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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 comments on the following bill and, in some instances, seeks a response or further information from the relevant minister.

Australian Institute of Health and Welfare Amendment (Assisted Reproductive Treatment Statistics) Bill 2019

Purpose	This bill seeks to amend the <i>Australian Institute of Health and Welfare Act 1987</i> to require accredited assisted reproductive technology centres to report their performance statistics to the Australian Institute of Health and Welfare and for the AIHW to publish these statistics
Sponsor	Senator Stirling Griff
Introduced	Senate on 4 July 2019

Strict liability offence¹

1.2 The bill seeks to insert proposed section 19A into the *Australian Institute of Health and Welfare Act 1987*. Proposed subsection 19A(1) requires a chief executive of an accredited assisted reproductive technology centre to provide certain statistical information to the Australian Institute of Health and Welfare (AIHW) within two months after the end of a financial year. Proposed subsection 19A(2) makes it an offence for the chief executive to fail to provide the statistical information within the set timeframe. The proposed offence is stated to be one of strict liability and is subject to a penalty of 100 penalty units.

1.3 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the

¹ Proposed subsection 19A(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent.

1.4 As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.² In this instance, the explanatory memorandum provides no justification as to why the offence is subject to strict liability, merely restating the penalty for not complying with this section.³

1.5 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is only punishable by a fine of up to 60 penalty units for an individual.⁴ In this instance, the bill proposes applying strict liability to an offence that is subject to 100 penalty units.

1.6 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying strict liability to an offence that is subject to 100 penalty units.

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

3 Explanatory memorandum, p. 3.

4 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 23.

Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Bill 2019

Purpose	This bill seeks to amend the <i>Australian Security Intelligence Organisation Act 1979</i> (the Act) to extend the operation of the Australian Security Intelligence Organisation's questioning and detention powers in Division 3 of Part III of the Act, for a further 12 months
Portfolio	Home Affairs
Introduced	House of Representatives on 4 July 2019

Trespass on rights and liberties⁵

1.7 This bill seeks to extend the operation of the Australian Security Intelligence Organisation's (ASIO) special powers relating to terrorism offences, which are due to sunset on 7 September 2019, for a further 12 months.⁶

1.8 The committee has previously expressed significant concerns about the impact of ASIO's special powers regime on a number of rights and liberties.⁷ The committee considers that ASIO's special powers regime is coercive in nature, as it empowers ASIO to require a person to answer questions or provide information or documents, and a failure to do so constitutes a criminal offence, and abrogates the privilege against self-incrimination.⁸

1.9 The committee further notes that under section 34 of the *Australian Security Intelligence Organisation Act 1979*, a questioning and detention warrant allows ASIO to request the detention of a non-suspect for the purpose of intelligence gathering, and police officers to enter and search any premises where they reasonably believe the person is, and to use reasonable force in order to take the person into custody. In executing a detention warrant, the AFP officer is not required to give the person any

5 Schedule 1, item 1, section 34ZZ. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

6 These powers are contained in Division 3 of Part 3 of the *Australian Security Intelligence Organisation Act 1979*.

7 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, pp. 13 – 16 and See Senate Standing Committee for the Scrutiny of Bills, *Report relating to the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, pp 31-33.

8 See sections 34E and 34L of the *Australian Security Intelligence Organisation Act 1979*.

information about the grounds for the warrant. A person may be detained for a maximum of seven days.⁹

1.10 As these powers have been granted to ASIO in support of its role as an intelligence gathering agency, they may apply in relation to individuals not suspected of, and not charged with, any offence, let alone a terrorism-related offence. As the committee has previously commented, the breadth of these powers raises significant scrutiny concerns that they may unduly trespass on personal rights and liberties.

1.11 The extraordinary nature of this regime is recognised by the inclusion of a sunset period in the current legislation. The committee considers that, as a general principle, sunset clauses are important safeguards which facilitate increased parliamentary scrutiny and oversight of bills containing extraordinary measures. Where a sunset clause is enacted, the committee considers that it should not be extended without a thorough review and the presentation of compelling evidence to the Parliament.

1.12 Given these concerns, in extending the operation of these significant powers by a further 12 months, the committee expects that the explanatory materials accompanying the bill should provide a comprehensive justification for the continued need for such powers.

