



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

NINTH REPORT
OF
2016

23 November 2016

ISSN 0729-6258 (Print)

ISSN 2204-3985 (Online)

Members 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 Toni Dawes, Secretary
Mr Glenn Ryall, Principal Research Officer
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
Website: http://www.aph.gov.au/senate_scrutiny

Terms of Reference

Extract from **Standing Order 24**

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 2016

The committee presents its *Ninth Report of 2016* to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Bills	Page No.
Counter-Terrorism Legislation Amendment Bill (No. 1) 2016	551
Criminal Code Amendment (War Crimes) Bill 2016	568
Industry Research and Development Amendment (Innovation and Science Australia) Bill 2016	571
Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016	579
VET Student Loans Bill 2016	582
VET Student Loans (Charges) Bill 2016	602

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

Purpose	This bill amends various legislation in relation to: <ul style="list-style-type: none">• extending control orders to children aged 14 or 15 years• control orders and tracking devices• preventative detention orders• telecommunications interception• use of surveillance devices• a new offence of advocating genocide• delayed notification search warrants
Portfolio	Attorney-General
Introduced	Senate on 15 September 2016
Status	This bill passed both Houses on 22 November 2016

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Attorney-General responded to the committee's comments in a letter received on 7 November 2016. The committee sought further information and the Attorney-General responded in a letter dated 21 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2016 - extract

Trespass on personal rights and liberties—use of information obtained where interim control order declared void

Schedule 8, item 1, proposed section 3ZZTC of the *Crimes Act 1914*

Schedule 9, item 58, proposed section 299 of the *Telecommunications (Interception and Access) Act 1979*

Schedule 10, item 45, proposed section 65B of the *Surveillance Devices Act 2004*

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

Surveillance Devices Act 2004 (the SD Act) (see Schedule 10, item 45, proposed section 65B) where the control order is subsequently declared to be void.

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

The Attorney-General provided a response to the committee, much of which now forms the reasons given in the statement of compatibility as to why these provisions do not undermine a right to a fair trial and fair hearing (pp 44–45). The statement of compatibility notes that the provision 'enables agencies to further use either lawfully intercepted information or lawfully accessed information obtained under an interception warrant relating to an interim control order which is subsequently declared void' (p. 44):

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

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

¹ (1978) 141 CLR 54.

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

³ See s 63 of the TIA Act.

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

Although it is said that the information is obtained ‘lawfully’ it remains the case that, if that basis for obtaining the information is subsequently declared to be void, the information was obtained in excess of the powers granted to obtain information. In this context, describing the information as ‘lawfully obtained information’ does not capture the essential point that information was obtained on the bases of a legally invalid exercise of power.

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

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

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

Attorney-General's initial response - extract

Proposed section 3ZZTC of the *Crimes Act 1914*, section 299 of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) and section 658 of the *Surveillance Devices Act 2004* (the SD Act) expressly permit agencies to rely on things, information or documents obtained under a monitoring warrant where the control order is subsequently declared void in very limited circumstances. Specifically, the things, information or documents can be used to prevent, or lessen the risk of, a terrorist act, serious harm to a person, or serious damage to property. These provisions also permit the use of such information to apply for, and in connection with, a preventative detention order. While agencies are therefore entitled to adduce such evidence under these provisions, the court's discretion as to whether or not that evidence may be admitted as evidence into the proceedings, irrespective of the manner in which the information was obtained, remains unaffected.

The provisions do not affect a court's discretion to refuse to admit evidence in a proceeding before it. In addition, these provisions do not override a court's duty to refuse to admit improperly obtained evidence in particular circumstances, or its determination of the weight to be given to particular evidence. Similarly, these provisions do not impact upon a party's right to adduce or challenge evidence in court.

Committee's initial response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the provisions do not affect a court's discretion in relation to the admissibility of evidence.

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

The committee draws its concerns to the attention of Senators and leaves the appropriateness of enabling the use of information obtained where an interim control order is subsequently declared void to the consideration of the Senate as a whole.

Attorney-General's further response - extract

Schedules 8, 9 and 10

Use of information obtained where interim control order declared void

The Committee requested that key information provided by the Attorney-General in the Digest in relation to this matter be included in the explanatory memorandum to the Bill. In accordance with the request of the Committee, the Revised Explanatory Memorandum, which will accompany the Bill when it is introduced into the House of Representatives, will note that the court's decision to refuse to admit evidence in a proceeding before it will not be affected by the proposed amendments to the *Crimes Act 1914, Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*.

Committee's further response

The committee thanks the Attorney-General for this further response and for indicating that key information will be inserted into the explanatory memorandum as requested by the committee. The committee welcomes the inclusion of additional information in explanatory material accompanying bills as these documents are an important point of access to understanding the law and, if needed, may be used as extrinsic material to assist with interpretation.

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

Alert Digest No. 7 of 2016 - extract

Trespass on personal rights and liberties—fair hearing

Schedule 15, general comment

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

- that the subject of the control order and their legal representative may only be provided with a redacted or summarised form of national security information.

Despite this, however, the court may consider the information in its entirety (proposed new subsection 38J(2));

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

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

These proposals clearly undermine the fundamental principle of natural justice which includes a fair hearing. In judicial proceedings a fair hearing traditionally includes the right to contest any charges against them but also to test any evidence upon which any allegations are based. In many instances it may not be possible in practice to contest the case for the imposition of control orders without access to the evidence on which the case is built. Evidence is susceptible to being misleading if it is insulated from challenge. Given that the burden of proof in civil cases is lower than criminal proceedings, that risk is magnified.

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

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

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

any general powers to stay or control its proceedings) cannot be said to ‘guarantee’ procedural fairness.

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

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

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

Sufficient information to be provided

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

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

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

representative is heavily restricted after national security information has been disclosed to the advocate.

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

Attorney-General's initial response - extract

The amendments contained in Part 1 of Schedule 15 enable a court to make three new types of protective orders in control order proceedings. Under revised section 38J of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), each of the new protective orders allows the court to consider sensitive national security information that the controlee and their ordinary legal representative are prevented from hearing or seeing. Part 2 of Schedule 15 provides that a special advocate may be appointed to represent the interests of the controlee in parts of the control order proceedings where the controlee and their ordinary legal representative have been excluded.

In determining whether to make a protective order under revised section 38J, the court must be satisfied that the controlee has been given 'sufficient information about the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations' (new paragraph 38J(1)(c)). This implements Recommendation 4 of the PJCIS Advisory Report.

Whether the controlee is provided the 'sufficient information' prior to the special advocate seeing the sensitive national security information will depend on the circumstances of the control order application.

In the ordinary case, the controlee will be given sufficient information about the allegations on which a control order request is based, such that they can instruct their ordinary legal representative and special advocate in relation to those allegations. This information is provided by the AFP pursuant to the various disclosure obligations under Division 104 (for instance, subparagraph 104.12A(2)(a)(iii)) as well as under other applicable procedural rights in federal civil proceedings (for instance, normal processes of discovery). Given the controlee will have access to this information prior to the special advocate seeing the sensitive national security information under new section 38PE, the controlee and the special advocate will generally be able to communicate freely.

There may be some circumstances where further information is disclosed to the controlee after a special advocate has been appointed and received the sensitive national security information. Following the receipt of the sensitive national security information by the

special advocate, any communication from the special advocate to the controlee will require the authorisation of the court, pursuant to new section 38PF. Following the closed hearing, if the court determines that the information should be subject to a new protective order under revised section 38J, the court must ensure the controlee is provided ‘sufficient information’ about the allegations contained in that ‘information’ such that they are able to instruct their ordinary legal representative and special advocate in relation to those allegations.

The communication restrictions in new section 38PF do not prevent the controlee from communicating with the special advocate nor providing information to the special advocate that the controlee considers relevant in relation to the ‘sufficient information’. Pursuant to new subsection 38PF(8), the controlee can continue to communicate with the special advocate in writing through their ordinary legal representative without restriction.

Committee’s initial response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General’s advice that there may be circumstances in which a person who may be subject to a control order (the ‘controlee’) will not be given sufficient information prior to a special advocate seeing the sensitive national security information (at which point communication between the two is heavily restricted).

The committee accepts that a controlee is able to communicate with the special advocate after the advocate has seen the sensitive national security information. However, such communication can only be in writing through their legal representative, and the advocate can only submit a written communication to the court for the court’s approval to forward it to the controlee or their legal representative (see proposed section 38PF). This is a heavily restricted approach to communication between the controlee and the special advocate, who may be the only person able to represent the interests of the controlee at many stages of the proceedings.

The committee considers that if a controlee is only given ‘sufficient information’ about the allegations against them *after* restrictions are placed on communication with the special advocate, there will be limited opportunity for proper instructions to be given to the special advocate. The committee considers this would appear to defeat the purpose of the special advocate scheme in instances where the information is not provided to the controlee before the special advocate has received the sensitive national security information.

continued

The committee reiterates its view that the secret evidence provisions are apt to undermine the fundamental principle of natural justice which includes the right to a fair hearing. The right to a fair hearing traditionally includes the right to contest any charges and test any evidence on which allegations are based. If sufficient information about the allegations against the controlee is not provided to the controlee until after communications with the special advocate are heavily restricted, the committee considers the scheme set out in the bill does not appear to provide an appropriate balance between the need to protect national security information and the controlee's right to procedural fairness.

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

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the timing of when 'sufficient information' is provided to the controlee to the consideration of the Senate as a whole.

Attorney-General's further response - extract

Schedule 15 Sufficient information

The Committee requested that the key information provided by the Attorney-General in response to the Digest be included in the explanatory memorandum to the Bill. In accordance with the request of the Committee, the Revised Explanatory Memorandum will include further detail about the interaction of the 'sufficient information' requirement under new paragraph 38J(1)(c) with the special advocate role.

The Revised Explanatory Memorandum will clarify that in the ordinary case, the controlee will be given sufficient information about the allegations on which a control order request is based prior to the special advocate being provided the sensitive national security information under new subsection 38PE(2). Accordingly, the controlee and the special advocate will generally be able to communicate without restrictions when the 'sufficient information' has been provided to the controlee.

The Revised Explanatory Memorandum will also outline that in some circumstances, further information may be disclosed to the controlee after the special advocate has been provided the sensitive national security information. Under such circumstances, the special advocate will need the approval of the court to communicate with the controlee. However, the controlee can continue to communicate with the special advocate without restriction, so long as the communication is in writing through their ordinary legal representative.

Committee's further response

The committee thanks the Attorney-General for this further response and for indicating that key information will be inserted into the explanatory memorandum as requested by the committee. The committee welcomes the inclusion of additional information in explanatory material accompanying bills as these documents are an important point of access to understanding the law and, if needed, may be used as extrinsic material to assist with interpretation.

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

Alert Digest No. 7 of 2016 - extract

In addition, the bill tightly regulates communication between special advocates and controlees (and their legal representatives) after national security information has been disclosed. However, subsection 38PD(1) allows unrestricted communication prior to the disclosure of that information. Proposed subsection 38PD(2) provides that the court may restrict or prohibit communication between the controlee and the special advocate if satisfied that it is in the interests of national security to do so and the orders are not inconsistent with the Act or regulations made under it. No justification is provided in the explanatory memorandum as to why this exception is required. It is unclear why such communication need be restricted given at this point in time no sensitive information would have been disclosed to the special advocate. If communication prior to national security information being disclosed is restricted it may make it very difficult for the special advocate to adequately perform their functions given that communication after disclosure is so tightly regulated by the provisions.

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

Attorney-General's initial response - extract

New section 38PD provides that communication between the special advocate and the controlee is generally not subject to any restriction prior to the special advocate being provided with the sensitive national security information under new subsection 38PE(2). The limited exception to this is outlined in new subsection 38PD(2). New subsection

38PD(2) states that the court may make orders restricting or prohibiting communications between the special advocate and the controlee even prior to the special advocate being disclosed the sensitive national security information if the court is satisfied that the order is in the interest of national security, and the order is not inconsistent with the NSI Act or regulations made under the Act.

The limited exception to the general rule in favour of unrestricted communication is to prevent the inadvertent unauthorised disclosure of sensitive national security information. There are circumstances where the appointed special advocate may have already acquired sensitive national security information, including the sensitive national security information that is to be subject to, or is already the subject of, a new protective order under revised section 38J. Where the special advocate has knowledge of such material, which is relevant to the control order proceeding, there is a risk that the special advocate may inadvertently disclose that information to the controlee. A court order under new subsection 38PD(2) which restricts or prohibits communication between the special advocate and controlee guards against the risk of inadvertent disclosure.

In making an order under new subsection 38PD(2), the court may require that any communication from the special advocate to the controlee be authorised by the court pursuant to the process outlined in new section 38PF. Such a process ensures that the court can review proposed communications from the special advocate to the controlee to minimise the risk of inadvertent disclosure of sensitive national security information. The process under new section 38PF still allows the controlee to communicate with the special advocate without restriction, so long as the communication is in writing and goes through their ordinary legal representative.

Noting the importance of promoting open and unrestricted communication between the special advocate and controlee prior to the special advocate receiving the sensitive national security information, it is likely that the court would only make an order under new subsection 38PD(2) in exceptional circumstances where the risk of inadvertent disclosure of sensitive national security information cannot be mitigated in any other way.

