

The Senate

Standing
Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

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

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

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

General information

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

Chapter 1

Commentary on Bills

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

Aged Care Quality and Safety Commission Bill 2018

Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018

Purpose	<p>The Aged Care Quality and Safety Commission Bill 2018 seeks to establish a new Aged Care Quality and Safety Commission to replace the existing Australian Aged Care Quality Agency and Aged Care Complaints Commissioner from 1 January 2019</p> <p>The Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018 seeks to address consequential and transitional matters that arise from the enactment of the <i>Aged Care Quality and Safety Commission Act 2018</i></p>
Portfolio	Health
Introduced	House of Representatives on 12 September 2018

Significant matters in delegated legislation

Review rights¹

1.2 The Aged Care Quality and Safety Commission Bill 2018 (the Principal bill) seeks to establish a new Aged Care Quality and Safety Commission (the Commission). Subclause 21(1) provides that the rules may make provision for or in relation to the performance of a function conferred on the Aged Care Quality and Safety Commissioner (the Commissioner). The Principal bill therefore proposes to leave a number of significant aspects of the regulatory functions to be undertaken by the Commissioner to be set out in the rules. For example, subclause 21(3) includes a non-exhaustive list of matters relating to the Commissioner's complaints functions for

1 Aged Care Quality and Safety Commission Bill 2018, clause 21. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

which the rules may make provision including, under proposed paragraph (f), the review or reconsideration of decisions made under the complaints scheme set out under the rules. Subclause 21(4) also contains a list of matters in relation to the Commissioner's regulatory functions for which the rules may make provision including, under proposed paragraph (h), the review or reconsideration of decisions relating to the accreditation of an aged care service or the registration of a quality assessor.

1.3 The committee's view is that significant matters, such as complaints and regulatory functions, and review rights in relation to decisions made under these functions, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.4 In this instance, the explanatory memorandum states that clause 21 is a broad provision intended to provide the Commissioner with flexibility to ensure the safety needs of aged care consumers are met.² However, the committee has generally not accepted a desire for flexibility as a sufficient justification for allowing significant matters to be set out in the delegated legislation, and it is not clear why it would not be possible set out at least some high-level requirements in relation to both of these functions in primary legislation.

1.5 With respect to subclause 21(3), the explanatory memorandum states that the rules will maintain a process of review where a complainant or provider does not agree with the decision made by the Commissioner in relation to the complaints functions.³ However, the explanatory memorandum does not set out what form of review rights will be provided for in the rules. The explanatory memorandum also makes no comment regarding the review process relating to the Commissioner's regulatory functions.

1.6 The explanatory memorandum states that the Complaints Principles currently made under section 96-1 of the *Aged Care Act 1997* (the Aged Care Act) will transfer to the rules made under this new Act.⁴ The committee notes that, while the Complaints Principles 2015 does provide for internal reconsideration of decisions made in relation to complaints by the current Aged Care Complaints Commissioner, it does not provide for any form of independent merits review—for example, by the Administrative Appeals Tribunal.

2 Aged Care Quality and Safety Commission Bill 2018, explanatory memorandum, p. 9.

3 Aged Care Quality and Safety Commission Bill 2018, explanatory memorandum, p. 10.

4 Aged Care Quality and Safety Commission Bill 2018, explanatory memorandum, p. 8.

1.7 The committee also notes that these significant matters are to be included in 'rules' rather than in 'regulations'.⁵ In relation to this matter, the committee has previously noted that regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel (OPC). Therefore, if significant matters are to be provided for in delegated legislation (rather than primary legislation) the committee considers they should at least be provided for in regulations, rather than other forms of delegated legislation which are subject to a lower level of executive scrutiny.⁶

1.8 In addition, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.⁷

1.9 The committee's view is that significant matters, such as complaints and regulatory functions, and review rights in relation to decisions made under these functions, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave the Commissioner's complaints and regulatory functions, including review rights in relation to decisions made under these functions, to be set out entirely in the rules; and**

5 The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 21–35.

6 See also Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 17 of 2014*, 3 December 2014, pp. 6–24.

7 See sections 18 and 19 of the *Legislation Act 2003*.

- **the type of consultation that it is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).**