1.13 In this regard, the statement of compatibility states that extending the operation of the powers:

ensures Australia's counter-terrorism capabilities are maintained pending passage of legislation to implement recommendations of the report of the Parliamentary Joint Committee on Intelligence and Security on the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (PJCIS report).¹⁰

1.14 The committee has previously commented on past extensions to the sunset date for these powers and notes that the same explanation was provided to justify extending the sunset date until September 2019.¹¹ At that time, the committee noted that there was a risk that the measures that were originally introduced on the basis of being a temporary response to an emergency situation could become permanent by their continual renewal.¹² In the committee's view, the extension of the sunset date by another 12 months in this bill would increase that risk.

9 Section 34S of *Australian Security Intelligence Organisation Act 1979*.

10 Statement of compatibility, p. 3.

11 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, pp. 13 – 16.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, p. 16.

1.15 The committee notes that the explanatory materials do not appear to contain any information regarding why an extension of an additional 12 months is required or when legislation to implement these recommendations will be introduced. Further, they do not appear to contain any information about how the relevant powers have been exercised since their enactment, or why they continue to be necessary.

1.16 The committee requests the minister's more detailed justification as to why it is considered necessary and appropriate to further extend the sunseting of ASIO's special powers relating to terrorism offences, noting that these powers could unduly trespass on personal rights and liberties.

Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Purpose	This bill seeks to introduce an exclusion orders scheme to delay Australians of counter-terrorism interest from re-entering Australia
Portfolio	Home Affairs
Introduced	House of Representatives on 4 July 2019

1.17 The committee commented on a similar bill in the previous Parliament in [Scrutiny Digest 2 of 2019](#).

Trespass on personal rights and liberties

Broad discretionary power¹³

1.18 The bill provides that the minister may make a temporary exclusion order (an exclusion order), which would exclude an Australian citizen from returning to Australia, if the minister suspects on reasonable grounds that making the exclusion order would substantially assist in:

- preventing a terrorist attack;
- preventing training being provided to, received from or participated in with a listed terrorist organisation;
- preventing the provision of support for, or the facilitation of, a terrorist attack; or
- preventing the provision of support or resources to an organisation that would help the organisation engage in a terrorist act.¹⁴

1.19 The minister may also make an exclusion order if the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security for reasons related to politically motivated violence.

1.20 An exclusion order could be made in relation to an Australian citizen who is at least 14 years of age and located outside of Australia. Once issued, an exclusion order would prevent the person from entering Australia for up to two years,¹⁵ with an offence punishable by up to two years' imprisonment to enter Australia, or help a

13 Various provisions. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

14 Clause 10.

15 Paragraph 10(6)(d).

person to enter, if an exclusion order is in force.¹⁶ However, the bill also provides that if a person applies for a 'return permit' the minister must grant a permit allowing the person to enter Australia, but in doing so, the minister may impose certain monitoring conditions as specified in the permit.¹⁷

1.21 The statement of compatibility explains that there is a need to reform Australia's approach to managing individuals who may represent a threat to public safety as the number of Australians travelling to join terrorist organisations overseas has significantly increased and the 'collapse of the Islamic State's territorial control complicates the threat environment as more Australians participating in or supporting the conflict, leave the conflict zone and, may seek to return home'.¹⁸ It also states that the purpose of the bill is not necessarily to prevent Australian citizens from returning to Australia but to 'ensure that the person will arrive into the hands of authorities with no surprises' by delaying their return and enabling the minister to impose conditions on individuals once they have returned to Australia.¹⁹

1.22 The committee has significant scrutiny concerns regarding the power of the minister to exclude Australian citizens from entering Australia, noting that the issuing of an exclusion order severely limits the citizenship rights of Australians to freely enter their country of nationality and could potentially leave an Australian citizen stranded in a conflict zone. There are also significant scrutiny concerns in subjecting persons to strict monitoring conditions without any requirement that the person needs to have been convicted of, let alone charged with, any offence.

Temporary exclusion orders

1.23 The threshold by which an exclusion order may be made is one of ministerial suspicion on reasonable grounds. The statement of compatibility notes that this 'incorporates an objective test which precludes the arbitrary exercise of many statutory powers'²⁰. However the committee notes that the decision to issue an exclusion order is based on whether the minister 'suspects' rather than that the minister 'believes' that making the order would assist in preventing certain terrorist related acts. The committee notes that the High Court has previously noted there is a different standard between a reasonable suspicion and a reasonable belief and 'the facts which can reasonably ground a suspicion may be quite insufficient to ground a belief'.²¹ The explanatory materials do not provide any justification for imposing this lower threshold on which an exclusion order may be made. Clause 14 requires that

16 Clauses 8 and 9.

17 Clause 15.

18 Statement of compatibility, p 30.

19 Statement of compatibility, p 31.

20 Statement of compatibility, p 38.

21 *George v Rockett* [1990] 170 CLR 104, at 115.

any decision to issue an exclusion order be reviewed by a reviewing authority. This is further discussed below at [1.39].