Committee's initial response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that there may be circumstances where the appointed special advocate may have already acquired sensitive national security information before a protective order is made. As such, the Attorney-General advises that proposed subsection 38PD(2), in allowing the court to restrict the disclosure of information between the special advocate and the controlee, is necessary to protect against the risk of inadvertent disclosure. The committee notes that the advice did not provide any examples as to the circumstances in which a special advocate would have knowledge of the national security information prior to it being officially disclosed to them.

continued

The committee also notes the Attorney-General's advice that it is likely that the court would only make such an order in exceptional circumstances where the risk of disclosure could not be mitigated in any other way. However, proposed subsection 38PD(2), as drafted, is not limited to exceptional circumstances, and could be used any time the court considers it appropriate to do so if satisfied that it is in the interests of national security and the orders are not inconsistent with the proposed Act.

In light of the above comments, the committee seeks the Attorney-General's further advice as to whether consideration has been given to:

- amending proposed subsection 38PD(2) to require the court to consider whether the risk of disclosure could be mitigated in any other way prior to restricting or prohibiting communications between a controlee and special advocate; and
- enabling the court to appoint a new special advocate who does not have access to sensitive national security information, to enable a controlee to properly communicate with their special advocate before a protective order is made.

Attorney-General's further response - extract

Communication restrictions between the special advocate and controlee prior to the disclosure of sensitive information to the special advocate

The Committee noted the response of the Attorney-General to the Digest that there may be instances where the appointed special advocate may have already acquired sensitive national security information before a disclosure is made by the Attorney-General to the special advocate under new subsection 38PE(2). Alternatively, it may be the case that the special advocate has knowledge of other sensitive national security information that is highly relevant to the control order proceeding on foot. In such circumstances, it is appropriate that communication between the special advocate and the controlee be restricted in order to prevent the inadvertent disclosure of the sensitive national security information.

A scenario where the court may consider that a restriction or prohibition is appropriate even prior to the sensitive national security information being disclosed to the special advocate is when the appointed special advocate has previously been involved in a control order proceeding where specific sensitive national security information was subject to a protective order under revised section 38J. In the subsequent control order proceeding, the Australian Federal Police may seek to rely on the same specific sensitive national security information, over which the Attorney-General may again seek a protective order under revised section 38J. In such circumstances, the court may consider that an order under new subsection 38PD(2) is appropriate because the prior knowledge of the special advocate of

the sensitive information heightens the risk of inadvertent disclosure of that information to the controlee.

The Committee sought additional information as to whether consideration has been given to:

- amending proposed subsection 38PD(2) to require the court to consider whether the risk of disclosure could be mitigated in any other way prior to restricting or prohibiting communications between a controlee and special advocate; and
- enabling the court to appoint a new special advocate who does not have access to sensitive national security information, to enable a controlee to properly communicate with their special advocate before a protective order is made.

The amendments proposed by the Committee are not required. The NSI Act is designed to provide the court flexibility and discretion to conduct its proceedings in such a way as to accord procedural fairness to all parties. The overarching responsibility of courts to provide procedural fairness, the existing safeguards contained in the NSI Act and the additional safeguards contained in Schedule 15 of the Bill ensure that the controlee is guaranteed a right to a fair hearing during a control order application. Given this context, and in particular the intent of the special advocate role to vigorously represent the interests of the controlee, it is likely that the court will only make an order under new subsection 38PD(2) where it considers that the risk of inadvertent disclosure of the sensitive national security information cannot be mitigated in any other way.

Committee's further response

The committee thanks the Attorney-General for this further response and notes that it would have been useful had this key information been included in the explanatory memorandum.

The committee notes the Attorney-General's advice that it is not necessary to amend the provisions to require the court to consider whether the risk of disclosure could be mitigated in any way other than restricting communication between the controlee and special advocate because it is intended that the court have flexibility and discretion to conduct its proceedings. The committee also notes the Attorney-General's advice that this power is set out in the context of existing safeguards in the NSI Act and additional safeguards in Schedule 15 of the bill, and that the intent of the special advocate scheme is to vigorously represent the interests of the controlee.

continued

However, the committee reiterates its view that the secret evidence provisions are apt to undermine the fundamental principle of natural justice, which includes the right to a fair hearing, and that the special advocates scheme, as drafted, does not appear to provide an appropriate balance between the need to protect national security information and the controlee's right to procedural fairness. In this context the committee considers that, from a scrutiny perspective, it is insufficient to leave a broad discretion to the court to limit communication between a controlee and special advocate so long as it is satisfied it is in the interests of national security and the orders are not inconsistent with the proposed Act.

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

Alert Digest No. 7 of 2016 - extract

Trespass unduly on personal rights and liberties—retrospective commencement

Schedule 15, item 32

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

The explanatory materials do not explain why the amendments should apply to proceedings which have already begun, especially given that (as explained above) the amendments may be in conflict with the fair hearing principle. The committee previously sought the Attorney-General's advice as to the rationale for the proposed retrospective application of the amendments to proceedings already commenced and as to how many current proceedings or potential proceedings are, or are likely to be, affected by this provision.

The Attorney-General responded:

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

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

Attorney-General's initial response - extract

The Explanatory Memorandum currently states that the new protective orders will apply to control order proceedings irrespective of whether the control order proceeding has commenced and irrespective of whether or not the NSI Act has been invoked. However, this does not mean that the new protective orders can be sought in respect of parts of the control order proceeding which have already concluded. As noted in the Attorney-General's previous response, the new protective orders will only be available in those parts of the control order proceedings that have not yet occurred and where the NSI Act has been invoked. Accordingly, the provisions will not operate retrospectively.

The existing Explanatory Memorandum already provides a description of the operation of the amendments contained in Part 1 of Schedule 15.

Committee initial response

The committee thanks the Attorney-General for this response.

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

Attorney-General's further response - extract

Retrospective commencement

The Committee requested that additional information provided by the Attorney-General in response to the Digest be included in the explanatory memorandum. In accordance with the request of the Committee, the Revised Explanatory Memorandum will clarify that the amendments to the NSI Act contained in Part 1 of Schedule 15 will not operate retrospectively.

The Revised Explanatory Memorandum will note that the new protective orders will become available as soon as they come into force, regardless of whether a control order proceeding has already commenced. This is consistent with existing protections that are available under the NSI Act. Section 6A of the NSI Act provides that the NSI Act can apply to civil proceedings that take place after the NSI Act has been invoked, irrespective of whether the proceedings commenced prior to the invocation of the Act. However, the new protective orders under revised section 38J will only be available in those parts of the proceedings that have not yet occurred.

Committee's further response

The committee thanks the Attorney-General for this further response and for indicating that key information will be inserted into the explanatory memorandum as requested by the committee. The committee welcomes the inclusion of additional information in explanatory material accompanying bills as these documents are an important point of access to understanding the law and, if needed, may be used as extrinsic material to assist with interpretation.

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

Criminal Code Amendment (War Crimes) Bill 2016

Purpose	This bill seeks to amend the <i>Criminal Code Act 1995</i> to ensure consistency between Australian domestic law and international law in relation to the treatment of members of organised armed groups in non-international armed conflicts
Portfolio	Attorney-General
Introduced	House of Representatives on 12 October 2016

The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Attorney-General responded to the committee's comments in a letter dated 22 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2016 - extract

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

Schedule 1, items 8–11

Items 8 to 11 of Part 2 of Schedule 1 each introduce a defence of proportionality to a number of existing offences. The defences will apply if the relevant death or injury results from an attack on a military objective, launched in circumstances where the perpetrator reasonably did not expect that the attack would cause excessive incidental civilian death or injury. In a note to each of the proposed subsections in these items it indicates that a defendant will bear an evidential burden in relation to establishing the matters to make out this defence.

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

As neither the statement of compatibility nor the explanatory memorandum address this issue the committee seeks a justification from the Attorney-General as to why the items propose to reverse the evidential burden of proof which addresses the principles set out in

the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50–52).

Attorney-General's response - extract

The items in question introduce a defence to a number of war crimes offences in the *Criminal Code Act 1995* (the Code), which are engaged by conduct which causes the death of, or injury to, a person not taking an active part in hostilities in a non-international armed conflict (subsections 268.70(1), 268.71(1), 268.71(2) and 268.72(1)).

The introduction of the defence aligns Australian domestic law with the international humanitarian law principle of proportionality, as applied to non-international armed conflict. It provides that the relevant offence will not apply if death or injury results from an attack on a military objective, launched in circumstances where the perpetrator reasonably did not expect that the attack would result in the incidental death of or injury to civilians that would have been excessive in relation to the concrete and direct military advantage anticipated.

The relevant war crimes offences specified above are contained in Division 268 of the Code, which was enacted in 2002 to create offences in Australian law that are the equivalent of the international crimes provided for in the Rome Statute of the International Criminal Court (the Rome Statute). The elements of those offences are closely modelled on the Elements of Crimes for the corresponding crimes in Article 8(2)(c)(i) of the Rome Statute. It would not be appropriate to specify an additional element for the proof of these offences under Australian domestic law, which required the prosecution to 'disprove' compliance with the principle of proportionality.

I also consider it appropriate for the burden to rest on the defendant to point to evidence establishing the elements of this defence, as they relate to matters peculiarly within the defendant's knowledge. In particular, consistent with the requirements of the principle of proportionality at international law, a central element of the defence concerns the 'expectation' of the perpetrator at the time of launching the attack (that is, the defence requires that, at that time, the perpetrator did not expect that the attack would cause excessive incidental civilian death or injury). This must be a question for the defendant.

Further, in line with Australia's Declaration in relation to Articles 51-58 of *Protocol I Additional to the Geneva Conventions of 1949*, military commanders and others responsible for planning, deciding upon, or executing attacks, must necessarily reach their decisions on the basis of their assessment of the information from all sources that are available to them at the relevant time. These persons will be best placed to raise evidence of matters including the objective of the attack and the concrete and direct military advantage that was anticipated. It would be significantly more difficult for the prosecution to disprove these matters beyond reasonable doubt.

Committee response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the elements of the offence 'relate to matters peculiarly within the defendant's knowledge' as it relates to what the defendant expected would occur. The committee also notes the Attorney-General's advice that the defendant is best placed to raise evidence of these matters, including the objective of the attack and the anticipated military advantage, and that it would be 'significantly more difficult for the prosecution to disprove these matters'. Finally, the committee notes the Attorney-General's advice that the elements of the offence are closely modelled on the terms of an international treaty and it would not be appropriate to specify an additional element of proof for these offences under Australian domestic law.

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

In light of the explanation provided the committee leaves the appropriateness of reversing the evidential burden of proof to the consideration of the Senate as a whole.

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

Purpose	This bill amends the <i>Industry Research and Development Act 1986</i> to: <ul style="list-style-type: none">• transition Innovation Australia to become Innovation and Science Australia, an independent body responsible for strategic advice on all industry, innovation, science and research matters; and• create a statutory framework to provide legislative authority for Commonwealth spending activities in relation to industry, innovation, science and research programs
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives on 1 September 2016
Status	This bill received the Royal Assent on 20 October 2016

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Minister responded to the committee's comments in a letter received on 13 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2016 - extract

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

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

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

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

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

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

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

- the rationale for establishing this separate authorisation scheme which appears to operate in parallel with the authorisation of spending activities under the FF(SP) Act (for example, the committee seeks advice as to examples of the types of programs that will be authorised under this provision and whether all authorisations of spending activities in the industry, innovation and science portfolio will now be authorised under these proposed provisions, rather than the FF(SP) Act);
- whether consideration has been given to amending this provision with a view to ensuring that important matters are included in primary legislation and to ensuring the opportunity for sufficient Parliamentary oversight of these types of arrangements (in this regard, the committee notes that if new spending activities are not to be authorised by primary legislation it would be possible to provide for additional scrutiny in a number of ways, for example by:
 - requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or
 - incorporating a disallowance process such as requiring that regulations be tabled in each House of the Parliament for five sitting days before they come

into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*)).

Minister's response - extract

Schedule 1, item 34, section 33

This section provides a mechanism for me to prescribe programs in relation to industry, innovation, science and research by disallowable legislative instrument, including in relation to expenditure of Commonwealth money under prescribed programs. Together with Schedule 1, item 34, section 34, this mechanism will allow me to provide legislative authority for Australian Government programs and arrangements, such as contracts with service providers and funding agreements with grant recipients. This mechanism is intended to operate in parallel to the *Financial Framework (Supplementary Powers) Act 1997* and *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Act and Regulations). That is, this provides a portfolio-specific approach to supplement the whole of government solution in the FF(SP) Act and Regulations which are the responsibility of the Minister for Finance.

Benefits of this approach

The mechanism is designed for, and limited to, industry, innovation, science and research programs. Programs will be authorised under the IR&D Act, the objects of which now explicitly include supporting and encouraging collaboration in the development and delivery of, and authorising spending on, programs relating to industry, innovation, science and research. This will ensure the link between program activities and the authorising legislation is clear and unambiguous.

The mechanism will allow me, as responsible Minister, to make legislative instruments prescribing programs in consultation with the Office of Parliamentary Counsel, the Attorney-General's Department, the Department of Finance and the Australian Government Solicitor, as appropriate. This results in a more streamlined process for providing legislative authority to industry, innovation, science and research programs. The mechanism will substantially reduce the administrative burden associated with obtaining legislative authority, and allow the Australian Government to be more agile and respond more quickly to opportunities to implement new and innovative ideas and programs.

Circumstances when the mechanism will be used

In relation to the Committee's query about when and for what programs the mechanism will be used, this will be considered on a case by case basis having regard to the proposed program, Australian Government policy, and relevant legal advice, and in consultation with the Department of Finance and the Attorney-General's Department as appropriate. Once suitable processes are put in place, the mechanism may be used routinely by my department for general spending activities relating to industry, innovation, science and research programs.

