not come into effect until the relevant disallowance period has expired; or
- a combination of these processes.

3.8 The committee sought the minister's advice as to whether consideration could be given to amending the bill to incorporate these measures, and other examples of Commonwealth legislation which allow the method and amount of taxation to be determined by legislative instrument without guidance.<sup>5</sup>

3.9 The minister responded by undertaking to propose government amendments to include in the bill provisions relating to the setting of a maximum charge on the face of the primary legislation. The minister also indicated that the method of calculation and the setting of the actual charge would remain in a legislative instrument.<sup>6</sup>

3.10 The committee welcomed the minister's commitment to amend the bill to include provisions in relation to the setting of a maximum charge on the face of the primary legislation; however, it reiterated that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The committee left the question of the appropriateness of allowing the method and amount of taxation to be determined by legislative instrument in this instance to the Senate as a whole.<sup>7</sup>

### ***Committee consideration of amendments to the bill***

3.11 On 20 June 2017 the House of Representatives agreed to three government amendments to the bill. The committee welcomed these amendments, which:

- ensured that the minister must be satisfied that the amount of the charge will be no more than the Commonwealth's likely costs incurred by the National VET Regulator in performing its functions; and
- provided that the determinations will be subject to parliamentary disallowance.

---

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 28.

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017*, 14 June 2017, p. 114-115.

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 6 of 2017*, 14 June 2017, p. 115.

---

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

---

**SCRUTINY SNAPSHOT:** The committee will continue to draw attention to bills which contain broad discretionary powers, particularly where the powers allow for the disclosure of personal information

*Standing order 24(1)(a)(ii) – insufficiently defined administrative powers*

---

3.12 This bill sought to insert a provision into each of the *Military Rehabilitation and Compensation Act 2007*, *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and *Veterans' Entitlement Act 1986* to enable the Secretary of the Department of Veterans' Affairs to disclose information about a particular case, or class of cases, to such persons and for such purposes that the secretary determines, if he or she certifies that it is necessary and in the public interest to do so.<sup>8</sup>

### ***Broad discretionary power—disclosure of information***

3.13 The committee expressed concern that, despite the inclusion of certain safeguards, the bill did not contain on its face any limitations in relation to the secretary's power to certify that the disclosure of information is in the public interest, and the bill did not *require* the minister to make rules in relation to how this power is to be exercised. The committee therefore sought the minister's advice as to:

- why (at least high-level) rules or guidance about the exercise of the secretary's disclosure power could not 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.<sup>9</sup>

3.14 The minister responded, advising of his intention to make rules appropriately limiting the circumstances in which the secretary can exercise the proposed public interest disclosure power and noting that, if rules or guidance were located in the primary legislation, the government would be less able to quickly respond to evolving circumstances due to the length of time required for the Parliament to pass

---

8 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 10 of 2016*, 30 November 2016, p. 29.

9 Senate Standing Committee for the Scrutiny of Bills, *Alerts Digest No. 10 of 2016*, 30 November 2016, p. 30.

legislation. The minister further stated that the secretary would not be able to exercise the public interest disclosure power until such rules had been made.<sup>10</sup>

3.15 However, the committee noted that the bill did not in fact prevent the secretary from exercising the disclosure power in the absence of relevant rules, rather it merely required that the secretary 'act in accordance with any rules made'.

3.16 The committee considered 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. The committee also considered 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.

3.17 On 15 February 2017, the Minister informed the committee of his intention to move amendments to reflect the committee's advice.<sup>11</sup>

### ***Committee consideration of amendments to the bill***

3.18 On 2 March 2017 the House of Representatives agreed to eight government amendments to the bill.<sup>12</sup> The committee welcomed these amendments, which imposed a positive duty on the minister to make rules regulating the exercise of the public interest disclosure power by the secretary. However, the committee also reiterated that, from a scrutiny perspective, it would still be appropriate for at least high-level guidance about the exercise of the secretary's disclosure power to be included in the primary legislation.<sup>13</sup>

3.19 On 27 March 2017 the Senate agreed to seven government and three opposition amendments to the bill.<sup>14</sup> These amendments removed all public interest disclosure provisions from the bill, addressing the committee's remaining scrutiny concerns in relation to this matter.<sup>15</sup> On 29 March 2017 the House of Representatives agreed to the Senate amendments.<sup>16</sup>

---

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2017*, 8 February 2017, pp. 95–96.