1.24 In addition, the committee notes that while the bill states that these are 'temporary' exclusion orders, there is no limit in the bill about the number of exclusion orders that may be issued in relation to a person. Subclause 10(7) of the bill makes it clear that the minister is not prevented from making another exclusion order once an initial exclusion order has expired and there is no limit regarding the number of times this may be done. While the explanatory memorandum states that the minister may issue a further exclusion order 'if new or further information comes to light which warrants making a temporary exclusion order',²² the committee notes that there are no such restrictions on the face of the bill. The committee notes that it may be unlikely that the minister would come to a different conclusion regarding whether a person should be subject to a new exclusion order after an initial one has expired. As a result, the committee is concerned that these measures could amount, in practice, to the permanent exclusion of an Australian citizen if the person is unwilling or unable to make an application for a return permit.

Return permits

1.25 Clause 15 of the bill provides that if an exclusion order is in force in relation to a person, the minister must provide a return permit to the person on application (or where the person is being deported by another country to Australia). The minister also has the discretion to give a permit where an exclusion order is in place if the minister considers it is appropriate to do so. In granting a return permit, the minister has the discretion to impose a number of pre-entry conditions, such as preventing the person from entering Australia for up to 12 months and specifying the date and manner of the person's arrival. The minister may also impose a number of post-entry conditions, including that while in Australia the person is required to notify a specified person or body of:

- their place of residence, employment and education (and of any changes within 24 hours of the change occurring);
- any contact with specified persons;
- any intention to travel to another State or Territory or to leave Australia;
- any access, or intention to access, 'specified forms of telecommunications or other technology in Australia' (and to provide sufficient information to the specified person or body to enable the specific telecommunications service, account or device to be identified).

1.26 Conditions may also be imposed stating that a person may be required to surrender their Australian travel document and is not permitted to apply for or

22 Explanatory memorandum, p. 9.

obtain another travel document. Failure to comply with a condition of a return permit (including notifying specified persons within 24 hours of any change occurring) would constitute an offence punishable by up to two years' imprisonment.²³

1.27 The minister may impose one or more of the listed pre or post entry conditions if he or she is 'satisfied' that the imposition of the conditions are reasonably necessary, and reasonably appropriate and adapted for the purpose of preventing certain acts. The committee notes that this provides the minister with a very broad discretionary power to impose conditions as it is based only on the opinion of the minister. In addition, under subclause 16(3) of the bill the minister is not required to justify imposing each individual condition; it is only necessary to be satisfied that the conditions imposed as a whole are reasonably necessary, appropriate and adapted.²⁴ The committee notes that there would be limited scope for a person to seek judicial review of the decision to impose conditions given the breadth of the discretionary power.

1.28 The committee expects that the inclusion of such a broad discretionary power, that has the potential to unduly trespass on personal rights and liberties, would be thoroughly justified in the explanatory materials. In this instance, the explanatory materials give limited information as to why it is necessary to enable the minister to impose potentially onerous conditions on Australian citizens subject to return permits. The statement of compatibility states:

The conditions specified under a return permit will assist law enforcement and security agencies to monitor the whereabouts, activities and associations of an individual. This will be achieved by requiring the individual to provide timely notification to authorities and enable early intervention in response to a threat to public safety.²⁵

1.29 The committee considers that the ministerial restrictions that can be imposed on a person subject to a return permit could be characterised as similar, in some respects, to a control order. The committee has previously raised serious concerns about the impact of control orders on an individual's personal liberty as a control order may be issued by a court without any criminal conviction (or without even a charge being laid).²⁶ In this instance, the order would be issued by the minister exercising a broad personal discretionary power rather than a court. While the committee notes that the restrictions on a return permit may be less restrictive than a control order (particularly as it does not allow for the detention of a person),

23 Clause 20.

24 Explanatory memorandum, p. 15.

25 Statement of compatibility, p 28.

26 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, pp. 13-16 and *Alert Digest No. 7 of 2016* and *Report No. 8 of 2016*.

the conditions may nevertheless be onerous. In particular, the committee notes that the conditions would allow for the monitoring of all internet or phone activity by a person, who the person associates with and where they live, work or are educated.