Broad discretionary powers

Significant matters in delegated legislation

Privacy⁸

1.10 Subclause 56(1) of the Principal bill provides that the Commissioner must, in circumstances specified in the rules, give information of a kind specified in the rules to the secretary for the purposes of the secretary's functions or powers. The explanatory memorandum states that clause 56 may be used where the secretary requires information about a complaint the Commissioner may be handling, including information about whether any action had been taken or directions issued to the appropriate provider in response to potential non-compliance.⁹ However, it does not explain why it is necessary to allow additional circumstances in which the Commissioner must give information to the secretary to be specified in the rules, rather than set out in primary legislation.

1.11 In addition, clause 61 of the Principal bill sets out a number of specific circumstances in which the Commissioner may disclose protected information, which includes personal information.¹⁰ Proposed paragraph 61(1)(a) provides that the Commissioner may disclose protected information if he or she determines that it is necessary in the public interest to disclose the information in a particular case, to such persons and for such purposes as the Commissioner determines. In addition, proposed paragraph 61(1)(j) provides that the Commissioner may disclose protected information 'to a person of a kind specified in the rules', for 'the purposes specified in the rules' in relation to persons of that kind.

1.12 The committee notes that the power under proposed paragraph 61(1)(a) gives the Commissioner an extremely broad discretion to disclose protected information, which may include sensitive personal information about aged care consumers, to *any* person and for *any* purpose, so long as the Commissioner

8 Aged Care Quality and Safety Commission Bill 2018, clause 56, and proposed paragraphs 61(1)(a) and (j). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i), (ii), (iv) and (v).

9 Aged Care Quality and Safety Commission Bill 2018, explanatory memorandum, p. 19.

10 'Protected information' is defined under subclause 60(2) as information acquired under or for the purposes of the Act or the rules that is personal information or relates to the affairs of an approved provider or a service provider of a Commonwealth-funded aged care service.

considers it necessary in the public interest to do so. The bill contains no requirement that before disclosing personal information about a person under this provision, the Commissioner must notify the person, give the person a reasonable opportunity to make written comments on the proposed disclosure and consider any written comments made by the person, and there is no requirement for the Commissioner to have regard to the impact the disclosure might have on the person.

1.13 In addition, paragraph 61(1)(j) enables the sharing of personal information to any person and for any purpose as will be specified in delegated legislation. The committee's view is that significant matters, such as the kinds of persons to whom protected information may be disclosed and the purposes for which such a disclosure may be made, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.14 The explanatory memorandum does not provide a specific justification as to why it is necessary to give a broad discretionary power to the Commissioner to release personal information or to allow the circumstances by which personal information can be released to be determined in the rules. It does contain a general comment that clause 61 enables the Commissioner to ensure the safety of aged care consumers in certain circumstances and that these provisions are in place so that action can be taken immediately when required and there are no delays to protect aged care consumers.¹¹ The explanatory memorandum further states that hampering the ability of the Commissioner to disclose protected information 'goes against the very purpose of the existence of the Commission' and that the Commissioner must have the ability to disclose protected information swiftly 'when an aged care consumer's safety, health or well-being is or may be at risk.'¹² However, the committee notes that proposed paragraph 61(1)(e) enables protected information to be disclosed in order to prevent or lessen a serious risk to the safety, health or well-being of an aged care consumer and proposed subparagraph 61(1)(h)(i) allows protected information to be disclosed for the enforcement of the criminal law. It is therefore unclear why it is necessary to provide a broad discretionary power to the Commissioner, or to allow the rules to expand the list of circumstances in which protected information may be disclosed, noting that the information in question may include very sensitive personal information about aged care consumers.

1.15 In relation to subclause 56(1), the committee requests the minister's advice as to why it is necessary to allow additional circumstances in which the Commissioner must give information to the secretary to be specified in the rules.