Parliamentary oversight

In relation to the Committee's concern about ensuring the opportunity for sufficient Parliamentary oversight of prescribed programs, the mechanism shares the same disallowance process as would apply to an amendment regulation made under the FF(SP) Act. Legislative instruments made using the mechanism will be subject to a 15 day disallowance period in both houses of Parliament, in accordance with the ordinary process under section 42 of the *Legislation Act 2003*. They will be subject to scrutiny from the Senate Standing Committee on Regulations and Ordinances. Spending programs will be subject to the budget process in the usual way, and a separate appropriation will still be required. Expenditure will also be subject to the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the Commonwealth Grant Rules and Guidelines (CGRGs) and the Commonwealth Procurement Rules, as applicable.

Committee response

The committee thanks the Minister for this response and notes that it would have been useful had this key information been included in the explanatory memorandum.

In relation to the committee's concerns about Parliamentary oversight, the committee notes the Minister's advice that 'the mechanism shares the same disallowance process as would apply to an amendment regulation made under the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act)'. The committee has previously commented on the need for sufficient Parliamentary oversight of the authorisation and establishment of new spending initiatives through the mechanism established by the FF(SP) Act. In the committee's *Eleventh Report of 2014* (at p. 558) the committee highlighted its preference that important matters, such as establishing legislative authority for spending arrangements and grants, should be included in primary legislation to allow full Parliamentary involvement in, and consideration of, such proposals. At that time the committee also expressed its disappointment that the government considered that it would not be appropriate to provide for some level of increased Parliamentary scrutiny of these proposals through modified disallowance procedures. **The committee draws these comments about Parliamentary oversight of the authorisation and establishment of new spending initiatives to the attention of Senators.**

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

In light of the fact that this bill has already passed Houses of Parliament the committee makes no further comment in relation to this matter.

Alert Digest No. 7 of 2016 - extract

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

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

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

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

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

Minister's response - extract

Schedule 1, item 34, subsection 35(1)

I note the Committee has asked for advice about whether the bill can be amended to include a requirement that agreements with the States about grants of financial assistance relating to an industry, innovation, science and/or research program made under proposed subsection 35(1) are tabled in Parliament within 15 sitting days after being made, and published on the internet within 30 days after being made.

I can assure the Committee that any grants of financial assistance to the States made subject to subsection 35(1) will be handled in the same way as grants subject to the Commonwealth Grant Rules and Guidelines. Information about grants to States will be published on my department's website no later than fourteen working days after the grant agreement for the grant takes effect.

Committee response

The committee thanks the Minister for this response and notes that it would have been useful had this key information been included in the explanatory memorandum.

As the committee noted in its original comments, 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. Where this power is delegated to the executive the committee considers that it is appropriate that the exercise of the power be subject to at least some level of Parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their State or Territory.

The committee thanks the Minister for his indication that any grants of financial assistance to the States will be handled in the same way as grants subject to the Commonwealth Grant Rules and Guidelines and, as a result, information about these grants to States will be published on the department's website no later than fourteen working days after the grant agreement takes effect. The committee welcomes this approach, although the committee notes that there is no legislative requirement for this to occur, nor is there any requirement to publish or table the relevant agreements in the Parliament.

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

Alert Digest No. 7 of 2016 - extract

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

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

The committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers

that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

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

Minister's response - extract

Schedule 1, item 34, section 36

I understand the Committee is seeking my advice as to the rationale for enabling me (as responsible Minister), or the accountable authority, to delegate our powers in relation to arrangements made under sections 34 and 35 to 'an official of any non-corporate Commonwealth entity', and whether consideration was given to limiting such powers or confining the delegation to members of the Senior Executive Service.

The delegation powers in the bill are consistent with the delegation powers of accountable authorities of non-corporate Commonwealth entities, set out in subsection 110(1) of the PGPA Act, as well as the delegation of powers of Ministers and accountable authorities under section 32D(1) and (3) of the FF(SP) Act.

The risks associated with providing for delegations in this way are reduced by the framework established by the PGPA Act, through duties placed on accountable authorities (sections 15-19) and officials (sections 25-29) which facilitate high standards of governance, performance and accountability. In particular, section 16 of the PGPA Act requires accountable authorities to establish and maintain an appropriate system of risk oversight, management and internal control over the entity, which includes delegation arrangements.

In relation to the current delegations, it has not been necessary for me to delegate my powers with respect to arrangements under the PGPA Act or the FF(SP) Act. The accountable authority's powers under the PGPA Act and the FF(SP) Act are delegated to officials subject to thresholds, limits and conditions as are appropriate for the relevant position or classification. The powers in the bill in relation to arrangements will be delegated consistently with this approach. This approach facilitates flexibility and responsibility consistent with the significance of the decision being made. I also note that

the powers delegated in this way do not include the power to sub-delegate, so responsibility cannot be moved lower than the level of the delegate chosen by the accountable authority.

Committee response

The committee thanks the Minister for this response and notes that it would have been useful had this key information been included in the explanatory memorandum.

As the committee noted in its original comments, the committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. **The committee takes this opportunity to reiterate its preference that limits are placed either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. In this regard, the committee's preference is that delegation is confined to the holders of nominated offices or to members of the Senior Executive Service.**

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

Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016

Purpose	This bill seeks to amend various Acts relating to family assistance and social security to: <ul style="list-style-type: none">• ensure that clear ‘date of effect rules’ operate for certain merits review decisions relating to family tax benefit by instalment in the 2012-13 and/or later income years;• make several contingent amendments to remove reference to Family Tax Benefit supplements; and• correct an unintended consequence of amendments that were made to the Youth Allowance Rate Calculator
Portfolio	Social Services
Introduced	House of Representatives on 20 October 2016

The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Minister responded to the committee’s comments in a letter received on 21 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2016 - extract

Trespass on personal rights and liberties—retrospective application Schedule 1, items 13–15

Schedule 1 proposes amendments to how the ‘date of effect rules’ in Part 5 of the *A New Tax System (Family Assistance) (Administration) Act 1999* operate for certain merits review decisions that create new or increased entitlements to family tax benefit. The amendments to the ‘date of effect rules’ will apply in relation to review decisions made on or after the commencement of the bill, however, the application provisions in items 13–15 mean that where the decision under review relates to the payment of family tax benefit by instalment in the 2012-13 or later income years, the new rules provided for in these amendments will be taken to apply.

The statement of compatibility (at p. 2) states that ‘most of the amendments have retrospective effect from the 2012-13 income year’, however ‘individuals have been aware of these notification timeframes for a number of years already’ and ‘there have been extensive communications of the requirements; the individuals have been advised of these timeframes regularly in letters sent directly to them, and on government websites’.

The committee notes this explanation, however, persons are generally entitled rely on the law as it actually is, rather than as they are advised by government departments as to what the law may be. To assist the committee in considering the appropriateness of the retrospective application of these amendments, the committee seeks the Minister's advice as to the number of persons likely to be affected by these amendments and the extent of detriment they are likely to suffer as a result of the retrospective application of these new provisions.

Minister's response - extract

In response to this request, I can advise that no one is expected to suffer detriment as a result of the amendments. This is because the Department of Human Services has been implementing the approach since 2012-13, consistent with government policy, so recipients who did not notify that they were not required to lodge tax returns for these years on time, have not been paid Family Tax Benefit supplements and top-ups. As such, they do not stand to lose any amount as a result of the amendments.

The amendments simply seek to strengthen and clarify the current provisions to put their interpretation beyond doubt. It became necessary to strengthen and clarify the current provisions following a decision by the Administrative Appeals Tribunal where the Department's interpretation was questioned. The amendments will ensure that the intended operation of the law is clear to all oversight and review agencies.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that 'no one is expected to suffer detriment as a result of the amendments' as the bill puts on a statutory footing the policy adopted by the Department of Human Services since 2012-13. As such, the Minister advised that 'no one stands to lose any amount as a result of the amendment'. The committee also notes the Minister's advice that the amendments became necessary 'following a decision by the Administrative Appeals Tribunal where the Department's interpretation was questioned'.

continued

Based on the information available to the committee, it is still not clear that no one will suffer any detriment as a result of the bill. While the Minister indicates that no one will lose any amount that they have already been paid, it is unclear whether anyone who had an entitlement to merits review under the AAT's interpretation of the law will now lose that entitlement. If so, it is unclear how many people could be affected by the bill and the extent of any detriment they may suffer.

The committee reiterates its earlier comments that people are generally entitled to rely on the law as it actually is, rather than as they are advised by government departments as to what the law may be.

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the retrospective application in items 13-15 to the consideration of the Senate as a whole.

VET Student Loans Bill 2016

Purpose	This bill seeks to introduce a new student loan program to replace the VET FEE-HELP loan scheme from 1 January 2017
Portfolio	Education and Training
Introduced	House of Representatives on 13 October 2016

The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Minister responded to the committee's comments in a letter received on 21 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2016 - extract

Trespass on personal rights and liberties—vicarious liability **Clause 65**

Subclauses 65(1) and (3) impose personal liability on executive officers of approved course providers where the provider commits an offence or contravenes a civil penalty provision, if the officer knew that the offence would be committed or the contravention would occur and the officer was in the position to influence the conduct of the provider and failed to take all reasonable steps to prevent the commission of the offence or the contravention. The explanatory memorandum provides the following justification for this approach (at p. 50):

This clause recognises the role of proper management and governance and the serious nature of the problem when people in management and governance roles in the provider are involved in the commission of offences or contraventions of civil penalty provisions. These subclauses prevent executive officers from avoiding personal responsibility but only in the limited circumstances described above where the officer was aware a contravention would occur and was in a position to influence the provider's conduct and did not take steps to prevent it. This clause should further incentivise persons of influence to ensure the provider complies with the Bill.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that when criminal responsibility is imposed on directors or officers of bodies corporate, the Council of Australian Government Principles and Guidelines for assessment of directors' liability must be applied. It also indicates that Treasury should be consulted on all provisions that seek to impose personal liability for corporate fault (at p. 33).

The committee has consistently taken the view that vicarious liability should only be used where the consequences for the offence are so serious that the normal requirement for proof of fault can be put aside. The committee seeks the Minister's advice as to whether the principles and processes identified in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 32-33) in relation to the imposition of vicarious liability have been followed in this instance.

Minister's response - extract

In developing the Bill, regard was had to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the **Guide**). This Guide was developed by the Attorney-General's Department to assist officers in Australian Government departments in the framing of offences, infringement notices and enforcement provisions.

Clause 65 of the Bill provides for personal liability of executive officers in limited circumstances. The Guide requires that when criminal responsibility is imposed on executive officers, the Council of Australian Government Principles and Guidelines for assessment of directors' liability (the **COAG Principles**) must be applied. Clause 65 is consistent with the COAG Principles.

The COAG Principles are not concerned with legislative provisions that impose direct liability on executive officers or that provide for executive officers to be liable if they were personally and directly complicit as a knowing accessory in the corporation's offence. In the latter case, for the executive officer to be held accessorially liable, the prosecution must prove beyond reasonable doubt, that the executive officer knew the essential facts that constitute the corporate offence and, through his or her own act or omission, was a participant in that offence.

Subclause 65(1) (which imposes the criminal liability) is of the nature of an accessorial liability provision and consequently does not fall within the ambit of the COAG Principles. Clause 65 requires the officer to know that the offence would be committed, have been in a position to influence the conduct of the provider in relation to the commission of the offence and have failed to take all reasonable steps to prevent the commission of the offence. Unlike other 'directors' liability' provisions, clause 65 does not extend responsibility for when the officer is reckless or negligent as to whether an offence would be committed; it only applies if the officer knew the offence would be committed. In the circumstances provided for in clause 65, it is fair and reasonable that the officer bear personal liability.

The COAG Principles are also not concerned with provisions (that is, subclause 65(3)) that impose liability on officers for civil penalty provisions.

Consistency with the COAG Principles

Notwithstanding the view that the COAG Principles do not apply to clause 65, regard has still been had to consistency with the core principles. Clause 65 meets the following Principles:

- a. Principle 1 is met since the provider must be held liable in the first instance. Paragraph 65(1)(a) requires as a pre-condition to finding an executive officer personally liable, that the provider has committed an offence under the Act.
- b. Principle 2 requires that officers should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act. Under the Bill, personal liability is only extended to four applicable offences (clauses 50 to 53). These offences are critical for ensuring that students are properly informed about their loan assistance, appropriate information and documentation is kept and the Secretary is able to access all the information and documents from the provider required to ensure proper compliance with the requirements of the Bill. The remaining offences in the Bill provide for personal liability in the first instance.
- c. Principle 3 is met, as a “designated officer” approach to liability is not applied under the Bill.
- d. Principle 4 is met because there are compelling public policy reasons for extending personal liability to executive officers. The Bill is a result of significant public harm being caused to the vocational education and training sector through the VET FEE-HELP scheme, substantial misuse of public funds and fees being incurred by non-genuine students as a result of inappropriate conduct by some providers. Reforms were introduced last year to stem some of the less scrupulous behavior (through the introduction of a civil penalty and infringement notice framework) but these have not proven to be sufficient to promote a high enough level of compliance. Extending liability to executive officers recognises that the people who hold these positions of influence, management and decision-making have the ability to set the direction of the provider’s conduct and to influence and control the behavior.
- e. Principle 5 is met, as clause 65 only applies if the officer knew the offence would be committed and was in a position to influence the conduct of the provider and failed to take all reasonable steps to prevent the offence.
- f. Principle 6 is met, as under paragraph 65(1)(d), to be personally liable, the officer must have failed to take all reasonable steps to prevent the commission of the offence. Clause 66 provides guidance about what the court may have regard to in determining whether the provider took reasonable steps.