1.30 The committee also has scrutiny concerns that an exclusion order may be made in relation to children aged between 14 and 17, and as such a return permit, with all of the associated conditions (including pre-entry conditions that mean the child may be unable to enter Australia for up to 12 months), can also be imposed on a child under 18 years of age.²⁷ While the committee notes that subclauses 10(3) and 16(5) require the minister to consider the best interests of a person aged 14 to 17 years as a primary consideration, this is offset by the requirement that the minister makes the protection of the community the paramount consideration.

Merits review

1.31 The bill also contains no avenue for merits review of decisions by the minister to either issue an exclusion order or impose conditions on a return permit. As such, only judicial review would be available. Yet, the committee has outlined above the limitations of judicial review in providing an adequate review mechanism (this is also further discussed at [1.39]). Although the decision to impose an exclusion order or apply conditions to a return permit to prevent certain terrorist acts must be based on reasonable grounds, the courts are unlikely to be able to supervise such matters closely given the courts have generally acknowledged their limitations in evaluating national security considerations.

1.32 Given the potential impact on personal rights and liberties in making an exclusion order or imposing conditions on a return permit, the committee considers that it may be appropriate for the bill to be amended to allow for merits review of decisions by the minister by a tribunal with appropriate national security expertise.

1.33 The committee notes that clause 31 requires the minister to prepare an annual report about the operation of the Act, which would be tabled in each House of the Parliament. However, given the serious potential consequences and breadth of power contained in the bill, the committee considers it may be appropriate to increase parliamentary oversight over such measures. This could include a sunset provision similar to those applying to other counter-terrorism measures, such as

27 In contrast, the committee notes that under section 104.28 of the *Criminal Code Act 1995*, a control order can only be made in relation to a person between 14 and 17 years of age for a period of 3 months.

control orders and preventative detention orders (which sunset one to three years after they are made or extended).²⁸

1.34 In light of the comments above, the committee seeks the minister's more detailed justification as to the necessity and appropriateness of providing the minister with broad discretionary powers to both issue temporary exclusion orders and impose conditions on return permits.

1.35 The committee also requests the minister's more detailed advice as to:

- **why merits review is not provided for; and**
- **why the bill is not subject to additional parliamentary oversight, such as a sunset provision.**

Exclusion of judicial review

1.36 Clause 27 of the bill seeks to exempt decisions made under the bill from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The committee notes that the ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act 1903*) and provides for the right to reasons in some circumstances. From a scrutiny perspective, the committee considers that the proliferation of exclusions from the ADJR Act should be avoided.

1.37 Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a sound justification for the exclusion. In this instance, the explanatory memorandum states:

Review under the *Administrative Decisions (Judicial Review) Act 1977* is excluded by this section as it largely replicates the review that is already undertaken by the reviewing authority. Nevertheless, judicial review of both the Minister's temporary exclusion order decision and the reviewing authority's consideration is available under section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*.

1.38 Clause 14 of the bill provides that immediately after making an exclusion order, the minister must refer the decision to make the order to a reviewing authority. The reviewing authority is appointed by the Attorney-General and must be either:

28 See subsections 104.32(1) and (2) (control orders); subsections 105.53(1) and (2) (preventative detention orders); and subsection 119.2(6) (declared area provisions) of the *Criminal Code Act 1995*; subsections 3UK(1), (2) and (3) of the *Crimes Act 1914* (stop, search and seizure powers); and section 34ZZ of the *Australian Security Intelligence Organisation Act 1979* (ASIO's special powers relating to terrorism offences).

- a former judge or justice of either the High Court, a court created by the Parliament or the Supreme Court of a State or Territory; or
- a current Deputy President or senior member of the Administrative Appeals Tribunal (AAT) who has been enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory for at least 5 years.²⁹

1.39 The reviewing authority is required to review the decision and determine whether any of the following criteria apply:

- the making of the decision to make the temporary exclusion order was an improper exercise of the power given by the Act;
- the decision was induced or affected by fraud; or
- if the temporary exclusion order was made because the minister suspected on reasonable grounds that doing so would substantially assist to prevent various terrorist acts—that there was no material before the minister from which the minister could form the required state of mind.