1.16 In relation to paragraph 61(1)(a), the committee requests the minister's advice as to:

11 Aged Care Quality and Safety Commission Bill 2018, explanatory memorandum, pp. 20-21.

12 Aged Care Quality and Safety Commission Bill 2018, explanatory memorandum, p. 21.

- **why it is necessary to grant the Commissioner a broad discretion to disclose protected information to any person and for any purpose, so long as the Commissioner considers it necessary in the public interest to do so; and**
- **why (at least high-level) rules or guidance about the exercise of this disclosure power cannot be included in the primary legislation.**

1.17 In relation to proposed paragraph 61(1)(j), the committee requests the minister's advice as to why it is considered necessary and appropriate to allow the rules to specify additional kinds of persons to whom protected information may be disclosed and the purposes for which such a disclosure may be made.

Reversal of evidential burden of proof¹³

1.18 Subclause 60(1) of the Principal bill seeks to make it an offence to make a record of, use, or disclose to a person protected information that was obtained in the course of performing functions, or exercising powers under or for the purposes of the Act. Subclause 60(3) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if:

- the person engages in the relevant conduct in the course of performing functions, or exercising powers, under or in relation to the Act or the rules, or the Aged Care Act or the Aged Care Principles; or
- the conduct is authorised by the person or body to whom the information relates; or
- the conduct is otherwise authorised under the Act, the rules or any other Act.

1.19 Subclause 60(4) provides another exception, stating that the offence does not apply to the disclosure of information if it is to the person or body to whom the information relates, or to the minister or secretary. The offence carries a maximum penalty of imprisonment for two years.

1.20 In addition, subclauses 74(3) and (4) of the Principal bill seek to make it an offence for a person who has been issued with an identity card not to return the card to the Commissioner within 14 days of ceasing to be, respectively, an authorised complaints officer or a quality assessor. These offences both carry a maximum penalty of one penalty unit. Subclause 30(6) provides an exception to these offences, stating the offences do not apply if the identity card was lost or destroyed.

13 Aged Care Quality and Safety Commission Bill 2018, subclauses 60(3) and (4), and 74(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

1.22 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.23 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in subclauses 60(3) and (4), and subclause 74(6) have not been addressed in the explanatory materials.

1.24 The committee notes that the offence set out under subclause 60(1) would appear to criminalise the conduct of public servants who deal with protected information in the course of performing functions or exercising powers under or for the purposes of the Act or the rules. The Principal bill relies on the existence of the defence under subclause 60(3) to enable protected information to be recorded, used or disclosed by persons performing authorised functions or exercising authorised powers. The Principal bill also relies on the defence under subclause 60(4) to enable the disclosure of protected information to the person to whom it relates or to the secretary or the minister. However, this would appear to leave officials acting appropriately in the course of their employment open to a criminal charge and then places the evidential burden of proof on the officer to raise evidence to demonstrate that they were in fact acting in accordance with this Act or another Act.

1.25 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclauses 60(3), (4) and 74(6). 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*.¹⁴

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

Broad delegation of administrative powers¹⁵

1.26 Subclause 76(1) of the Principal bill provides that the Commissioner may, in writing, delegate to a member of the staff of the Commission all or any of the Commissioner's functions or powers under the Act or the rules. In addition, item 19 of Schedule 1 of the Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018 (the Consequential bill) seeks to amend the Aged Care Act to provide that the secretary may delegate any of his or her powers under the Aged Care Act that he or she considers necessary for the Commissioner to perform his or her functions under the Act or the rules made under that Act.¹⁶ The Consequential bill also seeks to provide that the Commissioner may then sub-delegate such a power to a member of staff of the Commission.¹⁷

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

1.28 In this instance, the explanatory memorandum to the Principal bill states that the Commissioner requires a broad power of delegation as there will be certain functions where it may be appropriate for staff at different levels and skills to hold the same delegation, due to the wide range of matters that arise in the performance of these functions, and that it is considered that these functions will require different actions to be taken, and persons with different skills and abilities to implement these actions.¹⁸ The explanatory memorandum also states that the clause would allow the Commissioner to delegate his or her powers based on the functions required to be undertaken by individual staff members, and that this will ensure that decisions

15 Aged Care Quality and Safety Commission Bill 2018, subclause 76(1), and Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018, Schedule 1, item 19. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

16 Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018, Schedule 1, item 19, proposed subsection 96-2(2).

17 Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018, Schedule 1, item 19, proposed subsection 96-2(2A).