In drafting the Bill, regard was also had to similar provisions in other recent legislation, for example section 245AT of the *Migration Act 1958* (introduced in 2015) and section 133 of the *National Vocational Education and Training Regulator Act 2011*, and the Attorney-General’s Department was consulted on the Bill.

Committee response

The committee thanks the Minister for this response. The committee notes the Minister's advice in relation to the application of the COAG principles and the further information about the nature of the liability sought to be imposed by clause 65 of the bill.

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

In light of the explanation provided the committee leaves the appropriateness of the imposition of vicarious liability to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Merits review

Clause 74

Clause 74 sets out a table which lists the decisions that are reviewable under Part 7 of the proposed Act. Division 2 of Part 7 sets out the process for reconsideration of reviewable decisions, setting out a process for internal merits review and later review by the Administrative Appeals Tribunal (AAT) of reconsidered decisions. In contrast, decisions that are not classified as 'reviewable decisions' may be reconsidered, but there is no requirement that the decision be reviewed and there is no process for an application to the AAT for review of such a decision.

The explanatory memorandum provides no justification for limiting reviewable decisions to the five decisions listed in the table. There are other decisions that can be made under the proposed Act, for example decisions made by the Secretary under clauses 20, 25 and 34, which are therefore exempted from the process of merits review.

The committee seeks the Minister's advice as to why significant decisions which are authorised to be made under the proposed Act have been excluded from the merits review process set out in the bill.

Minister's response - extract

The Bill sets out in the table at clause 74 the significant decisions which are appropriately subject first, to internal merit review and second, to review by the Administrative Appeals Tribunal (the **AAT**). Notably, all decisions which directly impact the student are subject to merits review (for example, whether a loan is approved and a decision not to re-credit a student's FEE-HELP balance).

Other significant decisions made by the Secretary under the Bill are not subject to the merits review process as they involve factors that justify excluding merits review. In considering which decisions should be subject to merits review, consideration was also given to the costs of merits review and whether the additional burden on the AAT was justified by making the relevant decision subject to merits review.

A detailed explanation is provided below in respect to particular decision making provisions and the rationale for excluding them from the merits review process.

Clause 20

Clause 20 provides that the Secretary may decide not to pay a loan amount for a student for a course if any of the circumstances set out in paragraphs 20(a) to 20(g) apply. These circumstances are clearly defined and limited only to situations where it would be reasonable and relevant for the Secretary not to pay the loan. The circumstances set out in paragraphs (a), (b), (d) and (e) follow a defined set of circumstances; and the discretion in paragraph (c) is necessary to safeguard the interests of vulnerable prospective students and protect the integrity of the scheme. Moreover, the decision about whether or not to approve a VET student loan – made under section 18 – is subject to merits review.

Clause 25 and clause 29

The decision whether or not to approve a course provider (clause 25) and the decision about the period of the approval (clause 29) were considered inappropriate for merits review. These decisions involve elements that make them subject to government financial policy considerations. Subclause 116(7) of the Bill requires a cap to be imposed on the amount of VET student loans that can be approved for each calendar year. The decision to impose a cap was made following consultation with the Department of Finance and was a consequence of the extensive, unsustainable and rapid growth of the cost of the VET FEE-HELP scheme.

Proper process and natural justice will be provided in decision making, including through the opportunity for the applicant for approval as an approved course provider to provide further information if requested by the Secretary (clause 28) and the requirement for the Secretary to give written notice of the decision to the applicant. Further, for bodies that

apply for re-approval when their period of approval is close to expiring, clause 33 allows the provider's current approval to continue in effect until a decision is made on the re-approval.

Clause 32

Under clause 32 the Secretary may decide not to consider an application for approval as an approved course provider, either because the application is non-compliant with the application requirements under clause 28, or for reasons specified in the rules. This decision is not appropriate for merits review since it relates to either a procedural administrative decision (whether the application meets the procedural requirements of clause 28) or the rules. The reasons specified in the rules, as a legislative instrument, will be subject to 'parliamentary scrutiny' and to the *accountability* safeguards that apply to legislative decisions.

Clause 34

A decision of the Secretary to impose or vary conditions on a provider's approval (clause 34) is not subject to merits review. The Bill contains safeguards in the exercise of this power, including requiring the Secretary to give the provider written notice of, and reasons for, the decision. In many instances the decisions will involve elements that make them subject to government financial policy parameters. For example, a condition to impose fee limits on the total loan amounts that may be paid to a provider will be informed by the need to ensure that the Government does not exceed the total loan cap for VET student loans (subclause 116(7)).

Clauses 36 and 37

The decisions of the Secretary to suspend a provider's approval (clause 36) or to immediately suspend a provider's approval in limited circumstances (clause 37) are excluded from merits review. Merits review for these preliminary, interim and operational compliance decisions is not appropriate as it would lead to unnecessary frustration or delay of the proper operation of the decision-making process.

Clauses 36 and 37 enable the Secretary to adequately address compliance matters where there are genuine and reasonably founded concerns about a provider's actions or omissions. This provides sufficient time for substantive decisions around revocation to be made. Notably, the ultimate decision (which may flow from the earlier decision) under clause 36 to formally revoke the approval of an approved course provider will be subject to merits review.

In addition, the Bill includes safeguards around the exercise of these powers, including that the Secretary must give the provider written notice of and reasons for the decision. Further, the immediate suspension under clause 37 is time limited.

Clause 43

A decision to issue a compliance notice is excluded from merits review. Clause 44 requires the Secretary to consider any submissions that are received from the provider in respect to the compliance notice, when deciding whether to vary or revoke a compliance notice. Failure to comply with a compliance notice is a civil penalty provision for which an infringement notice may be issued. The Guide notes that a decision to issue an infringement notice should not be subject to merits review. Merits review for issuing a compliance notice which is a preliminary, interim compliance process would frustrate the proper operation of the decision-making process for which the costs of merits review is not justified.

Safeguards

In addition to the safeguards mentioned above, general principles of administrative law will apply to decision making under the Bill - these include, the need to accord procedural fairness, to exercise discretion for proper purposes and to take into account all relevant considerations.

Further, clause 81 provides that decisions made under the Bill other than the reviewable decisions set out in clause 74, may be reconsidered by the decision maker. Therefore, where a provider wishes to submit further information following decisions that are made, the Secretary may reconsider the decision and confirm or vary the initial decision, or set the initial decision aside and substitute a new decision.

Committee response

The committee thanks the Minister for this response. In particular, the committee notes the Minister's advice that 'all decisions which directly impact the student are subject to merits review'.

The committee notes the detailed information provided for the specific clauses that are proposed to be excluded from merits review. The committee accepts that decisions relating to whether procedural administrative requirements have been met; preliminary, interim and operational compliance decisions; or decisions that go to financial policy considerations, may be a basis for the exclusion of merits review.

However, the committee notes that in relation to paragraph 20(c), merits review is excluded of the secretary's decision not to pay a loan amount for a student if the secretary is satisfied that the student is not an eligible student or not a genuine student. The Minister's response states that this discretion is necessary to safeguard the interests of vulnerable prospective students and protect the integrity of the scheme. However, in general, it is usually appropriate that merits review be made available in relation to the exercise of a discretion that may adversely affect the interests of a party.

continued

In addition, merits review is excluded under clause 32 when the secretary is not required to consider or decide an application where the application does not comply with the proposed Act and ‘in the circumstances set out in the rules’. The Minister’s response states that this is not appropriate for merits review as it relates to either a procedural administrative decision or the rules. The Minister goes on to say that the rules, as a legislative instrument, will be subject to Parliamentary scrutiny. However, it is not possible to say whether it is appropriate to exclude merits review of a decision not to consider an application in circumstances set out in the rules when no detail has been provided as to what circumstances may be prescribed in the rules. While the rules may be subject to Parliamentary scrutiny, at that point the exclusion of merits review will be provided for in the primary legislation and not subject to amendment by the rules.

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

The committee draws its scrutiny concerns to the attention of Senators and in light of the explanation provided the committee leaves the appropriateness of the exclusion of merits review for specified decisions to the consideration of the Senate as a whole.

The committee also draws the committee’s comments in relation to clause 32 to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Alert Digest No. 8 of 2016 - extract

Rights and liberties dependent on insufficiently defined administrative powers—reconsideration of decisions Clauses 77 and 81

Clause 77 provides for a decision-maker to reconsider a reviewable decision if satisfied there is a ‘sufficient reason to do so’, regardless of whether there is an application to do so. Clause 81 provides for the same power in relation to a decision that is not a reviewable decision, on the same basis. In exercising both powers the decision-maker must confirm or vary the initial decision or set aside the initial decision and substitute a new decision.

In general, once an administrative decision is made the power to make that decision is spent and the decision-maker has no power to revisit the decision. (Complications in the application of this general principle may arise if the initial decision was beyond the powers of the decision-maker, that is, based on a ‘jurisdictional error’.) This principle serves the value of certainty and predictability as affected persons may rely on administrative decisions that have been made (absent an application from a person with standing for

judicial review). Allowing the decision-maker a general power to reconsider applications, which does not appear to be time limited, may be thought to make their legal position unduly dependent on insufficiently defined or determined administrative powers.

Therefore the committee seeks the Minister's advice as to why it is necessary to enable a decision-maker to reconsider a decision on their own motion and whether consideration has been given to including limits on the exercise of this power (for example, time limits).

Minister's response - extract

The Committee has raised concerns with clauses 77 and 81 having regard to the traditional principle of *functus officio*, that an administrative decision-making power is spent once the power has been exercised. However, as the Committee itself noted, there are complications with this general principle in the event of a jurisdictional error in making the initial decision. The principle may also be circumvented in instances where it may be argued there is an implied power to revoke or vary a decision or if there is an express statutory authority.

In drafting the Bill, it was considered preferable to provide for an express statutory power to enable decision-makers to reconsider a decision on their own motion. Applying the traditional principle has the advantages of certainty and predictability for decisions. However, enabling a decision-maker to review a decision of their own accord was preferred because:

- a. it promotes good administration and fairness, ensuring the Commonwealth is accountable and proactive in not leaving intact decisions that are unfair or have unintended consequences;
- b. it provides an option for a low cost, efficient means for the Commonwealth to reconsider a decision and, where necessary, correct a decision, without requiring the affected person to go through the lengthy and more resource intensive process of either an AAT or judicial review; and
- c. including an express statutory right for own motion review provides certainty about the review rights of the decision-maker rather than relying on the exceptions provided for in the common law to the general principle of *functus officio*.

Regard was also had in drafting the Bill to legislative schemes similar to the VET student loan program which had provisions similar to clause 77. For example, section 209-5 of the Higher Education Support Act 2003 (**HESA**), clause 95 of Schedule 1A to HESA and section 85-4 of the Aged Care Act 1997.

Limits

Consideration was given to including limits on the powers under clauses 77 and 81, for example, as suggested by the Committee, introducing time limits by when the decisions must be reconsidered. Whilst there is value in such an approach, the concern remains that any such limits may result in an unfair outcome which is a key goal to be avoided in the first place by allowing decision-makers to review their decisions.

Both clauses 77 and 81 require the decision maker to be satisfied that there is sufficient reason to reconsider the decision. The decision maker is also required to give a statement of reasons. Any review of a decision will still be subject to the general principles of administrative law, including the need to accord procedural fairness, to exercise discretion for proper purposes and to take into account all relevant considerations. Relevant considerations arguably would include the implications for the parties if an initial decision is revoked and the time from when the initial decision was made.

Parties affected by reconsidered decisions continue to have access to the usual avenues of review:

- a. for reviewable decisions, applicants may apply to the AAT for merits review of a reconsidered decision;
- b. judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (noting the Bill does not limit this right in any way);
- c. where there is no legal liability to pay compensation, an affected person may also be able to apply under the discretionary Scheme for Compensation for Detriment caused by Defective Administration; and
- d. persons who believe they have been treated unfairly or unreasonably by the Australian Government can apply to the Commonwealth Ombudsman for investigation and resolution.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice in relation to why an express statutory power enabling decision-makers to reconsider decisions on their own motion was included in the bill. The committee also notes the Minister's advice as to the rationale for not including a time limit on the exercise of this power.

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

continued

In light of the detailed information provided, the committee leaves the appropriateness of giving decision-makers a general power to reconsider a decision on their own motion to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Trespass on personal rights and liberties—*infringement notices* **Clause 85**

Clause 85 provides that an offence or civil penalty provision of the proposed Act is subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*. That Act creates a framework for the use of infringement notices.

The discussion on the implementation of infringement notice schemes in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* is premised on the principle that not all offences are appropriately enforced through infringement notices. In particular the Guide states (at p. 58):

An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. The offences should be such that an enforcement officer can easily make an assessment of guilt or innocence.

The explanatory material does not explain why it is considered appropriate that each offence and civil penalty provision in the bill should be subject to an infringement notice.

It is not clear to the committee why all of the offence and civil penalty provisions in this bill are appropriately subject to an infringement notice scheme. The committee therefore seeks a more detailed explanation from the Minister as to the approach taken.

Minister's response - extract

Clause 85 provides that an offence or civil penalty provision is subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (the **RP Act**). Part 5 of the RP Act creates a framework for the use of infringement notices. Where an offence or civil penalty provision is subject to an infringement notice, a person who is given an infringement notice can choose to pay an amount as an alternative to having court proceedings brought against them for contravention of the provision (without any

admission of guilt or liability). If the person chooses not to pay the amount, proceedings can be brought against the person in relation to the contravention.