If any of the above criteria apply, the order is taken to have never been made.³⁰

1.40 The explanatory memorandum states that 'the review authority is required to consider the legality of the minister's temporary exclusion order decision rather than its merits'.³¹ The committee notes that this may limit the effectiveness of the reviewing authority, as it does not enable the reviewer to consider the wisdom or fairness of the decision. The committee also notes that clause 26 of the bill exempts the minister from having to observe the requirements of procedural fairness when making a decision. This would further limit the ability of the review authority to find that the decision contains an error of law. The exclusion of procedural fairness is discussed further below at paragraph [1.46].

1.41 In addition, subclause 14(3) allows the minister to withhold any material from the reviewing authority relied on in the decision making process that, in the minister's opinion, would be contrary to the public interest. The committee notes that this provides the minister with a very broad power to exclude information from the reviewing authority. This may in turn limit the ability of the reviewing authority to conduct an effective review. The explanatory memorandum notes that this is to 'avoid the risk of inadvertent disclosure of sensitive national security information through the review process'.³²

29 Clause 23.

30 Clause 7.

31 Explanatory memorandum, p 12.

32 Explanatory memorandum, p 12.

1.42 The committee also notes that the review mechanism explicitly involves the application of the grounds of review similar to those found in the ADJR Act.³³ This appears to indicate that there is no concern in principle with the decisions of the minister and reviewing authority being subject to independent review on these grounds, and as such it is unclear why review under the ADJR Act is not available.

1.43 The committee further notes that the reviewing authority can be a member of the AAT. As a result, the reviewing authority may not have judicial experience, including the independence of mind which comes from the exercise of judicial power. In addition, subclause 23(3) allows the Attorney-General to revoke the appointment of a reviewing authority. This lack of security of tenure further limits the independence of the reviewing authority, which in turn limits the capacity of this measure to be a strong safeguard against undue trespass on rights and liberties.

1.44 Based on the preceding discussion, the committee considers that the inclusion of a reviewing authority is only a modest safeguard compared to the breadth of the discretionary power provided to the minister and may not adequately protect the rights and liberties of persons affected. Accordingly, the committee does not consider that the inclusion of a reviewing authority adequately compensates for the exclusion of judicial review under the ADJR Act.

1.45 The committee requests the minister's justification as to why it is considered appropriate to exclude judicial review under the *Administrative Decisions (Judicial Review) Act 1977* in relation to decisions made under the bill.

Procedural fairness³⁴

1.46 Clause 26 of the bill provides that the minister is not required to observe any requirements of procedural fairness in exercising his or her powers under this bill. The committee notes that the right to procedural fairness has two basic rules. It requires that decision-makers are not biased and do not appear to be biased, and requires that a person who may be adversely affected by a decision is given an adequate opportunity to put their case before the decision is made. The committee considers that the right to procedural fairness is a fundamental common law right and it expects that any limitation on this right be comprehensively justified in the explanatory memorandum.

1.47 In justifying clause 26 the explanatory memorandum states:

Procedural fairness requirements, specifically enabling the potential subject of [an exclusion order] to respond to allegations against them, can

33 See section 5 of the *Administrative Decisions (Judicial Review) Act 1977*.

34 Clause 26. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

frustrate the policy intention of this Bill by providing advance notice that they are being considered for [an exclusion order]. Such a requirement may also be practically difficult to implement in circumstances where that individual is overseas, potentially in conflict zones.³⁵

1.48 The committee does not consider this explanation adequately justifies the decision to remove in its entirety the right to procedural fairness. The committee notes that while judicial review will be available, judicial review is undertaken after a decision has already been made and focuses on whether a legal error has been made. This does not provide the person who may be subject to an exclusion order with the opportunity to address whether the issuing of an exclusion order is appropriate or correct any mistakes of fact. This is combined with a lack of merits review (as discussed above at paragraph [1.31]) and as a result severely limits a person's avenue for review of a decision under this bill. In addition the committee notes that it may be difficult or prohibitive for a person subject to an exclusion order to initiate the judicial review process in circumstances where the person is located outside of Australia and may not have access to the necessary services.

1.49 The committee also notes that the courts have consistently interpreted procedural fairness obligations flexibly based on specific circumstances and the statutory context. If it could, in the circumstances of a particular case, be demonstrated that no hearing could be afforded without undue prejudice to national security, then the rules of natural justice may require no more than a consideration of the extent to which it is possible to give notice to the affected person and how much (if any) detail of the reasons for the proposed decision should be disclosed.³⁶ The explanatory materials do not address why this level of flexibility would not adequately deal with situations where it would be impractical or inappropriate to grant a reasonable opportunity to be heard.