11 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [Provisions]*, February 2017, pp. 3–4.

12 *House of Representatives Votes and Proceedings*, No. 38, 2 March 2017, p. 607.

13 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2017*, 22 March 2017, p. 41.

14 *Journals of the Senate*, No. 35, 27 March 2017, pp. 1185–1186.

15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 66.

16 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 65.

3.20 The Senate Foreign Affairs, Defence and Trade Legislation Committee conducted an inquiry into the provisions of the bill and made reference to the Scrutiny of Bills committee's comments in their final report.<sup>17</sup>

### Regional Investment Corporation Bill 2017

---

**SCRUTINY SNAPSHOT:** The committee will continue to draw attention to bills which allow the delegation and subdelegation of administrative powers to officials at any level; inappropriately exempt legislative instruments from disallowance and sunseting requirements; do not include appropriate tabling requirements; or delegate, without sufficient legislative guidance or publishing and tabling requirements, the Parliament's power to grant, and set terms and conditions on, financial assistance to the states.

*Standing order 24(1)(a)(ii) – inappropriately defined administrative powers*

*Standing order 24(1)(a)(iv) – inappropriate delegation of legislative powers*

*Standing order 24(1)(a)(v) – appropriate parliamentary scrutiny of legislative power*

---

3.21 This bill sought to establish a Regional Investment Corporation (the Corporation). The two main functions of the Corporation would be administering loans under the farm business concessional loans program and administering grants of financial assistance to the states and territories for water infrastructure projects.

#### ***Broad delegation of administrative powers***

3.22 The bill sought to allow all or any of the powers or functions of the Corporation, board and CEO to be delegated or subdelegated to any member of the staff of the Corporation. These powers would include significant matters, such as the power to sign an agreement, on behalf of the Commonwealth, with a state or territory for the grant of financial assistance in relation to a water infrastructure project, and the power to sign loan agreements to be administered by the Corporation.

3.23 The committee stated that it 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, and noted that there was no guidance on the face of the bill as to relevant skills or experience required to undertake delegated functions. The committee also noted that it has not generally accepted the need for administrative flexibility as a sufficient justification for a broad delegation of administrative powers to officials at any level, a justification provided by the explanatory memorandum in this case.

---

17 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [Provisions]*, February 2017, pp. 3–4 and p. 19.

3.24 The committee sought the minister's advice as to why it is necessary to allow this broad delegation of administrative powers and functions to any Corporation member of staff, and on the appropriateness of amending the bill to provide some legislative guidance on the scope of powers that might be delegated, or the categories of people to whom powers might be delegated. The minister responded by restating the need to provide the Corporation with operational flexibility, and noting the appropriateness of the proposed approach in light of the Corporation's governance structure and the likely expertise of its staff.

3.25 The committee reiterated its preference that delegations of administrative power be confined to the holders of nominated offices or to senior officials or, alternatively, that a limit be set on the scope and type of powers that might be delegated, but noted the specific considerations relating to governance structures and staff expertise detailed by the minister. The committee requested that the key information provided by the minister be included in the explanatory memorandum, and made no further comment on this matter.

#### ***Exemption from disallowance and sunseting***

3.26 The bill sought to allow the minister to give directions, by legislative instrument, to the Corporation. The explanatory memorandum stated that ministerial directions making up the Corporation's operating mandate would be legislative instruments, but would not be subject to disallowance as they would fall within an exemption under the Legislation (Exemptions and Other Matters) Regulation 2015 relating to directions given by a minister to a corporate Commonwealth entity. The explanatory statement also stated that certain 'other directions'<sup>18</sup> to the Corporation will not be legislative instruments—and therefore not subject to disallowance, sunseting and tabling requirements—because they too would be subject to an exemption.<sup>19</sup>

3.27 The committee noted that some of the matters to be determined by non-disallowable directions were significant—including eligibility criteria for loans or financial assistance; a class of farm business loans; terms and conditions attaching to agreements with the states and territories in relation to water infrastructure projects; and where the Corporation is to be located—and that the explanatory

---

18 These 'other directions' are provided for under clause 12 of the bill, which seeks to allow the minister to give written directions about a class of farm business loans; requiring the Corporation to enter an agreement for the grant of financial assistance to a particular state or territory in relation to a particular water infrastructure project; and about the location of the Corporation.