An infringement notice scheme provides an additional administrative option for dealing with certain offences and civil penalty contraventions, which is generally cheaper, faster and simpler than instituting court proceedings. It offers the Commonwealth (as regulator), the benefits of cost and efficiency; and offers providers (as respondents) the benefit of being able to discharge their obligation without appearing before a court or admitting guilt or liability.

Since the Bill applies the infringement framework of the RP Act, this means only those offences in the Bill which are strict liability offences are subject to infringement notices (section 100 RP Act). This is consistent with the Guide.

In terms of civil penalties, the Bill applies the infringement notice scheme to all the penalty provisions. This is appropriate as it provides the Commonwealth the flexibility and discretion to select the most appropriate penalty and/or sanction particular to the contravention. This is consistent with the approach taken to the reforms to HESA last year when the infringement notice scheme was introduced to the VET FEE-HELP scheme to stem the unscrupulous behaviour of some providers. In a system which has been plagued with non-compliance, to the detriment of vulnerable students, it is critical for the Commonwealth to have a broad range of tools available to deter the non-compliant conduct.

Most civil penalties in the Bill are of a 'low level' with penalty amounts of 60 penalty units; the maximum penalty amount is 240 penalty units. The Commonwealth retains discretion in each instance whether to issue an infringement notice and must determine if there are reasonable grounds to believe a contravention has occurred before issuing such a notice (consistent with the Guide).

In some instances infringement notices remain appropriate for a contravention of a more serious provision where the circumstances warrant less serious action and the immediate deterrent of the sanction is advantageous. On other occasions, it may be more appropriate in the first instance to commence civil proceedings. It is to be remembered that under the VET student loan program, the strongest compliance tool will remain suspension and/or revocation, which are both outside of the civil penalty process.

The Bill remains subject to the RP Act which is consistent with the Guide and ensures personal rights and liberties are not trespassed against.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice in relation to the rationale for applying an infringement notice scheme to all strict liability offences and civil penalty provisions in the bill. In particular, the committee notes the advice that the VET system 'has been plagued with non-compliance to the detriment of vulnerable students' and therefore 'it is critical for the Commonwealth to have a broad range of tools available to deter non-compliant conduct'. The committee also notes that the bill remains subject to the provisions of Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (for example, subsection 104(2) of that Act provides that an amount payable under an infringement notice must not exceed 12 penalty units where the person is an individual, or 60 penalty units where the person is a body corporate).

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

In light of the detailed information provided, the committee leaves the appropriateness of applying an infringement notice scheme to all strict liability offences and civil penalty provisions to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Trespass on personal rights and liberties—absolute liability Subclause 101(2)

Clause 101 sets out an offence relating to unauthorised access to, or modification of, personal information. Subclause (2) states that absolute liability applies to an element of the offence (relating to where the information is held). The offence is subject to 2 years imprisonment. The explanatory memorandum provides no justification as to why an element of the offence is subject to absolute liability.

In a criminal law offence the proof of fault is usually a basic requirement. However, offences of absolute liability remove the fault element that would otherwise apply, and does not allow for a defence of reasonable mistake of fact. The committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including commenting whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The committee seeks a detailed justification from the Minister for the imposition of absolute liability in clause 101 with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 22–25).

Minister's response - extract

Clause 101 sets out an offence relating to unauthorised access to, or modification of, personal information, which is VET information. Subclause 101(2) provides that absolute liability applies to paragraph 101(l)(e) regarding whether the information was held on a computer of (or on behalf of) an approved course provider or a Tertiary Admission Centre.

The effect of making this element of the offence subject to absolute liability is that, if the prosecution shows that this physical element existed, the element will be made out, without the prosecution being required to prove fault. In addition, the defence of honest and reasonable mistake of fact would not be available to the defendant for this element.

Subclause 101(2) is consistent with the equivalent provision in HESA (section 179-35) and Schedule IA of HESA (clause 78). It is also consistent with the Guide.

The Guide requires that absolute liability should only apply where there is adequate justification and subject to certain limitations. Applying absolute liability to a particular physical element of an offence may be justified where:

- a. requiring proof of fault of the particular element would undermine deterrence and there are legitimate grounds for penalising persons lacking fault in that element; or
- b. the element is a jurisdictional element rather than one going to the essence of the offence.

Applying absolute liability to paragraph 101(l)(e) is appropriate; whether the information is held on the computer of (or on behalf of) an approved course provider or Tertiary Admission Centre is essentially a precondition to the offence and does not go to the essence of the offence itself. The location of the information is an objective fact established by reference to an objective standard that does not relate to culpability. Therefore, the defendant's state of mind is not relevant to this question and the exclusion of the defence of honest and reasonable mistake of fact does not detrimentally impact on the defendant. This satisfies the justification requirement for applying absolute liability to a particular physical element of an offence.

In contrast, the elements in paragraphs 101(l)(a) to 101(l)(d) of the offence go to the essence of the offence and appropriately need to be proved by the prosecution beyond reasonable doubt.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice in relation to the rationale for applying absolute liability to one element of the offence relating to unauthorised access to, or modification of, personal information. In particular, the committee notes the Minister's advice that the relevant element of the offence (i.e. the location of the information) 'is an objective fact established by reference to an objective standard that does not relate to culpability'.

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

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

Alert Digest No. 8 of 2016 - extract

Insufficiently defined administrative power—delegation of administrative powers

Clause 114

Clause 114 allows the Secretary to delegate, in writing, any or all of his or her powers under the Act to 'an APS employee'. There is no limit on what level of the Australian Public Service the employee is employed at. The explanatory memorandum provides no explanation as to why there is a need to enable the Secretary's power to be delegated so broadly.

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

Where broad delegations are made, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case as there is no explanation for the approach in the explanatory memorandum, the committee seeks the Minister's advice as to the rationale for enabling the Secretary to delegate his or her powers to 'an APS employee' and whether consideration was given to

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

Minister's response - extract

The rationale for enabling the Secretary to delegate his or her powers to “APS employees” was to provide for flexibility having regard to:

- a. the many powers of the Secretary under the Bill, which may be delegated;
- b. the broad range in those powers from high-profile, high impact decisions, with consequences for providers and students, to acts that are more administrative or process-driven; and
- c. the undesirability and impracticality in being unduly prescriptive in the Bill about the appropriate delegate for each of the many, wide-ranging powers under the Bill.

By way of example, some powers, such as under subclause 36(1) to revoke or suspend the approval of an approved course provider, are appropriate to only be delegated to senior members of the Senior Executive Service. In contrast other powers, such as under subsection 17(4) requesting a student to provide further information (for the purposes of deciding the student's application for a loan) are arguably suitable to be delegated to less senior persons.

The power of the Secretary to delegate to “APS employees” is fettered by other controls to ensure the appropriateness of the delegation including:

- a. duties of the Secretary as an “accountable authority” under the *Public Governance Performance and Accountability Act 2013* (the PGPA), which includes, amongst other duties, the duty to govern the Commonwealth entity (section 15), the duty to establish and maintain systems relating to risk and control (section 16) and a duty in relation to requirements imposed on others (section 18);
- b. internal to the Department, the Secretary's Instructions made under section 20A of the PGPA. For example, despite a similarly broad power of delegation under Schedule 1A to HESA, the delegations for the VET FEE-HELP Scheme were primarily at the Senior Executive Service level, with a few exceptions at the APS Executive Level 2 level; and
- c. authorised persons and infringement officers for the purposes of exercising the powers in the Bill in respect to the RP Act are required to be a member of the Senior Executive Service.

In considering the delegation power, regard has also been given to comparative legislative schemes which are consistent with clause 114 and similarly provide for the flexibility of a broad delegation power. For example, section 238-1 of HESA and clause 98 of Schedule 1A to HESA, section 96-2 of the *Aged Care Act 1997*, section 234 of the *Social Security*

(Administration) Act 1999 and section 221 of *A New Tax System (Family Assistance) (Administration) Act 1999*.

Committee response

The committee thanks the Minister for this response.

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

The committee notes the Minister's advice that allowing the secretary to delegate his or her powers to APS employees of any level is necessary to provide flexibility in the context of the varied nature of the powers of the secretary under the bill. At a general level, the committee does not consider that the varied nature of administrative powers is, of itself, a sufficient justification for allowing the delegation to a very broad class of persons. For example, it may be possible to provide that different powers are able to be delegated to different classes of person depending on the particular nature of the power.

However, in this instance, in light of the detailed information provided, the committee leaves the appropriateness of allowing the Secretary to delegate his or her powers to APS employees of any level to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Delegation of legislative power Subclause 116(5)

Clause 116 sets out a rule making power under the proposed Act. Subclause 116(5) provides that the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time (despite the requirements in the *Legislation Act 2003*).

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

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and

- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

The explanatory memorandum does not justify the need for such a provision or provide any examples of instruments which may be so incorporated. The explanatory memorandum states that such rules ‘would ordinarily not incorporate another instrument or written document unless it is publicly available’. This implies that in some instances instruments or written documents which are not publicly available may be incorporated.

The committee seeks a detailed explanation from the Minister as to why subclause 116(5) allows for the incorporation of legislative provisions by reference to other documents (as in force from time to time) which addresses the issues identified above.

Minister’s response - extract

Subclause 116(5) of the Bill provides that despite subsection 14(2) of the *Legislation Act 2003* (the LI Act), the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time.

While the LI Act does not require incorporated documents to be registered, section 41 of that Act provides that either House of Parliament may, at any time while a legislative instrument is subject to disallowance, require any document incorporated by reference in the instrument to be made available for inspection by that House. This provides an opportunity for Parliamentary scrutiny over the documents.

In this case, the justification for the incorporation of other documents by reference is that it is important to allow flexibility to accommodate the evolution of the program and the VET sector. This will facilitate responsiveness to the needs of students and industry and allow for measures to better protect the integrity of the program. It also provides for simplicity, enabling the reference to a document rather than having to duplicate a document that is already published and freely accessible.

In developing the rules, the Minister is mindful of the Committee’s concerns and will only include documents by reference where the documents are available publicly, for free or for minimal cost. Further, the Explanatory Statement will describe (for those not on the Federal Register of Legislation) where copies of the documents may be obtained.

Examples of when the power in subclause 116(5) may be relied upon are as follows. It is anticipated the rules will incorporate by reference other legislative instruments, such as *Standards for NVR Registered Training Organisations (RTOs) 2015* and *Fit and Proper Person Requirements 2011*. It is also anticipated the rules will refer to other documents

which are not legislative instruments such as the Australian Qualifications Framework, the Australian Core Skills Framework and the Australian Quality Training Framework. Notably, each of these documents are national tools and well-regarded in the Australian education and training systems and are publically available.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that legislative rules made under clause 116 of the bill will only incorporate documents by reference 'where the documents are available publicly, for free or for minimal cost'. The committee further notes that each of the examples provided by the Minister of documents that may be incorporated by reference are publicly available, although there is no requirement on the face of the bill that incorporated documents must be publicly and freely available.

The committee takes this opportunity to reiterate its scrutiny concerns where material incorporated into the law is not publicly available or is available only if a fee is paid (and, as a result, persons interested in or affected by the law may have inadequate access to its terms).

A fundamental principle of the rule of the law is that every person subject to the law should be able to freely and readily access its terms. The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue: *Access to Australian Standards Adopted in Delegated Legislation* (June 2016). This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available. The committee draws this report to the attention of Senators as the matters raised are relevant to all Australian jurisdictions.

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

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

continued

- contain a description of the documents and indicate how they may be obtained (see paragraph 15J(2)(c) of the *Legislation Act 2003*).

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

The committee leaves the appropriateness of subclause 116(5), which allows the legislative rules to incorporate external documents into the law, to the consideration of the Senate as a whole.

VET Student Loans (Charges) Bill 2016

Purpose	This bill seeks to impose a charge on approved VET course providers
Portfolio	Education and Training
Introduced	House of Representatives on 13 October 2016

The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Minister responded to the committee's comments in a letter received on 21 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2016 - extract

Delegation of legislative power—setting level of charge by regulation Clause 7

This bill provides for the imposition of a charge on 'approved course providers' as a tax. Approved course providers are VET providers approved in accordance with the VET Student Loans Bill 2016. The charges imposed on 'approved course providers' are intended to fund the VET student loan program, including costs incurred by the Commonwealth in administering the program, data collection and analysis as well as compliance and enforcement activities (explanatory memorandum, p. 1).

Clause 7 of the bill, however, provides for the amount of charge payable to be prescribed by the regulations or in a manner worked out in accordance with a method prescribed in the regulations.

The explanatory memorandum (at p. 5) states that 'it is anticipated that the amount of the charge will be determined having regard to the size of the provider' and that 'prior to the introduction of the regulations a fees schedule will be determined that is consistent with the Australian Government Cost Recovery Guidelines and documented in a cost recovery implementation statement'.

The committee notes this explanation of how it is anticipated that the level of charge will be determined. However, there are no limitations on the amount of charge payable on the face of the bill. As the setting of the amount of charges is a significant matter, the committee seeks the Minister's advice as to whether the bill can be amended to provide greater legislative guidance as to how the charge amount is to be determined and to limit the amount that may be imposed.

Minister's response - extract

The detail about the calculation methodology, amounts and limits to charges are still being worked through by the Department in consultation with the Department of Finance.