1.50 The restriction on procedural fairness would also apply to decisions by the minister to revoke an exclusion order or to vary or revoke a return permit. The decision to vary or revoke a return permit could be made while the subject of the permit was in Australia. The justification in the explanatory materials does not address why procedural fairness in these circumstances would not be appropriate.

1.51 Finally, the committee notes that the explanatory materials only address the natural justice aspect of procedural fairness and does not provide any explanation why the other limb of the right to procedural fairness, the bias rule, has also been excluded.

1.52 The committee requests the minister's advice as to why it is appropriate and necessary to remove the obligation of the minister to observe the requirements of procedural fairness. The committee considers that, given the

35 Explanatory memorandum, p. 27.

36 For example, see *Leghaei v Director General of Security* [2005] FCA 1576; [2007] FCAFC 27.

serious scrutiny concerns raised and the potential consequences for an individual in excluding them from Australia or imposing monitoring conditions on their return, it may be appropriate to amend the bill to remove clause 26 to ensure the minister is required to observe the usual requirements of procedural fairness when exercising powers under the bill, and seeks the minister's advice in relation to this.

Reverse evidential burden of proof³⁷

1.53 Clauses 9 and 21 of the bill provide that it is an offence for a person to permit the use of a vessel or aircraft to convey another person to Australia if the person knows the other person is subject to an exclusion order or is entering Australia in violation of a condition of their return permit. Both clauses provide an offence-specific defence which provide that the offence does not apply if the second person is being deported or extradited to Australia. In addition, clause 22 provides that it is an offence for a person to give information or produce documents as required by their return permit knowing that the information or document is false or misleading. The clause provides an offence-specific defence if the information or document is not false or misleading in a material particular.

1.54 Clause 24 provides that it will be an offence for a reviewing authority to disclose information obtained as part of a review under clause 14. The clause provides an offence-specific defence if the information is disclosed for the purpose of giving effect to the Act. In each instance, the offence-specific defences mean the evidential burden of proof is reversed.³⁸

1.55 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.

1.56 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 clauses 9, 21, 22 and 24 have not been addressed in the explanatory materials.

37 Clauses 9, 21 and 16. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

38 As a result of subsection 13.3(3) of the *Criminal Code Act 1995* which 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.

1.57 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 this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if the advice explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.³⁹

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

Criminal Code Amendment (Agricultural Protection) Bill 2019

Purpose	This bill seeks to amend the <i>Criminal Code Act 1995</i> to introduce two new offences relating to the incitement of trespass or property offences on agricultural land
Portfolio	Attorney-General
Introduced	House of Representatives on 4 July 2019

Reversal of the evidential burden of proof⁴⁰

1.58 The bill seeks to insert new sections 474.46 and 474.47 into the *Criminal Code Act 1995*, to make it an offence to use a carriage service for inciting either trespass or property damage or theft on agricultural land. Both offences contain offence-specific defences, which provide that the offence does not apply if:

- the material relates to a news report, or a current affairs report that is in the public interest and made by a person working in a professional capacity as a journalist; or
- the person engaging in the conduct is not subject to any civil or criminal liability for the conduct under a law of the Commonwealth, a State or a Territory.

1.59 In making these offence-specific defences the defendant will bear the evidential burden of proof.⁴¹ 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.

1.60 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 nevertheless expects any such reversal of the evidential burden of proof to be justified. In this instance, the explanatory memorandum notes in relation to each offence-specific defence:

40 Schedule 1, item 2, proposed sections 474.46 and 474.47. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

41 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.

This exemption is an offence-specific defence as described in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. In line with that guide, an offence-specific defence is appropriate in this circumstance as this is not a matter that is central to the question of culpability for the offence.⁴²

1.61 In addition, in relation to the offence-specific defences for journalists working in the public interest, the explanatory memorandum notes the defence is appropriate 'as the defendant would be best placed to raise evidence that they are working in a professional capacity as a journalist'.⁴³ In relation to the offence-specific defences for conduct not subject to liability under other laws, the explanatory memorandum notes the defence is appropriate 'as the defendant would be best placed to raise evidence that their conduct was lawfully protected under a law of the Commonwealth, State or Territory'.⁴⁴

1.62 The committee notes that the *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is *peculiarly* within the knowledge of the defendant; **and**
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁴⁵

The explanatory memorandum does not address how any of the offence specific defences contained in the bill are both peculiarly within the knowledge of the defendant and significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. For example, no explanation is provided as to why the question of whether a news or current report is in the public interest would be a matter that is peculiarly within the knowledge of the defendant. Furthermore, the explanatory memorandum does not explain why it would be significantly more difficult and costly for the prosecution to disprove any of the matters than for the defendant to establish.