19 For these exemptions, see subsection 6(1) and section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.

memorandum provided no explanation of the necessity of excluding these directions from disallowance beyond noting that they fall within existing exemptions.<sup>20</sup>

3.28 The committee requested the minister's advice as to why it was appropriate for ministerial directions not to be subject to disallowance and sunseting, and why it was appropriate that directions in relation to farm business loans, water infrastructure projects and the location of the Corporation also not be subject to tabling requirements. Finally, the committee sought the minister's advice as to why there was no requirement on the minister to seek the board's advice prior to making a direction with regard to the location of the corporation, as would be required in the case of directions relating to farm business loans and water infrastructure projects.<sup>21</sup>

3.29 The minister's response did not provide specific justification as to why the ministerial directions should be exempt from disallowance and sunseting, and the committee considered it would be appropriate for the directions to be subject to disallowance and for consideration to be given to including specific consultation requirements with respect to these directions on the face of the bill. Finally, the committee suggested it remained unclear why the minister should not be required to consult with the board when determining the location of the Corporation as the power is an ongoing one—that is, it is not limited to determining only the *initial* location of the Corporation.

#### ***No requirement to table report in Parliament***

3.30 The bill sought to require the minister to arrange a review of the operation of the Act; however, it did not require that the report be made public or be tabled in the Parliament.

3.31 The committee therefore suggested it may be appropriate for the bill to be amended to include a legislative requirement that any report of the review be:

- tabled in the Parliament within 15 sitting days after it is received by the minister, and
- published on the internet within 30 days after it is received by the minister.

3.4 The minister advised that the review, and the corresponding written report, will inform the government in its consideration of future arrangements for the Corporation and that it was therefore appropriate that the government be able to decide if the report is to be released and the timing and method of release for the report.

3.32 The committee noted this advice, but nevertheless considered that, as the review relates to the operation of an Act of Parliament establishing the Corporation,

---

20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 143.

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2017*, 9 August 2017, pp. 143-4.

there should be a statutory requirement that the report of the review be tabled in the Parliament within 15 sitting days after it is received by the minister so that the Parliament is appropriately informed about the operation of the Corporation that it has established.

### ***Parliamentary scrutiny—section 96 grants to the States***

3.33 With respect to the administration of financial assistance to the states for water infrastructure projects, the explanatory memorandum stated that such grants would be made under section 96 of the Constitution. The explanatory memorandum further stated the Corporation would administer these funds *on behalf of the Commonwealth* because 'the decision on whether to provide the financial assistance remains with the government, not the Corporation'.<sup>22</sup>

3.34 The committee highlighted that the power to make grants to the states and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution. The committee also stated that, where the Parliament delegates this power, it considers it appropriate that the exercise of the power be subject to at least some level of parliamentary scrutiny, given the terms of section 96 and the role of senators in representing the people of their state or territory.<sup>23</sup>

3.35 The committee suggested it may be appropriate for the bill to be amended to:

- include at least some high-level guidance as to the types of terms and conditions that would attach to financial assistance for water infrastructure projects; and
- require that any written directions made by the minister requiring the Corporation to make a grant of financial assistance to a state or territory for a particular water infrastructure project, and setting out the terms of such an agreement, be tabled in the Parliament within 15 sitting days of being made and published on the internet within 30 sitting days of being made.<sup>24</sup>

3.36 The minister advised that the Corporation's operating mandate would be the key means by which the government would set out its expectations for the Corporation and that it was expected to include high-level requirements for financial assistance granted under the National Water Infrastructure Loan Facility. The minister further advised that the Corporation's operating mandate would be tabled in Parliament, and that the terms and conditions attaching to financial assistance

---

22 Regional Investment Corporation Bill 2017 Explanatory Memorandum, pp. 6-7.

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2017*, 21 June 2017, p. 36. Section 96 of the Constitution provides that: '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2017*, 21 June 2017, p. 37.

granted to a state or territory under direction from the minister would be required to be published in the Corporation's annual report.<sup>25</sup>