The reputation of the vocational education and training sector has been impacted by unscrupulous providers, driven by financial gain with poor student outcomes. Urgent reform is required to address these problems. In developing the Bill, it was felt that the demand for urgent reform outweighed the benefit of delaying introduction to enable more detail to be included in the Charges Bill. This decision was made having regard to the other controls in place to ensure the appropriateness of the charge and the calculation methodology:

- a. the detail will be contained in regulations which will be subject to Parliamentary scrutiny through being subject to disallowance for 15 sitting days after tabling in both Houses of Parliament; and
- b. the Department will need to comply with and meet the requirements of the Australian Government Cost Recovery Guidelines when formulating the charges calculation methodology and determining the appropriate charge amounts. A cost recovery implementation statement will also need to be prepared to further facilitate transparency and accountability.

There is also benefit in providing the detail in regulations as it will allow for greater flexibility to deal with the evolution of the program and to ensure that charge methodology and amounts remain appropriate.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that the 'detail about the calculation methodology, amounts and limits to charges are still being worked through by the Department' and that 'it was felt that the demand for urgent reform outweighed the benefit of delaying introduction to enable more detail to be included in the Charges Bill'. The committee acknowledges these points; however, from a scrutiny perspective, the committee does not generally consider that the need for urgency is, of itself, a sufficient justification for leaving important aspects of a legislative scheme to the regulations. While the Australian Government Cost Recovery Guidelines may currently be applicable as a matter of policy, the committee notes that it remains the case that there is no guidance on the face of the bill as to how the charge amount is to be determined, nor is there any limit on the amount that may be imposed.

continued

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

The committee draws its general concerns in relation to setting the amount of a charge by regulation to the attention of Senators. Noting that the regulations will be subject to Parliamentary disallowance the committee leaves the appropriateness of setting the level of charge by regulation in this instance to the consideration of the Senate as a whole.

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

Senator Helen Polley
Chair



ATTORNEY-GENERAL

21 NOV 2016

CANBERRA

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

Dear Senator Polley

I refer to the Eighth Report of 2016 of the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2016* (the Bill).

The Committee previously considered the Bill in Alert Digest No. 7 of 2016, and a previous iteration of this Bill, the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2015* in Alert Digest No. 13 of 2015. I responded to both of these reports, on 7 November 2016 and 25 February 2016 respectively.

In the Eighth Report of 2016, the Committee sought additional advice and made additional requests in respect of certain aspects of the Bill. I enclose a response to the Committee regarding these matters.

I trust this information is of assistance to the Committee.

Thank you again for writing on this matter.

Attorney-General's response to the Senate Standing Committee for the Scrutiny of Bills

Eighth Report of 2016

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

Passed the Senate on 9 November 2016

Portfolio: Attorney-General

Introduction

The Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (the Bill) was introduced into the Senate on 15 September 2016. The Bill passed the Senate on 9 November 2016.

On 9 November 2016, the Senate Standing Committee for the Scrutiny of Bills (the Committee) released its Eighth Report of 2016 (the Report), outlining its view on the responses provided by the Attorney-General to the matters raised by the Committee in Alert Digest No. 7 of 2016 (the Digest).

Outlined below are responses to the comments made by the Committee in the Report.

Schedules 8, 9 and 10

Use of information obtained where interim control order declared void

The Committee requested that key information provided by the Attorney-General in the Digest in relation to this matter be included in the explanatory memorandum to the Bill. In accordance with the request of the Committee, the Revised Explanatory Memorandum, which will accompany the Bill when it is introduced into the House of Representatives, will note that the court's decision to refuse to admit evidence in a proceeding before it will not be affected by the proposed amendments to the *Crimes Act 1914, Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*.

Schedule 15

Sufficient information

The Committee requested that the key information provided by the Attorney-General in response to the Digest be included in the explanatory memorandum to the Bill. In accordance with the request of the Committee, the Revised Explanatory Memorandum will include further detail about the interaction of the 'sufficient information' requirement under new paragraph 38J(1)(c) with the special advocate role.

The Revised Explanatory Memorandum will clarify that in the ordinary case, the controlee will be given sufficient information about the allegations on which a control order request is based prior to the special advocate being provided the sensitive national security information under new subsection 38PE(2). Accordingly, the controlee and the special advocate will generally be able to communicate without restrictions when the 'sufficient information' has been provided to the controlee.

The Revised Explanatory Memorandum will also outline that in some circumstances, further information may be disclosed to the controlee after the special advocate has been provided the sensitive national security information. Under such circumstances, the special advocate will need the approval of the court to communicate with the controlee. However, the controlee can continue to communicate with the special advocate without restriction, so long as the communication is in writing through their ordinary legal representative.

Communication restrictions between the special advocate and controlee prior to the disclosure of sensitive information to the special advocate

The Committee noted the response of the Attorney-General to the Digest that there may be instances where the appointed special advocate may have already acquired sensitive national

security information before a disclosure is made by the Attorney-General to the special advocate under new subsection 38PE(2). Alternatively, it may be the case that the special advocate has knowledge of other sensitive national security information that is highly relevant to the control order proceeding on foot. In such circumstances, it is appropriate that communication between the special advocate and the controlee be restricted in order to prevent the inadvertent disclosure of the sensitive national security information.

A scenario where the court may consider that a restriction or prohibition is appropriate even prior to the sensitive national security information being disclosed to the special advocate is when the appointed special advocate has previously been involved in a control order proceeding where specific sensitive national security information was subject to a protective order under revised section 38J. In the subsequent control order proceeding, the Australian Federal Police may seek to rely on the same specific sensitive national security information, over which the Attorney-General may again seek a protective order under revised section 38J. In such circumstances, the court may consider that an order under new subsection 38PD(2) is appropriate because the prior knowledge of the special advocate of the sensitive information heightens the risk of inadvertent disclosure of that information to the controlee.

The Committee sought additional information as to whether consideration has been given to:

- amending proposed subsection 38PD(2) to require the court to consider whether the risk of disclosure could be mitigated in any other way prior to restricting or prohibiting communications between a controlee and special advocate; and
- enabling the court to appoint a new special advocate who does not have access to sensitive national security information, to enable a controlee to properly communicate with their special advocate before a protective order is made.

The amendments proposed by the Committee are not required. The NSI Act is designed to provide the court flexibility and discretion to conduct its proceedings in such a way as to accord procedural fairness to all parties. The overarching responsibility of courts to provide procedural fairness, the existing safeguards contained in the NSI Act and the additional safeguards contained in Schedule 15 of the Bill ensure that the controlee is guaranteed a right to a fair hearing during a control order application. Given this context, and in particular the intent of the special advocate role to vigorously represent the interests of the controlee, it is likely that the court will only make an order under new subsection 38PD(2) where it considers that the risk of inadvertent disclosure of the sensitive national security information cannot be mitigated in any other way.

Retrospective commencement

The Committee requested that additional information provided by the Attorney-General in response to the Digest be included in the explanatory memorandum. In accordance with the request of the Committee, the Revised Explanatory Memorandum will clarify that the amendments to the NSI Act contained in Part 1 of Schedule 15 will not operate retrospectively.

The Revised Explanatory Memorandum will note that the new protective orders will become available as soon as they come into force, regardless of whether a control order proceeding has already commenced. This is consistent with existing protections that are available under the NSI Act. Section 6A of the NSI Act provides that the NSI Act can apply to civil proceedings that take place after the NSI Act has been invoked, irrespective of whether the proceedings commenced prior to the invocation of the Act. However, the new protective orders under revised section 38J will only be available in those parts of the proceedings that have not yet occurred.



ATTORNEY-GENERAL

22 NOV 2016

CANBERRA

MC16-142493

Senator Helen Polley

Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Senator

Criminal Code Amendment (War Crimes) Bill 2016

I refer to the Senate Scrutiny of Bills Committee's *Alert Digest No. 8 of 2016*, in which the Committee commented on the Criminal Code Amendment (War Crimes) Bill 2016 and sought my advice as to why Items 8 to 11 of Part 2 of the Bill propose to reverse the evidential burden of proof.

The items in question introduce a defence to a number of war crimes offences in the *Criminal Code Act 1995* (the Code), which are engaged by conduct which causes the death of, or injury to, a person not taking an active part in hostilities in a non-international armed conflict (subsections 268.70(1), 268.71(1), 268.71(2) and 268.72(1)).

The introduction of the defence aligns Australian domestic law with the international humanitarian law principle of proportionality, as applied to non-international armed conflict. It provides that the relevant offence will not apply if death or injury results from an attack on a military objective, launched in circumstances where the perpetrator reasonably did not expect that the attack would result in the incidental death of or injury to civilians that would have been excessive in relation to the concrete and direct military advantage anticipated.

The relevant war crimes offences specified above are contained in Division 268 of the Code, which was enacted in 2002 to create offences in Australian law that are the equivalent of the international crimes provided for in the Rome Statute of the International Criminal Court (the Rome Statute). The elements of those offences are closely modelled on the Elements of Crimes for the corresponding crimes in Article 8(2)(c)(i) of the Rome Statute. It would not be appropriate to specify an additional element for the proof of these offences under Australian domestic law, which required the prosecution to 'disprove' compliance with the principle of proportionality.

I also consider it appropriate for the burden to rest on the defendant to point to evidence

establishing the elements of this defence, as they relate to matters peculiarly within the defendant's knowledge. In particular, consistent with the requirements of the principle of proportionality at international law, a central element of the defence concerns the 'expectation' of the perpetrator at the time of launching the attack (that is, the defence requires that, at that time, the perpetrator did not expect that the attack would cause excessive incidental civilian death or injury). This must be a question for the defendant.

Further, in line with Australia's Declaration in relation to Articles 51-58 of *Protocol I Additional to the Geneva Conventions of 1949*, military commanders and others responsible for planning, deciding upon, or executing attacks, must necessarily reach their decisions on the basis of their assessment of the information from all sources that are available to them at the relevant time. These persons will be best placed to raise evidence of matters including the objective of the attack and the concrete and direct military advantage that was anticipated. It would be significantly more difficult for the prosecution to disprove these matters beyond reasonable doubt.

Thank you again for allowing me the opportunity to address the Committee's comments.

Cc: scrutiny.sen@aph.gov.au



The Hon Greg Hunt MP

Minister for Industry, Innovation and Science

13 NOV 2016

MC16-007465

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

Dear Senator

A handwritten signature in blue ink, appearing to read 'Helen', written over the word 'Dear Senator'.

I refer to the Acting Committee Secretary's letter of 13 October 2016 seeking further information about the Industry Research and Development Amendment (Innovation and Science Australia) Bill 2016 (the bill).

In its *Alert Digest No. 7 of 2016*, the Committee requested further information about various provisions in the bill.

My response addressing the concerns raised is at Attachment A.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

Greg Hunt

Encl. (1)

Response to the Committee's concerns raised in *Alert Digest No. 7 of 2016*

My response is provided below in relation to each of the concerns raised by the Committee regarding specific provisions of the Industry Research and Development Amendment (Innovation and Science Australia) Bill 2016 (the bill). The bill amends the *Industry Research and Development Act 1986* (IR&D Act) to transition Innovation Australia to Innovation and Science Australia, and to create a statutory framework to provide legislative authority for Commonwealth spending activities in relation to industry, innovation, science and research programs. The bill was passed by both houses of Parliament and received royal assent on 20 October 2016. For convenience, all references in this response are to the provisions in the bill (as mentioned in the Committee's correspondence) rather than the provisions of the Act as passed.

Schedule 1, item 34, section 33

This section provides a mechanism for me to prescribe programs in relation to industry, innovation, science and research by disallowable legislative instrument, including in relation to expenditure of Commonwealth money under prescribed programs. Together with Schedule 1, item 34, section 34, this mechanism will allow me to provide legislative authority for Australian Government programs and arrangements, such as contracts with service providers and funding agreements with grant recipients. This mechanism is intended to operate in parallel to the *Financial Framework (Supplementary Powers) Act 1997* and *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Act and Regulations). That is, this provides a portfolio-specific approach to supplement the whole of government solution in the FF(SP) Act and Regulations which are the responsibility of the Minister for Finance.

Benefits of this approach

The mechanism is designed for, and limited to, industry, innovation, science and research programs. Programs will be authorised under the IR&D Act, the objects of which now explicitly include supporting and encouraging collaboration in the development and delivery of, and authorising spending on, programs relating to industry, innovation, science and research. This will ensure the link between program activities and the authorising legislation is clear and unambiguous.

The mechanism will allow me, as responsible Minister, to make legislative instruments prescribing programs in consultation with the Office of Parliamentary Counsel, the Attorney-General's Department, the Department of Finance and the Australian Government Solicitor, as appropriate. This results in a more streamlined process for providing legislative authority to industry, innovation, science and research programs. The mechanism will substantially reduce the administrative burden associated with obtaining legislative authority, and allow the Australian Government to be more agile and respond more quickly to opportunities to implement new and innovative ideas and programs.

Circumstances when the mechanism will be used

In relation to the Committee's query about when and for what programs the mechanism will be used, this will be considered on a case by case basis having regard to the proposed program, Australian Government policy, and relevant legal advice, and in consultation with the Department of Finance and the Attorney-General's Department as appropriate. Once suitable

processes are put in place, the mechanism may be used routinely by my department for general spending activities relating to industry, innovation, science and research programs.