18 Aged Care Quality and Safety Commission Bill 2018, explanatory memorandum, p. 26.

made by a staff member will be reviewable by senior and executive staff, including the Commissioner.¹⁹

1.29 The explanatory memorandum to the Consequential bill contains no explanation of the need to allow the secretary to delegate his or her powers under the Aged Care Act to the Commissioner, and allow the Commissioner to sub-delegate these powers to any member of staff of the Commission. It merely notes that the proposed amendments are part of a series of amendments intended to update certain references as a consequence of the proposed abolition of the Aged Care Quality Agency and the Aged Care Complaints Commissioner, and the establishment of the Commission.²⁰

1.30 While the committee notes the explanation provided in the explanatory memorandum to the Principal bill, it has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

1.31 The committee considers, if it is necessary to allow the Commissioner to delegate powers provided under the Principal bill, or sub-delegate the secretary's powers under the Aged Care Act, to any member of staff, it is not clear why the bill cannot at least include a requirement that the Commissioner be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated. The committee notes that the Principal bill seeks to impose such a requirement under subclause 73(2) in relation to the appointment of authorised complaints officers.

1.32 The committee considers it may be appropriate to:

- **amend clause 76 of the Aged Care Quality and Safety Commission Bill 2018 to require that the Commissioner be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated; and**
- **amend item 19 of Schedule 1 of the Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018 to require that the Commissioner be satisfied that persons performing sub-delegated functions and exercising sub-delegated powers have the expertise appropriate to the function or power sub-delegated.**

1.33 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the delegation and sub-delegation of administrative powers to a broad range of staff members of the Commission.

19 Aged Care Quality and Safety Commission Bill 2018, explanatory memorandum, p. 26.

20 Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018, explanatory memorandum, p. 4.

Commonwealth Places and Services (Facial Recognition) Bill 2018

Purpose	This bill seeks to make it an offence to wear facial coverings in certain public places
Sponsor	Senator Cory Bernardi
Introduced	Senate on 11 September 2018

Trespass on personal rights and liberties

Reversal of evidential burden of proof

Significant penalties²¹

1.34 The bill seeks to amend the *Criminal Code Act 1995* to include proposed subsections 395.2(1) and (2), which would make it an offence for a person to wear a full face covering in a public place,²² and to compel a person under 18 years of age to wear a full face covering in a public place. These offences would apply in a Commonwealth place and in a Territory.²³ Proposed subsection 395.2(3) provides an exception (offence specific defence) to these offences, stating that the offence does not apply if the wearing of the full face covering is reasonably necessary, in all the circumstances, for the: lawful pursuit of the wearer's occupation; the wearer's participation in lawful entertainment, recreation or sport; a genuine artistic purpose; protection from physical harm; or such other purposes as are prescribed by the regulations. The proposed offences carry a maximum penalty ranging from 1 penalty unit for the first offence to imprisonment for one month or 10 penalty units, or both, for the third offence.

1.35 The bill also seeks to amend the *Social Security (Administration) Act 1999* to include proposed subsection 216A(1) and (2), which would make it an offence for a person to wear a full face covering in any building owned or leased by the Commonwealth and engage in conduct in relation to an officer for the purpose of making a claim for a social security payment under the social security law, or to compel another person under 18 years of age to wear a full face covering who then engages in the relevant conduct. Proposed subsection 216A(4) provides an exception to these offences identical to that set out under proposed subsection 395.2(3). These

21 The committee draws senators' attention to this bill pursuant to Senate Standing Order 24(1)(a)(i).

22 'Public place' is defined in proposed section 395.2(5), and states it does not include a place of worship or a place where marriage, civil partnership or civil union ceremony is being lawfully held.

23 Schedule 1, item 1, proposed section 395.1.

offences are also subject to the same range of penalties as the offence under proposed subsection 395.2(1).

1.36 The bill also seeks to amend the *Australian Citizenship Act 2007* to state that a person must not make a pledge of commitment to be an Australian citizen while wearing a full face covering.