3.37 The committee noted the minister's advice but suggested it was not clear that the annual reports would include details of all of the relevant terms and conditions attaching to such grants, and that there was no legislative requirement that such agreements be published on the internet or tabled in the Parliament in their entirety. The committee further noted that the minister did not address its suggestion that some high-level guidance as to the types of terms and conditions that states and territories will be required to comply with be included on the face of the bill.<sup>26</sup>

3.38 The committee concluded its consideration of this aspect of the bill by drawing its scrutiny concerns to the attention of senators and leaving to the Senate as a whole the appropriateness of delegating to the executive government and the proposed Regional Investment Corporation the Parliament's power under section 96 of the Constitution to make grants to the states and to determine terms and conditions attaching to them, without any statutory guidance as to the types of terms and conditions that states and territories will be required to comply with or a statutory requirement that the relevant agreements with the states and territories be published on the internet or tabled in the Parliament.

3.39 The Senate Rural and Regional Affairs and Transport Legislation Committee conducted an inquiry into the provisions of the bill and made extensive use of the committee's scrutiny comments in its final report.<sup>27</sup>

### ***Committee consideration of amendments to the bill***

3.40 The Senate agreed to two government amendments on 18 October 2017, one opposition amendment on 6 December 2017, and seven opposition amendments on 6 February 2018. The committee welcomed these amendments and noted that they appeared to address the majority of the scrutiny concerns it had expressed in relation to the bill.<sup>28</sup> Specifically, the amendments:

- set out a number of requirements that ministers must observe when giving a direction to the Corporation to enter into an agreement on behalf of the Commonwealth to provide grants of financial assistance to a state or territory in relation to a particular water infrastructure project;

---

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 141.

26 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 141.

27 Senate Rural and Regional Affairs and Transport Legislation Committee, *Regional Investment Corporation Bill 2017 [Provisions]*, August 2017.

28 See government amendments (1) and (2), and opposition amendments (1) to (6) and (12).



- provided that ministerial directions relating to the Corporation's operating mandate would be subject to disallowance;
- provided that any terms and conditions attached to a grant agreement must be in accordance with the rules;
- provided that the rules must prescribe the terms and conditions, or kinds of terms and conditions, that may be included in a grant agreement, as well as the matters the Corporation must consider when specifying terms and conditions to be included in such an agreement;
- required the minister to cause a copy of any grant agreement, and any direction given in relation to that agreement, to be tabled in the Parliament and published on the internet; and
- required the minister to cause a copy of the report of the review of the Act to be tabled in the Parliament and published on the internet.<sup>29</sup>

**Senator John Williams**  
**Acting Chair**

---

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 65-66.



## **Appendix 1**

### **The committee's scrutiny principles in detail**



---

## Provisions which trespass unduly on personal rights and liberties

---

### Application of criterion set out in standing order 24(1)(a)(i)

The committee is required to report on whether the provisions of proposed legislation could 'trespass unduly on personal rights and liberties'. For example, a bill might raise issues relating to:

- having a retrospective and adverse effect on those to whom it applies, sometimes from the date of a media announcement (in these instances known as 'legislation by press release');
- abrogating the privilege against self-incrimination (the right people have at common law to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved);
- reversing the common law burden of proof (requiring a person to prove their innocence when legal proceedings are taken against them);
- imposing strict or absolute liability as an element of fault for an offence;
- authorising search and seizure without the need to obtain a judicial warrant;
- privacy, including the confidentiality of professional communications with a person's legal advisers;
- equipping officers with oppressive powers, especially for use against a vulnerable group of people; or
- taking away Parliament's right to obtain information from the executive.

These are categories that have arisen for consideration during most parliaments and are ones with which the committee is very familiar. However, standing order 24(1)(a)(i) may also apply in other circumstances and the committee is alert to identifying any new matters that may be considered inconsistent with the intent of the principle. More detail about matters that give rise to scrutiny concern and examples are discussed below.

### **Retrospectivity**

Legislation has retrospective effect when it makes a law apply to an act or omission that took place *before* the legislation itself was enacted. Criticism of this practice is longstanding. The committee considers that retrospective legislation is of concern where it will, or might, have a detrimental effect on people. The committee will comment adversely in these circumstances. Where proposed legislation will have retrospective effect the committee expects that the explanatory memorandum

should set out in detail the reasons retrospectivity is sought. The justification should include a statement of whether any person will or might be adversely affected and, if so, the number of people involved and the extent to which their interests are likely to be affected.