Parliamentary oversight

In relation to the Committee's concern about ensuring the opportunity for sufficient Parliamentary oversight of prescribed programs, the mechanism shares the same disallowance process as would apply to an amendment regulation made under the FF(SP) Act. Legislative instruments made using the mechanism will be subject to a 15 day disallowance period in both houses of Parliament, in accordance with the ordinary process under section 42 of the *Legislation Act 2003*. They will be subject to scrutiny from the Senate Standing Committee on Regulations and Ordinances. Spending programs will be subject to the budget process in the usual way, and a separate appropriation will still be required. Expenditure will also be subject to the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the *Commonwealth Grant Rules and Guidelines* (CGRGs) and the *Commonwealth Procurement Rules*, as applicable.

Schedule 1, item 34, subsection 35(1)

I note the Committee has asked for advice about whether the bill can be amended to include a requirement that agreements with the States about grants of financial assistance relating to an industry, innovation, science and/or research program made under proposed subsection 35(1) are tabled in Parliament within 15 sitting days after being made, and published on the internet within 30 days after being made.

I can assure the Committee that any grants of financial assistance to the States made subject to subsection 35(1) will be handled in the same way as grants subject to the CGRGs. Information about grants to States will be published on my department's website no later than fourteen working days after the grant agreement for the grant takes effect.

Schedule 1, item 34, section 36

I understand the Committee is seeking my advice as to the rationale for enabling me (as responsible Minister), or the accountable authority, to delegate our powers in relation to arrangements made under sections 34 and 35 to 'an official of any non-corporate Commonwealth entity', and whether consideration was given to limiting such powers or confining the delegation to members of the Senior Executive Service.

The delegation powers in the bill are consistent with the delegation powers of accountable authorities of non-corporate Commonwealth entities, set out in subsection 110(1) of the PGPA Act, as well as the delegation of powers of Ministers and accountable authorities under section 32D(1) and (3) of the FF(SP) Act.

The risks associated with providing for delegations in this way are reduced by the framework established by the PGPA Act, through duties placed on accountable authorities (sections 15-19) and officials (sections 25-29) which facilitate high standards of governance, performance and accountability. In particular, section 16 of the PGPA Act requires accountable authorities to establish and maintain an appropriate system of risk oversight, management and internal control over the entity, which includes delegation arrangements.

In relation to the current delegations, it has not been necessary for me to delegate my powers with respect to arrangements under the PGPA Act or the FF(SP) Act. The accountable authority's powers under the PGPA Act and the FF(SP) Act are delegated to officials subject to

thresholds, limits and conditions as are appropriate for the relevant position or classification. The powers in the bill in relation to arrangements will be delegated consistently with this approach. This approach facilitates flexibility and responsibility consistent with the significance of the decision being made. I also note that the powers delegated in this way do not include the power to sub-delegate, so responsibility cannot be moved lower than the level of the delegate chosen by the accountable authority.

I trust this information is of assistance to the Committee.

Thank you again for bringing the Committee's concerns to my attention.



The Hon Christian Porter MP
Minister for Social Services

MC16-010086

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

21 NOV 2016

Dear ~~Senator Polley~~ *Helen*

Thank you for the committee's letter of 10 November 2016 regarding the Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016. I appreciate the time you have taken to bring these matters to my attention.

The Senate Standing Committee for the Scrutiny of Bills, in its *Alert Digest No.8 of 2016*, has noted the retrospective application of amendments under items 13–15 of Schedule 1 of the Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016 and has asked the following question:

To assist the committee in considering the appropriateness of the retrospective application of these amendments, the committee seeks the Minister's advice as to the number of persons likely to be affected by these amendments and the extent of detriment they are likely to suffer as a result of the retrospective application of these new provisions.

In response to this request, I can advise that no one is expected to suffer detriment as a result of the amendments. This is because the Department of Human Services has been implementing the approach since 2012-13, consistent with government policy, so recipients who did not notify that they were not required to lodge tax returns for these years on time, have not been paid Family Tax Benefit supplements and top-ups. As such, they do not stand to lose any amount as a result of the amendments.

The amendments simply seek to strengthen and clarify the current provisions to put their interpretation beyond doubt. It became necessary to strengthen and clarify the current provisions following a decision by the Administrative Appeals Tribunal where the Department's interpretation was questioned. The amendments will ensure that the intended operation of the law is clear to all oversight and review agencies.

Thank you again for raising this matter with me. I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services



Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC16-007467

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

Dear Senator Polley

Helen,

I am writing in response to comments contained in the Senate Scrutiny of Bills Committee's Alert Digest No. 8 of 2016, concerning the VET Student Loans Bill 2016 (the Bill) and the VET Student Loans (Charges) Bill 2016 (Charges Bill).

The Committee sought a response to eight issues identified in the 'Commentary on Bills' outlined in Alert Digest No. 8 of 2016. To facilitate the Committee finalising its consideration of the Bill, a response to these issues is at Attachment A to this letter.

I thank the Committee for raising the issues and providing me with the opportunity to respond.

Simon Birmingham

Encl. Response to Senate Scrutiny of Bills Committee's Commentary on Amendments to Bills

21 NOV 2016

VET STUDENT LOANS BILL 2016

1. Trespass on personal rights and liberties—vicarious liability Clause 65

The Committee seeks the Minister's advice as to whether the principles and processes identified in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (at pp 32-33) in relation to the imposition of vicarious liability have been followed in this instance.

1. In developing the Bill, regard was had to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the **Guide**). This Guide was developed by the Attorney-General's Department to assist officers in Australian Government departments in the framing of offences, infringement notices and enforcement provisions.
2. Clause 65 of the Bill provides for personal liability of executive officers in limited circumstances. The Guide requires that when criminal responsibility is imposed on executive officers, the Council of Australian Government Principles and Guidelines for assessment of directors' liability (the **COAG Principles**) must be applied. Clause 65 is consistent with the COAG Principles.
3. The COAG Principles are not concerned with legislative provisions that impose direct liability on executive officers or that provide for executive officers to be liable if they were personally and directly complicit as a knowing accessory in the corporation's offence. In the latter case, for the executive officer to be held accessorially liable, the prosecution must prove beyond reasonable doubt, that the executive officer knew the essential facts that constitute the corporate offence and, through his or her own act or omission, was a participant in that offence.
4. Subclause 65(1) (which imposes the criminal liability) is of the nature of an accessorial liability provision and consequently does not fall within the ambit of the COAG Principles. Clause 65 requires the officer to know that the offence would be committed, have been in a position to influence the conduct of the provider in relation to the commission of the offence and have failed to take all reasonable steps to prevent the commission of the offence. Unlike other 'directors' liability' provisions, clause 65 does not extend responsibility for when the officer is reckless or negligent as to whether an offence would be committed; it only applies if the officer knew the offence would be committed. In the circumstances provided for in clause 65, it is fair and reasonable that the officer bear personal liability.
5. The COAG Principles are also not concerned with provisions (that is, subclause 65(3)) that impose liability on officers for civil penalty provisions.

Consistency with the COAG Principles

6. Notwithstanding the view that the COAG Principles do not apply to clause 65, regard has still been had to consistency with the core principles. Clause 65 meets the following Principles:

- a. Principle 1 is met since the provider must be held liable in the first instance. Paragraph 65(1)(a) requires as a pre-condition to finding an executive officer personally liable, that the provider has committed an offence under the Act.
 - b. Principle 2 requires that officers should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act. Under the Bill, personal liability is only extended to four applicable offences (clauses 50 to 53). These offences are critical for ensuring that students are properly informed about their loan assistance, appropriate information and documentation is kept and the Secretary is able to access all the information and documents from the provider required to ensure proper compliance with the requirements of the Bill. The remaining offences in the Bill provide for personal liability in the first instance.
 - c. Principle 3 is met, as a “designated officer” approach to liability is not applied under the Bill.
 - d. Principle 4 is met because there are compelling public policy reasons for extending personal liability to executive officers. The Bill is a result of significant public harm being caused to the vocational education and training sector through the VET FEE-HELP scheme, substantial misuse of public funds and fees being incurred by non-genuine students as a result of inappropriate conduct by some providers. Reforms were introduced last year to stem some of the less scrupulous behavior (through the introduction of a civil penalty and infringement notice framework) but these have not proven to be sufficient to promote a high enough level of compliance. Extending liability to executive officers recognises that the people who hold these positions of influence, management and decision-making have the ability to set the direction of the provider’s conduct and to influence and control the behavior.
 - e. Principle 5 is met, as clause 65 only applies if the officer knew the offence would be committed and was in a position to influence the conduct of the provider and failed to take all reasonable steps to prevent the offence.
 - f. Principle 6 is met, as under paragraph 65(1)(d), to be personally liable, the officer must have failed to take all reasonable steps to prevent the commission of the offence. Clause 66 provides guidance about what the court may have regard to in determining whether the provider took reasonable steps.
7. In drafting the Bill, regard was also had to similar provisions in other recent legislation, for example section 245AT of the *Migration Act 1958* (introduced in 2015) and section 133 of the *National Vocational Education and Training Regulator Act 2011*, and the Attorney-General’s Department was consulted on the Bill.

2. Merits review - Clause 74

The Committee seeks the Minister’s advice as to why significant decisions which are authorised to be made under the proposed Act have been excluded from the merits review process set out in the Bill.

8. The Bill sets out in the table at clause 74 the significant decisions which are appropriately subject first, to internal merit review and second, to review by the Administrative Appeals

Tribunal (the AAT). Notably, all decisions which directly impact the student are subject to merits review (for example, whether a loan is approved and a decision not to re-credit a student's FEE-HELP balance).

9. Other significant decisions made by the Secretary under the Bill are not subject to the merits review process as they involve factors that justify excluding merits review. In considering which decisions should be subject to merits review, consideration was also given to the costs of merits review and whether the additional burden on the AAT was justified by making the relevant decision subject to merits review.
10. A detailed explanation is provided below in respect to particular decision making provisions and the rationale for excluding them from the merits review process.

Clause 20

11. Clause 20 provides that the Secretary may decide not to pay a loan amount for a student for a course if any of the circumstances set out in paragraphs 20(a) to 20(g) apply. These circumstances are clearly defined and limited only to situations where it would be reasonable and relevant for the Secretary not to pay the loan. The circumstances set out in paragraphs (a), (b), (d) and (e) follow a defined set of circumstances; and the discretion in paragraph (c) is necessary to safeguard the interests of vulnerable prospective students and protect the integrity of the scheme. Moreover, the decision about whether or not to approve a VET student loan – made under section 18 – is subject to merits review.

Clause 25 and clause 29

12. The decision whether or not to approve a course provider (clause 25) and the decision about the period of the approval (clause 29) were considered inappropriate for merits review. These decisions involve elements that make them subject to government financial policy considerations. Subclause 116(7) of the Bill requires a cap to be imposed on the amount of VET student loans that can be approved for each calendar year. The decision to impose a cap was made following consultation with the Department of Finance and was a consequence of the extensive, unsustainable and rapid growth of the cost of the VET FEE-HELP scheme.
13. Proper process and natural justice will be provided in decision making, including through the opportunity for the applicant for approval as an approved course provider to provide further information if requested by the Secretary (clause 28) and the requirement for the Secretary to give written notice of the decision to the applicant. Further, for bodies that apply for re-approval when their period of approval is close to expiring, clause 33 allows the provider's current approval to continue in effect until a decision is made on the re-approval.

Clause 32

14. Under clause 32 the Secretary may decide not to consider an application for approval as an approved course provider, either because the application is non-compliant with the application requirements under clause 28, or for reasons specified in the rules. This decision is not appropriate for merits review since it relates to either a procedural administrative decision (whether the application meets the procedural requirements of clause 28) or the rules. The reasons specified in the rules, as a legislative instrument, will be subject to 'parliamentary scrutiny' and to the accountability safeguards that apply to legislative decisions.

Clause 34

15. A decision of the Secretary to impose or vary conditions on a provider's approval (clause 34) is not subject to merits review. The Bill contains safeguards in the exercise of this power, including requiring the Secretary to give the provider written notice of, and reasons for, the decision. In many instances the decisions will involve elements that make them subject to government financial policy parameters. For example, a condition to impose fee limits on the total loan amounts that may be paid to a provider will be informed by the need to ensure that the Government does not exceed the total loan cap for VET student loans (subclause 116(7)).

Clauses 36 and 37

16. The decisions of the Secretary to suspend a provider's approval (clause 36) or to immediately suspend a provider's approval in limited circumstances (clause 37) are excluded from merits review. Merits review for these preliminary, interim and operational compliance decisions is not appropriate as it would lead to unnecessary frustration or delay of the proper operation of the decision-making process.
17. Clauses 36 and 37 enable the Secretary to adequately address compliance matters where there are genuine and reasonably founded concerns about a provider's actions or omissions. This provides sufficient time for substantive decisions around revocation to be made. Notably, the ultimate decision (which may flow from the earlier decision) under clause 36 to formally revoke the approval of an approved course provider will be subject to merits review.
18. In addition, the Bill includes safeguards around the exercise of these powers, including that the Secretary must give the provider written notice of and reasons for the decision. Further, the immediate suspension under clause 37 is time limited.

Clause 43

19. A decision to issue a compliance notice is excluded from merits review. Clause 44 requires the Secretary to consider any submissions that are received from the provider in respect to the compliance notice, when deciding whether to vary or revoke a compliance notice. Failure to comply with a compliance notice is a civil penalty provision for which an infringement notice may be issued. The Guide notes that a decision to issue an infringement notice should not be subject to merits review. Merits review for issuing a compliance notice which is a preliminary, interim compliance process would frustrate the proper operation of the decision-making process for which the costs of merits review is not justified.