42 Explanatory memorandum pp. 13 and 17.

43 Explanatory memorandum pp. 13 and 17.

44 Explanatory memorandum pp. 13 and 17.

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

1.63 The committee requests the Attorney-General's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offences, and requests the minister's advice in relation to this matter.

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

<p>Purpose</p>	<p>This bill seeks to amend the <i>Fair Work (Registered Organisations) Act 2009</i> to:</p> <ul style="list-style-type: none"> • expand the automatic disqualification regime to prohibit persons that have committed serious criminal offences punishable by five or more years imprisonment from acting as an official of a registered organisation; • allow the Federal Court to disqualify certain officials from holding office who contravene a range of industrial and other relevant laws, are found in contempt of court, repeatedly fail to stop their organisation from breaking the law or are otherwise not a fit and proper person to hold office in a registered organisation; • make it an offence for a person to continue to act as an official or in a way that influences the affairs of an organisation once they have been disqualified; • allow the Federal Court to cancel the registration of an organisation on a range of grounds; • expand the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation; and • introduce a public interest test for amalgamations of registered organisations
<p>Portfolio</p>	<p>Industrial Relations</p>
<p>Introduced</p>	<p>House of Representatives on 4 July 2019</p>

1.64 The committee commented on a similar bill in the previous Parliament in [Scrutiny Digest 12 of 2017](#). The committee does not have any additional comments regarding the matters it raised in relation to that bill.

Strict liability offences⁴⁶

1.65 Schedule 1 to the bill seeks to amend the Fair Work (Registered Organisations) Act 2009 to expand the circumstances in which a person may be disqualified from holding office in a registered organisation. Proposed section 226

46 Proposed sections 226, 323G and 323H. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

provides that a person commits an offence if the person is disqualified from holding office in an organisation and the person stands for office or continues to hold office in an organisation. Proposed section 226 also provides that it is an offence if the disqualified person exercises the capacity to significantly affect the financial standing of the organisation or gives directions to the committee of management of an organisation. Proposed subsection 226(4) provides that these offences are ones of strict liability where the person has been disqualified from holding office by the Federal Court. Each offence is punishable by 100 penalty units or imprisonment for 2 years.

1.66 In addition, proposed subsection 323G(3) provides that a person commits an offence if they do not comply with an administrator's reasonable request under subsection 323G(2). Proposed subsection 323H(5) provides that a person commits an offence if they do not comply with a notice requiring the person to deliver to the administrator specified books that are in the person's possession. Both offences are stated to be ones of strict liability and are punishable by a penalty of 120 penalty units.

1.67 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.⁴⁷ In this instance, in relation to the offences in proposed section 226, the explanatory memorandum states:

Strict liability is appropriate in circumstances where the Federal Court has made an order disqualifying a person from holding office under new sections 28M or 222 in terms of providing a sufficient deterrent effect.

Applying a fault element, whether intention, knowledge, recklessness or negligence, would unnecessarily weaken the deterrent effect of new sections 28M or 222. It is a matter of fact as to whether a person has been disqualified by order of the Federal Court and by virtue of such order, a person will be aware that they have been disqualified under those provisions.⁴⁸

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

48 Explanatory memorandum, p 13.

1.68 In relation to the offences in proposed sections 323G and 323H, the explanatory memorandum notes that the offences are modelled on similar offences in the *Corporations Act 2001* and that 'the similarities between the regulation of the corporate governance of companies and registered organisations justifies the imposition of strict liability'.⁴⁹

1.69 The *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.⁵⁰ In this instance, the bill proposes applying strict liability to offences that are subject to either 100 penalty units and 2 years imprisonment or 120 penalty units. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed. The explanatory memorandum provides no justification for including penalties above what is recommended in the *Guide to Framing Commonwealth Offences*, nor does it explain why it is appropriate that some strict liability offences are punishable by imprisonment.

1.70 The committee requests the minister's more detailed justification for the application of strict liability to offences attracting penalties of either 100 penalty units and 2 years imprisonment or 120 penalty units.