**For examples, see the committee's comments concerning the:**

- Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (*Scrutiny Digest 6 of 2017*);
- Investigation and Prosecution Measures Bill 2017 (*Scrutiny Digest 13 of 2017*);  
and
- Social Services Omnibus Savings and Child Care Reform) Bill 2017 (*Scrutiny Digest 3 of 2017*).

### ***Abrogation of the privilege against self-incrimination***

At common law, a person can decline to answer a question on the ground that their reply might tend to incriminate them. Legislation that interferes with this common law entitlement trespasses on personal rights and liberties and causes the committee considerable concern. However, the committee is also conscious of a government's need to have sufficient information to enable it to properly carry out its duties for the community. The committee accepts that in some circumstances good administration might require access to information that can only be obtained, or can best be obtained, by forcing a person to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence.

The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a provision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.

One of the factors the committee considers is the subsequent use that may be made of any incriminating disclosures. The committee generally holds to the view that it is relevant to take into account whether the proposed legislation balances the harm of abrogating the privilege by including a prohibition against any direct or indirect uses of the information beyond the purpose for which it is being obtained.

To date the only exception to this that the committee generally finds acceptable is that a forced disclosure should only be available for use in criminal proceedings when they are proceedings for giving false or misleading information in the disclosure the person has been compelled to make. The committee's experience is that the importance of the availability of these use and derivative use immunities are generally understood and they are usually included in bills that seek to abrogate the privilege against self-incrimination.

**For examples see the committee's comments concerning the:**

- Education and Other Legislation Amendment Bill (No. 1) 2017 (*Scrutiny Digest 5 of 2017*);
- Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 (*Scrutiny Digest 15 of 2017*); and
- Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (*Scrutiny Digest 15 of 2017*).

***Reverse burden of proof***

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence; the accused is not required to prove anything. Provisions in some legislation reverse this burden and require the person charged with an offence to prove, or disprove, a matter in order to establish his or her innocence or at least identify evidence that suggests a reasonable possibility that the matter exists or does not exist.

The committee usually comments adversely on a bill that places the burden on an accused person to disprove one or more elements of the offence with which he or she is charged, unless the explanatory memorandum clearly and adequately justifies the rationale for the approach, particularly by reference to the principles outlined in its comments on this issue recorded in the committee's *Scrutiny Digests* and in the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which states in relation to a provision which reverses the burden of proof (often drafted, in effect, as a defence):

However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence.

Creating a defence is also more readily justified if:

- the matter in question is not central to the question of culpability for the offence;
- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.<sup>1</sup>

**For examples, see the committee's comments concerning the:**

- Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (*Scrutiny Digest 12 of 2017*);

---

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

- Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 (*Scrutiny Digest 8 of 2017*); and
- Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 (*Scrutiny Digest 12 of 2017*).

### ***Strict and absolute liability offences***

The committee draws the Senate's attention to provisions that create offences of strict or absolute liability and expects that where a bill creates such an offence the reasons for its imposition will be set out in the explanatory memorandum that accompanies the bill.

An offence is one of **strict liability** where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. A person charged with a strict liability offence is able to invoke a defence of mistake of fact.

An offence of **absolute liability** also provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. However, in the case of absolute liability offences, the defence of mistake of fact is not available.

### **For examples, see the committee's comments concerning the:**

- Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (*Scrutiny Digest 12 of 2017*);
- Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017 (*Scrutiny Digest 5 of 2017*); and
- Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (*Scrutiny Digest 12 of 2017*).

### ***Powers of search and seizure without warrant***

The committee consistently draws the Senate's attention to provisions that allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties. A provision giving such a power will be acceptable only when the circumstances and gravity of the matter justify it (and this information should be included in the explanatory memorandum).

### **For example see the committee's comments concerning the:**

- Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (*Scrutiny Digest 12 of 2017*); and
- Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 (*Scrutiny Digest 3 of 2017*).



---

## Insufficiently defined administrative powers

---

### Application of criterion set out in standing order 24(1)(a)(ii)

Legislation may contain provisions which make rights and liberties unduly dependent on insufficiently defined administrative powers. For example, a provision might:

- give administrators ill-defined and/or wide powers;
- delegate power to 'a person' without any further qualification as to who that person might be; or
- fail to provide for people to be notified of their rights of appeal against administrative decisions.