1.37 The committee notes that, insofar as the proposed provisions seek to prevent persons from wearing full facial coverings in certain circumstances, it may be considered that the bill might restrict both religious freedom and freedom of expression, and as such, may unduly trespass on personal rights and liberties. The statement of compatibility states that the bill engages freedom of religion but does not justify the limitation and notes that participation in worship services or marriage ceremonies are exempt from the remit of the bill. However, the committee notes that religious freedom would allow for the expression of one's religion beyond the confines of places of worship or marriage ceremonies. The statement of compatibility also notes that the bill engages freedom of political communication and the bill makes clear, in proposed section 395.2(4), that the section does not apply to the extent it would infringe on any constitutional doctrine of implied freedom of political communication. However, the committee notes that the implied freedom of political communication is a much narrower doctrine than the right to freedom of expression.

1.38 As noted above, the bill seeks to impose the possibility of a custodial penalty (imprisonment for one month for a third offence); however, no justification is provided in the explanatory memorandum for why a custodial penalty is proposed in relation to offences that, on their face, appear to be quite minor (namely the wearing of certain clothing). The committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties.

1.39 Finally, with respect to the offence specific defences proposed in the bill, the committee notes that subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.40 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.41 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden

(requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed subsection 395.2(3) and proposed subsection 216A(4) have not been addressed in the explanatory materials.

1.42 The committee notes that provisions of the bill may unduly trespass on personal rights and liberties. In the event that this bill progresses further through the Parliament, the committee may set out its scrutiny concerns in greater detail in a future *Scrutiny Digest*.

Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

Purpose	This bill seeks to amend the <i>Crimes Act 1914</i> to allow constables and protective service officers to: <ul style="list-style-type: none"> • direct a person to produce evidence of their identity; • direct a person to leave airport premises and/or not take a specified flight or any flight, for up to 24 hours; and • direct a person to stop or do anything else necessary to facilitate an identity check or move-on direction
Portfolio	Home Affairs
Introduced	House of Representatives on 12 September 2018

Trespass on personal rights and liberties²⁴

1.43 The bill seeks to amend the *Crimes Act 1914* to enhance police powers at Australia's major airports. Proposed section 3UN seeks to allow a constable or protective service officer (PSO)²⁵ to direct a person to produce evidence of their identity. Before issuing the direction, the constable or PSO must suspect on reasonable grounds that the person has committed, is committing, or will commit an offence,²⁶ or consider on reasonable grounds that it is necessary to give the direction in order to safeguard aviation security.

1.44 Proposed section 3UO seeks to allow a constable or PSO to direct a person to leave airport premises or to not take particular flights. Before issuing the direction, the constable or PSO must consider on reasonable grounds that the person has contravened a direction under proposed section 3UN, suspect on reasonable grounds that the direction is necessary to prevent or disrupt relevant criminal activity,²⁷ or consider on reasonable grounds that the direction is necessary to safeguard aviation security.

24 Schedule 1, items 2 and 5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

25 Section 40EA of the *Australian Federal Police Act 1979* (AFP Act) allows the Commissioner to declare that an Australian Federal Police employee is a PSO. Section 40EB allows the Commissioner to set PSO competency and qualification requirements.

26 This includes offences against a law of the Commonwealth, or a law of a State having a federal aspect, punishable by imprisonment for 12 months or more.

27 This includes activities involving offences against a law of the Commonwealth, or a law of a State having a federal aspect, punishable by imprisonment for 12 months or more.

1.45 Proposed section 3UQ seeks to allow a constable or PSO to direct a person to stop, or to do anything else the constable considers on reasonable grounds to be necessary to facilitate the exercise of a power under proposed section 3UN or 3UO.²⁸ Before issuing the direction, the constable or PSO must consider on reasonable grounds that it is necessary to facilitate the exercise of one or both of those powers.

1.46 The explanatory memorandum states that the powers in the bill seeks to ensure that constables and PSOs can:

engage with persons at the earliest opportunity to assess any potential threat and/or risk to public safety, and direct a person to leave, or not to take flights to or from, these airports where appropriate.²⁹

1.47 The committee acknowledges the importance of ensuring the safety of persons in and around Australian airports, and of protecting persons and aviation infrastructure from criminal activity. However, it appears that the bill would also permit constables and PSOs to exercise such powers in order to safeguard 'aviation security', which is broadly defined in item 2 to include the 'good order' of major airports, associated premises, and flights to and from a major airport. The explanatory memorandum indicates that the term 'aviation security' is intended to be interpreted in accordance with its ordinary meaning but would also capture 'a wide range of disruptive behaviour that poses a risk to others in the aviation environment', including non-criminal conduct.³⁰ However, the explanatory memorandum does not explain the meaning of 'good order', and there is nothing on the face of the bill that would limit the powers in proposed sections 3UN, 3UO and 3UQ to situations where criminal activity or a threat to safety is identified.