Safeguards

20. In addition to the safeguards mentioned above, general principles of administrative law will apply to decision making under the Bill – these include, the need to accord procedural fairness, to exercise discretion for proper purposes and to take into account all relevant considerations.
21. Further, clause 81 provides that decisions made under the Bill other than the reviewable decisions set out in clause 74, may be reconsidered by the decision maker. Therefore, where a provider wishes to submit further information following decisions that are made, the Secretary may reconsider the decision and confirm or vary the initial decision, or set the initial decision aside and substitute a new decision.

3. Rights and liberties dependent on insufficiently defined administrative powers— reconsideration of decisions – Clauses 77 and 81

The Committee seeks the Minister's advice as to why it is necessary to enable a decision-maker to reconsider a decision on their own motion and whether consideration has been given to including limits on the exercise of this power (for example, time limits).

22. The Committee has raised concerns with clauses 77 and 81 having regard to the traditional principle of *functus officio*, that an administrative decision-making power is spent once the power has been exercised. However, as the Committee itself noted, there are complications with this general principle in the event of a jurisdictional error in making the initial decision. The principle may also be circumvented in instances where it may be argued there is an implied power to revoke or vary a decision or if there is an express statutory authority.
23. In drafting the Bill, it was considered preferable to provide for an express statutory power to enable decision-makers to reconsider a decision on their own motion. Applying the traditional principle has the advantages of certainty and predictability for decisions. However, enabling a decision-maker to review a decision of their own accord was preferred because:
- a. it promotes good administration and fairness, ensuring the Commonwealth is accountable and proactive in not leaving intact decisions that are unfair or have unintended consequences;
 - b. it provides an option for a low cost, efficient means for the Commonwealth to reconsider a decision and, where necessary, correct a decision, without requiring the affected person to go through the lengthy and more resource intensive process of either an AAT or judicial review; and
 - c. including an express statutory right for own motion review provides certainty about the review rights of the decision-maker rather than relying on the exceptions provided for in the common law to the general principle of *functus officio*.
24. Regard was also had in drafting the Bill to legislative schemes similar to the VET student loan program which had provisions similar to clause 77. For example, section 209-5 of the *Higher Education Support Act 2003 (HESA)*, clause 95 of Schedule 1A to HESA and section 85-4 of the *Aged Care Act 1997*.

Limits

25. Consideration was given to including limits on the powers under clauses 77 and 81, for example, as suggested by the Committee, introducing time limits by when the decisions must be reconsidered. Whilst there is value in such an approach, the concern remains that any such limits may result in an unfair outcome which is a key goal to be avoided in the first place by allowing decision-makers to review their decisions.
26. Both clauses 77 and 81 require the decision maker to be satisfied that there is sufficient reason to reconsider the decision. The decision maker is also required to give a statement of reasons. Any review of a decision will still be subject to the general principles of administrative law, including the need to accord procedural fairness, to exercise discretion for proper purposes and to take into account all relevant considerations. Relevant considerations arguably would include the

implications for the parties if an initial decision is revoked and the time from when the initial decision was made.

27. Parties affected by reconsidered decisions continue to have access to the usual avenues of review:
 - a. for reviewable decisions, applicants may apply to the AAT for merits review of a reconsidered decision;
 - b. judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (noting the Bill does not limit this right in any way);
 - c. where there is no legal liability to pay compensation, an affected person may also be able to apply under the discretionary Scheme for Compensation for Detriment caused by Defective Administration; and.
 - d. persons who believe they have been treated unfairly or unreasonably by the Australian Government can apply to the Commonwealth Ombudsman for investigation and resolution.

4. Trespass on personal rights and liberties—infringement notices – Clause 85

It is not clear to the Committee why all of the offence and civil penalty provisions in this Bill are appropriately subject to an infringement notice scheme. The committee therefore seeks a more detailed explanation from the Minister as to the approach taken.

28. Clause 85 provides that an offence or civil penalty provision is subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (the **RP Act**). Part 5 of the RP Act creates a framework for the use of infringement notices. Where an offence or civil penalty provision is subject to an infringement notice, a person who is given an infringement notice can choose to pay an amount as an alternative to having court proceedings brought against them for contravention of the provision (without any admission of guilt or liability). If the person chooses not to pay the amount, proceedings can be brought against the person in relation to the contravention.
29. An infringement notice scheme provides an additional administrative option for dealing with certain offences and civil penalty contraventions, which is generally cheaper, faster and simpler than instituting court proceedings. It offers the Commonwealth (as regulator), the benefits of cost and efficiency; and offers providers (as respondents) the benefit of being able to discharge their obligation without appearing before a court or admitting guilt or liability.
30. Since the Bill applies the infringement framework of the RP Act, this means only those offences in the Bill which are strict liability offences are subject to infringement notices (section 100 RP Act). This is consistent with the Guide.
31. In terms of civil penalties, the Bill applies the infringement notice scheme to all the penalty provisions. This is appropriate as it provides the Commonwealth the flexibility and discretion to select the most appropriate penalty and/or sanction particular to the contravention. This is consistent with the approach taken to the reforms to HESA last year when the infringement notice scheme was introduced to the VET FEE-HELP scheme to stem the unscrupulous behaviour of some providers. In a system which has been plagued with non-compliance, to the

detriment of vulnerable students, it is critical for the Commonwealth to have a broad range of tools available to deter the non-compliant conduct.

32. Most civil penalties in the Bill are of a 'low level' with penalty amounts of 60 penalty units; the maximum penalty amount is 240 penalty units. The Commonwealth retains discretion in each instance whether to issue an infringement notice and must determine if there are reasonable grounds to believe a contravention has occurred before issuing such a notice (consistent with the Guide).
33. In some instances infringement notices remain appropriate for a contravention of a more serious provision where the circumstances warrant less serious action and the immediate deterrent of the sanction is advantageous. On other occasions, it may be more appropriate in the first instance to commence civil proceedings. It is to be remembered that under the VET student loan program, the strongest compliance tool will remain suspension and/or revocation, which are both outside of the civil penalty process.
34. The Bill remains subject to the RP Act which is consistent with the Guide and ensures personal rights and liberties are not trespassed against.

5. Trespass on personal rights and liberties—absolute liability – Subclause 101(2)

<p>The Committee seeks a detailed justification from the Minister for the imposition of absolute liability in clause 101 with reference to the principles set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (at pp 22–25).</p>
--

35. Clause 101 sets out an offence relating to unauthorised access to, or modification of, personal information, which is VET information. Subclause 101(2) provides that absolute liability applies to paragraph 101(1)(e) regarding whether the information was held on a computer of (or on behalf of) an approved course provider or a Tertiary Admission Centre.
36. The effect of making this element of the offence subject to absolute liability is that, if the prosecution shows that this physical element existed, the element will be made out, without the prosecution being required to prove fault. In addition, the defence of honest and reasonable mistake of fact would not be available to the defendant for this element.
37. Subclause 101(2) is consistent with the equivalent provision in HESA (section 179-35) and Schedule 1A of HESA (clause 78). It is also consistent with the Guide.
38. The Guide requires that absolute liability should only apply where there is adequate justification and subject to certain limitations. Applying absolute liability to a particular physical element of an offence may be justified where:
 - a. requiring proof of fault of the particular element would undermine deterrence and there are legitimate grounds for penalising persons lacking fault in that element; or
 - b. the element is a jurisdictional element rather than one going to the essence of the offence.
39. Applying absolute liability to paragraph 101(1)(e) is appropriate; whether the information is held on the computer of (or on behalf of) an approved course provider or Tertiary Admission Centre is essentially a precondition to the offence and does not go to the essence of the offence itself. The location of the information is an objective fact established by reference to an objective

standard that does not relate to culpability. Therefore, the defendant's state of mind is not relevant to this question and the exclusion of the defence of honest and reasonable mistake of fact does not detrimentally impact on the defendant. This satisfies the justification requirement for applying absolute liability to a particular physical element of an offence.

40. In contrast, the elements in paragraphs 101(1)(a) to 101(1)(d) of the offence go to the essence of the offence and appropriately need to be proved by the prosecution beyond reasonable doubt.

6. Insufficiently defined administrative power—delegation of administrative powers - Clause 114

In this case as there is no explanation for the approach in the explanatory memorandum, the Committee seeks the Minister's advice as to the rationale for enabling the Secretary to delegate his or her powers to 'an APS employee' and whether consideration was given to limiting the powers that might be delegated and/or confining the delegation to members of the Senior Executive Service.

41. The rationale for enabling the Secretary to delegate his or her powers to "APS employees" was to provide for flexibility having regard to:
- a. the many powers of the Secretary under the Bill, which may be delegated;
 - b. the broad range in those powers from high-profile, high impact decisions, with consequences for providers and students, to acts that are more administrative or process-driven; and
 - c. the undesirability and impracticality in being unduly prescriptive in the Bill about the appropriate delegate for each of the many, wide-ranging powers under the Bill.
42. By way of example, some powers, such as under subclause 36(1) to revoke or suspend the approval of an approved course provider, are appropriate to only be delegated to senior members of the Senior Executive Service. In contrast other powers, such as under subsection 17(4) requesting a student to provide further information (for the purposes of deciding the student's application for a loan) are arguably suitable to be delegated to less senior persons.
43. The power of the Secretary to delegate to "APS employees" is fettered by other controls to ensure the appropriateness of the delegation including:
- a. duties of the Secretary as an "accountable authority" under the *Public Governance Performance and Accountability Act 2013* (the PGPA), which includes, amongst other duties, the duty to govern the Commonwealth entity (section 15), the duty to establish and maintain systems relating to risk and control (section 16) and a duty in relation to requirements imposed on others (section 18);
 - b. internal to the Department, the Secretary's Instructions made under section 20A of the PGPA. For example, despite a similarly broad power of delegation under Schedule 1A to HESA, the delegations for the VET FEE-HELP Scheme were primarily at the Senior Executive Service level, with a few exceptions at the APS Executive Level 2 level; and

- c. authorised persons and infringement officers for the purposes of exercising the powers in the Bill in respect to the RP Act are required to be a member of the Senior Executive Service.

44. In considering the delegation power, regard has also been given to comparative legislative schemes which are consistent with clause 114 and similarly provide for the flexibility of a broad delegation power. For example, section 238-1 of HESA and clause 98 of Schedule 1A to HESA, section 96-2 of the *Aged Care Act 1997*, section 234 of the *Social Security (Administration) Act 1999* and section 221 of *A New Tax System (Family Assistance) (Administration) Act 1999*.

7. Delegation of legislative power – Subclause 116(5)

The Committee seeks a detailed explanation from the Minister as to why subclause 116(5) allows for the incorporation of legislative provisions by reference to other documents (as in force from time to time) which addresses the issues identified above

- 45. Subclause 116(5) of the Bill provides that despite subsection 14(2) of the *Legislation Act 2003* (the **LI Act**), the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time.
- 46. While the LI Act does not require incorporated documents to be registered, section 41 of that Act provides that either House of Parliament may, at any time while a legislative instrument is subject to disallowance, require any document incorporated by reference in the instrument to be made available for inspection by that House. This provides an opportunity for Parliamentary scrutiny over the documents.
- 47. In this case, the justification for the incorporation of other documents by reference is that it is important to allow flexibility to accommodate the evolution of the program and the VET sector. This will facilitate responsiveness to the needs of students and industry and allow for measures to better protect the integrity of the program. It also provides for simplicity, enabling the reference to a document rather than having to duplicate a document that is already published and freely accessible.
- 48. In developing the rules, the Minister is mindful of the Committee's concerns and will only include documents by reference where the documents are available publicly, for free or for minimal cost. Further, the Explanatory Statement will describe (for those not on the Federal Register of Legislation) where copies of the documents may be obtained.
- 49. Examples of when the power in subclause 116(5) may be relied upon are as follows. It is anticipated the rules will incorporate by reference other legislative instruments, such as *Standards for NVR Registered Training Organisations (RTOs) 2015* and *Fit and Proper Person Requirements 2011*. It is also anticipated the rules will refer to other documents which are not legislative instruments such as the Australian Qualifications Framework, the Australian Core Skills Framework and the Australian Quality Training Framework. Notably, each of these documents are national tools and well-regarded in the Australian education and training systems and are publically available.

VET STUDENT LOANS (CHARGES) BILL 2016

8. Delegation of legislative power—setting level of charge by regulation - Clause 7

The Committee notes this explanation of how it is anticipated that the level of charge will be determined. However, there are no limitations on the amount of charge payable on the face of the bill. As the setting of the amount of charges is a significant matter, the committee seeks the Minister's advice as to whether the bill can be amended to provide greater legislative guidance as to how the charge amount is to be determined and to limit the amount that may be imposed.

50. The detail about the calculation methodology, amounts and limits to charges are still being worked through by the Department in consultation with the Department of Finance.
51. The reputation of the vocational education and training sector has been impacted by unscrupulous providers, driven by financial gain with poor student outcomes. Urgent reform is required to address these problems. In developing the Bill, it was felt that the demand for urgent reform outweighed the benefit of delaying introduction to enable more detail to be included in the Charges Bill. This decision was made having regard to the other controls in place to ensure the appropriateness of the charge and the calculation methodology:
 - a. the detail will be contained in regulations which will be subject to Parliamentary scrutiny through being subject to disallowance for 15 sitting days after tabling in both Houses of Parliament; and
 - b. the Department will need to comply with and meet the requirements of the Australian Government Cost Recovery Guidelines when formulating the charges calculation methodology and determining the appropriate charge amounts. A cost recovery implementation statement will also need to be prepared to further facilitate transparency and accountability.
52. There is also benefit in providing the detail in regulations as it will allow for greater flexibility to deal with the evolution of the program and to ensure that charge methodology and amounts remain appropriate.