### *Ill-defined and wide powers*

Since its establishment in 1981, the committee has drawn the Senate's attention to legislation that gives administrators seemingly ill-defined and wide powers. The committee sees a number of approaches that are of concern from year to year, though it is also always alert to identifying novel ways in which this issue may arise.

As is often the case, if a provision that is of interest to the committee is accompanied by a comprehensive explanation of the rationale for the approach in the explanatory memorandum, the committee is able to better understand the proposal and either make no further comment or leave the matter to the consideration of the Senate.

### For examples, see the committee's comments concerning the:

- Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (*Scrutiny Digest 8 of 2017*);
- Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (*Scrutiny Digest 13 of 2017*); and
- Imported Food Control Amendment Bill 2017 (*Scrutiny Digest 11 of 2017*).

### *Delegation of power to 'a person' or to a wide class of persons*

The committee consistently draws attention to legislation that allows significant and wide-ranging powers to be delegated to anyone who fits an all-embracing description (such as 'a person') or which allows delegations to a relatively large class of persons with little or no specificity as to appropriate qualifications or attributes. Generally the committee prefers to see a limit set either on the sorts 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 delegations are made the committee also expects that an explanation of why they are considered necessary should be included in the explanatory memorandum, especially if the delegation is broad.

**For examples, see the committee's comments concerning the:**

- Australian Education Amendment Bill 2017 (*Scrutiny Digest 9 of 2017*); and
- Migration Amendment (Regulation of Migration Agents) Bill 2017 (*Scrutiny Digest 10 of 2017*); and
- Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017 (*Scrutiny Digest 6 of 2017*).

---

## Undue dependence on non-reviewable decisions

---

### Application of criterion set out in standing order 24(1)(a)(iii)

Legislation may contain provisions which make 'rights, liberties or obligations unduly dependent upon non-reviewable decisions'. Relevantly, a bill may seek to:

- exclude review on the merits by an appropriate appeal tribunal;
- exclude judicial review of the legality of a decision; or
- provide that reasons need not be given for a decision.

### ***Excluding merits and judicial review***

The committee is of the view that, where a decision may have a substantial impact on a person's rights and interests, judicial review should generally be available to ensure that such decisions are lawfully made. Since its establishment, the committee has drawn attention to provisions that explicitly or otherwise exclude or fail to provide for effective judicial review.

The committee routinely draws attention to bills that seek to deny the opportunity for effective review. However, the committee also accepts that there are circumstances in which review is not, or may not be, necessary. The committee is assisted to come to this conclusion when the explanatory memorandum comprehensively and persuasively describes the rationale for the proposed approach.

**For examples, see the committee's comments concerning the:**

- Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (*Scrutiny Digest 15 of 2017*);
- Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2017 (*Scrutiny Digest 3 of 2017*); and
- Treasury Laws Amendment (Combating Multination Tax Avoidance) Bill 2017 (*Scrutiny Digest 3 of 2017*).

---

## **Inappropriate delegation of legislative power**

---

### **Application of criterion set out in standing order 24(1)(a)(iv)**

Legislation often includes the delegation of a power to make laws, giving delegates (usually a member or representative of the Executive Government) the authority to make regulations or other instruments that are not required to be considered and approved by Parliament before they take effect. The committee's task under this criterion is therefore to draw the Senate's attention to provisions that seek to delegate Parliament's power inappropriately. Examples of provisions that may inappropriately delegate legislative power include those which:

- enable subordinate legislation to amend an Act of Parliament (often called a 'Henry VIII' clause);
- provide that matters which are so important that they should be regulated by Parliament but are, in fact, to be dealt with by subordinate legislation;
- provide that a levy or a charge be set by regulation; or
- give to the Executive unfettered control over whether or when an Act passed by the Parliament should come into force.

### **Henry VIII clauses**

A Henry VIII clause is an express provision which authorises the amendment of either the empowering Act, or any other primary legislation, by means of delegated legislation. Since its establishment, the committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Once again, a clear and helpful explanation in the explanatory memorandum can allow the committee to leave the matter to the Senate.

**For examples, see the committee's comments concerning the:**

- Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017 (*Scrutiny Digest 6 of 2017*);
- Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017 (*Scrutiny Digest 6 of 2017*); and
- Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 (*Scrutiny Digest 3 of 2017*).