1.48 It is not clear to the committee as to the necessity for such broad powers to safeguard the 'good order' of an airport or flight, particularly as it would appear such powers may be used to direct persons to produce identity documents, vacate airports and related premises, and abstain from taking flights, in circumstances where there is no suspicion of criminal activity and no threat to safety; for example, to disrupt or to quell a peaceful protest. The committee is therefore concerned that allowing constables and PSOs to exercise powers to protect 'aviation security' may unduly trespass on individuals' rights to privacy, free speech and free movement, particularly where the powers are exercised to promote 'good order'.

28 The committee notes that although the power to issue directions under proposed section 3UQ would be conferred on both constables and PSOs, the power is drafted as directing a person to do anything the *constable* (as opposed to the constable or PSO) considers necessary.

29 Explanatory memorandum, p. 3.

30 Explanatory memorandum, p. 5.

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

- **the circumstances in which it is envisaged the powers in proposed sections 3UN, 3UO and 3UQ (identification, stop and move-on directions powers) would be exercised to ensure the 'good order' of an airport, its premises, and flights, and the need for such powers; and**
- **whether these circumstances would extend beyond ensuring safety or disrupting or preventing criminal activity; in particular, whether the powers may be exercised to disrupt or quell a peaceful protest.**

Bills with no committee comment

1.50 The committee has no comment in relation to the following bills which were introduced into the Parliament between 10 – 13 September 2018:

- Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018;
- Shipping Registration Amendment Bill 2018;
- Social Services Legislation Amendment (Ending the Poverty Trap) Bill 2018
- Treasury Laws Amendment (Supporting Australian Farmers) Bill 2018.

Commentary on amendments and explanatory materials

Imported Food Control Amendment Bill 2017

[Digests 6 & 11/17]

1.51 On 11 September 2018 the Assistant Minister for Agriculture and Water Resources (Senator Colbeck) tabled a further replacement explanatory memorandum to the bill.

1.52 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.³¹

Private Health Insurance Legislation Amendment Bill 2018

[Digests 5 & 6/18]

1.53 On 10 September 2018 the Senate agreed to five Government amendments, the Minister for Indigenous Affairs (Senator Scullion) tabled a supplementary explanatory memorandum and the bill was read a third time.

1.54 On 11 September 2018 the House of Representatives agreed to the Senate amendments and the bill was passed.

1.55 In *Scrutiny Digest 5 of 2018* and *Scrutiny Digest 6 of 2018*, the committee raised a number of concerns about the bill.³² The amendments appear to partially address the committee's concerns. In particular, the committee welcomes the inclusion of new subsection 34(2C), which would require the Private Health Insurance Ombudsman, when delegating functions and powers, to be satisfied that the delegate has expertise appropriate to the function or power delegated.

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

31 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, pp. 73-88; *Scrutiny Digest 11 of 2017*, pp. 27-32.

32 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, pp. 47-51; *Scrutiny Digest 6 of 2018*, pp. 118-127

Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018

[Digest 6/18]

1.57 On 11 September 2018 the Senate agreed to 11 Government and one Independent (Senator Storer) amendments, the Minister for Communications and the Arts (Senator Fifield) tabled a supplementary explanatory memorandum and the bill was read a third time. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

1.58 Amendment 3 inserts a new Schedule 1A into the bill. Item 2 of that Schedule seeks to replace the reference to a 'legislative instrument' in subsection 124PD(2) of the *Social Security (Administration) Act 1999* with a 'notifiable instrument'. This would allow the minister to exclude particular areas from the definition of 'trial area' by notifiable, rather than legislative, instrument.

1.59 The committee notes that notifiable instruments, unlike legislative instruments, are not subject to the usual disallowance and sunset provisions in the *Legislation Act 2003* and so are not subject to parliamentary scrutiny.

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

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

- Australian Institute of Health and Welfare Amendment Bill 2018;³³
- Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017;³⁴ and
- Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment Bill 2018.³⁵

33 On 12 September 2018 the Senate agreed to one Government amendment, the Assistant Minister for Defence (Senator Fawcett) tabled a supplementary explanatory memorandum. On the same day the House of Representatives agreed to the Senate amendment, the Assistant Minister to the Deputy Prime Minister (Mr Broadbent) presented an addendum to the explanatory memorandum and the bill was passed.

34 On 12 September the Senate agreed to one Opposition amendment and the bill was read a third time. On the same day the House of Representatives agreed to the Senate amendment and the bill was passed.

35 On 10 September 2018 the Senate agreed to one Government amendment, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum, and the bill was read a third time. On 11 September 2018 the House of Representatives agreed to the Senate amendment and the bill was passed.

Chapter 2

Commentary on ministerial responses

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

Veterans' Entitlements Amendment Bill 2018

Purpose	This bill seeks to authorise the Department of Veterans' Affairs to deduct an overpayment of a service pension, income support supplement or social security pension from a specified payment paid to the surviving partner, where the partner had the benefit of that overpayment and the overpayment was due to the death of the deceased
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 22 August 2018

Retrospective application¹

2.2 In [Scrutiny Digest 10 of 2018](#)² the committee requested the minister's advice as to why it is necessary to retrospectively apply proposed section 53NAA from 1 January 1996 and whether this will adversely affect any persons.

Minister's response³

2.3 The minister advised:

I am pleased to provide my advice in relation to why it is necessary to retrospectively apply proposed section 53NAA from 1 January 1996 and whether this will adversely affect any persons. While the Bill passed the Senate on 13 September 2018, it is proposed that an Addendum to the Explanatory Memorandum including the requested information from the Committee will be tabled in the Senate on 17 September 2018. A copy of the Addendum to be tabled is enclosed.

2.4 The addendum to the explanatory memorandum relevantly provides:

1 Schedule 1, item 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2018*, at pp. 8-9.

3 The minister responded to the committee's comments in a letter dated 17 September 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

This measure does not adversely affect a person. It allows for the streamlining of two separate processes, the recovery of an overpayment arising from the death of the pensioner and the payment of bereavement payment to the surviving partner.

This is a compassionate, sympathetic and unobtrusive response which avoids disturbing the family with additional interactions with the Department of Veterans' Affairs (DVA) while they are grieving.

This approach is also consistent with the method that the Department of Social Services adopts for its clients.

If retrospectivity were not applied, the DVA would have to examine the debt recovery of pension monies from the deceased pensioner and take action to recover or waive recovery of the debt depending on its age.

In addition, DVA would be required to repay surviving partners (or their estates where the partners are now deceased) the amount of bereavement payment that was reduced because of overpayment resulting from the death of their partner dating back to 1996.

Not only would this be difficult given the passage of time but the contact from the DVA is likely to adversely affect the surviving partner and their family

Committee comment

2.5 The committee thanks the minister for this response. The committee notes that an addendum to the explanatory memorandum was tabled in the Senate on 17 September 2018, in accordance with the minister's advice.⁴ The committee notes that the addendum explains that the retrospective application of proposed section 53NAA is necessary as the Department of Veterans' Affairs (DVA) would otherwise be required to examine the debt recovery of pension monies from deceased pensioners and take action to recover or waive recovery of the debt depending on its age. In addition, the DVA would be required to repay surviving partners the amount of bereavement payment that was reduced because of overpayment resulting from the death of their partner dating back to 1996. The committee also notes that the addendum states that the retrospective application of proposed section 53NAA will not adversely affect any persons.

2.6 In light of the information provided in the addendum to the explanatory memorandum, and the fact that this bill has already passed both Houses of Parliament, the committee makes no further comment on this matter.

4 *Journals of the Senate*, No. 118, 17 September 2018, p. 3770.

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

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

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.²

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Helen Polley
Chair

- 1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.
- 2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