***Determining important matters by delegated legislation***

The committee also draws attention to provisions that inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. Significant matters should be undertaken directly by Parliament and not left to the subordinate legislation disallowance process.

**For example, see the committee's comments concerning the:**

- Australian Border Force Amendment (Protected Information) Bill 2017 (*Scrutiny Digest 10 of 2017*);
- National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 (*Scrutiny Digest 6 of 2017*); and
- Parliamentary Business Resources Bill 2017 (*Scrutiny Digest 5 of 2017*).

***Setting the rate of a 'levy' by regulation***

The committee has also consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation. This creates a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the committee expects that there will be some limits imposed on the exercise of this power. For example, the committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

**For example, see the committee's comments concerning the:**

- Industrial Chemicals Charges (General) Bill 2017 and related bills (*Scrutiny Digest 8 of 2017*); and
- Therapeutic Goods (Charges) Amendment Bill 2017 (*Scrutiny Digest 13 of 2017*).

---

## Appropriate parliamentary scrutiny of legislative power

---

### Application of criterion set out in standing order 24(1)(a)(v)

Whenever Parliament delegates power to legislate, it should properly address the question of how much oversight to maintain over the exercise of that delegated power. Provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny include those which:

- provide a power to make delegated legislation that is not to be tabled in Parliament, or which is to be tabled, but is not disallowable;
- require delegated legislation to be tabled and disallowable, but with a disallowance period so short that Parliament may not be able to scrutinise it properly;
- provide that legislative instruments to be made under primary legislation may incorporate rules or standards of other bodies as in force from time to time; or
- enable a Minister or other person to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised, with no obligation that they be tabled in Parliament or subject to disallowance.

### ***Not tabled or not subject to disallowance***

When a provision specifies that an instrument is *not* a legislative instrument the committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the committee expects to see a full explanation outlined in the explanatory memorandum justifying the need for the exemption.

### **For example, see the committee's comments concerning the:**

- Agriculture and Water Resources Legislation Amendment Bill 2016 (*Scrutiny Digest 3 of 2017*);
- ASIC Supervisory Cost Recovery Levy Bill 2017 (*Scrutiny Digest 6 of 2017*); and
- Human Rights Legislation Amendment Bill 2017 (*Scrutiny Digest 5 of 2017*).

### ***Incorporating material 'as in force from time to time'***

The *Legislative Instruments Act 2003* includes a general rule which allows a legislative instrument, such as a regulation, to adopt or incorporate additional material and give it the force of law. The incorporated material applies in the form in which it exists *at the time of adoption* unless a provision in the relevant Act allows material to be incorporated 'as in force from time to time'. Typical wording included in bills to achieve this outcome provides that the relevant regulations may:

...apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing as in force from time to time.

Allowing material to be incorporated 'as in force from time to time' is of concern from a scrutiny perspective because it:

- allows a change in legal obligations to be imposed without the Parliament's knowledge and without the opportunity for Parliament to scrutinise the variation;
- can create uncertainty in the law because those affected may not be aware that the law has changed; and
- those obliged to obey the law may have inadequate access to its terms, depending on the nature of the material being incorporated.

The committee expects that the explanatory memorandum for a bill that includes a provision which seeks to incorporate non-legislative material 'as in force from time to time' will clearly and comprehensively explain the necessity for this approach and indicate how the concerns outlined above will be met.

In some instances the committee noted that a bill sought to incorporate material 'as in force from time to time', but acknowledged that an appropriate explanation was provided in the explanatory memorandum.

#### **For example, see the committee's comments concerning the:**

- Imported Food Control Amendment Bill 2017 (*Scrutiny Digest 8 of 2017*);
- Major Bank Levy Bill 2017 (*Scrutiny Digest 7 of 2018*); and
- Treasury Laws Amendment (Banking Measures No. 1) Bill 2017 (*Scrutiny Digest 15 of 2017*).

### ***Standing Appropriations***

In the committee's *Fourteenth Report of 2005*, the committee stated that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the

---

committee's terms of reference relating to the delegation and exercise of legislative power. (p. 272)

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation in the period during which it applies.

**For example, see the committee's comments concerning the:**

- Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (*Scrutiny Digest 15 of 2017*).