49 Explanatory memorandum, pp 33 - 34.

50 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

Migration Amendment (Repairing Medical Transfers) Bill 2019

Purpose	This bill seeks to amend the <i>Migration Act 1958</i> to repeal the medical transfer provisions inserted by Schedule 6 of the <i>Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019</i>
Portfolio	Home Affairs
Introduced	House of Representatives on 4 July 2019

Trespass on rights and liberties⁵¹

1.71 The bill seeks to amend the *Migration Act 1958* to repeal the medical transfer provisions inserted by Schedule 6 to the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*.

1.72 Sub-item 15(1) of Schedule 1 to the bill provides that subsection 7(2) of the *Acts Interpretation Act 1901* (Acts Interpretation Act) does not apply to the repeal of the medical transfer provisions. Subsection 7(2) of the Acts Interpretation Act provides that if an Act is repealed, then the repeal does not affect the previous operation of the Act or any rights, privileges, liabilities or obligations accrued or incurred under the Act prior to its repeal. Subsection 7(2) also ensures that any investigations or legal proceedings that were instituted prior to the repeal may continue as if the Act was still in force.

1.73 The committee considers that any provision of a bill which may trespass upon a person's rights or liberties should be soundly justified in the explanatory memorandum. In this instance, the explanatory memorandum states that:

Subsection 7(2) of the Acts Interpretation Act would, if applicable, preserve, amongst other things, any right, privilege, obligation or liability acquired, accrued or incurred under the medical transfer provisions.⁵²

1.74 However, the committee notes that the explanatory memorandum does not appear to explain why it is necessary to exclude the application of subsection 7(2) of the Acts Interpretation Act from the repeal of the medical transfer provisions, and, as a result, what rights or privileges acquired or accrued by persons under the previous provisions will be affected by the repeal of the medical transfer provisions.

51 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

52 Explanatory memorandum, p 7.

1.75 The committee requests the minister's more detailed information as to why it is necessary and appropriate to include sub-item 15(1) of Schedule 1 to the bill and whether its inclusion will trespass on the rights and liberties of any person.

Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019

Purpose	This bill seeks to amend the <i>Corporations Act 2001</i> , <i>A New Tax System (Goods and Services Tax) Act 1999</i> and the <i>Taxation Administration Act 1953</i> to: <ul style="list-style-type: none"> • introduce new phoenixing offences; • prohibit directors from improperly backdating resignations or ceasing to be director when this could leave a company with no director; and • allow the Commissioner to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances
Portfolio	Treasury
Introduced	House of Representatives on 4 July 2019

1.76 The committee commented on a similar bill in the previous Parliament in [Scrutiny Digest 2 of 2019](#) and reiterates the following concerns in relation to the current bill.

Strict liability offences⁵³

1.77 The bill proposes to insert subsection 203AA(1) into the *Corporations Act 2001*, which specifies when the resignation of a company director is to take effect. Proposed subsection 203AA(6) provides that if a court fixes the resignation day, the applicant must, within a set timeframe, lodge a copy of the order made by the court with the Australian Securities and Investments Commission (ASIC). Proposed subsection 203AA(7) makes it an offence of strict liability, subject to 120 penalty units, for failing to comply with this requirement.

1.78 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict

53 Schedule 2, item 2, proposed subsection 203AA(6) and items 5 and 6. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.⁵⁴

1.79 The committee notes that the *Guide to Framing Commonwealth Offences* also states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.⁵⁵ In this instance, the bill proposes applying strict liability to offences that are subject to up to 120 penalty units.

1.80 The explanatory memorandum explains that the application of strict liability is consistent with the offence for failing to notify ASIC of the resignation on time under subsection 205B(5) of the *Corporations Act 2001* (as amended by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*).⁵⁶ However, it does not explain why the application of strict liability is necessary or appropriate in these particular circumstances, and why strict liability applies to an offence subject to 120 penalty units (double the recommended limit in the *Guide to Framing Commonwealth Offences*).

1.81 As the explanatory materials do not adequately address this issue, the committee requests the Assistant Treasurer's more detailed justification for the application of strict liability to an offence attracting a penalty of 120 penalty units.

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

55 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

56 Explanatory memorandum, p. 45.

Previous comments on bills restored to the *Notice Paper* or reintroduced

1.82 The committee has previously commented and reiterates those comments on the following bills which have been restored to the *Notice Paper* or reintroduced into the Parliament between 2 – 4 July 2019:

- Air Services Amendment Bill 2018
[Scrutiny Digest 5/18](#)
- Australian Cannabis Agency Bill 2018
[Scrutiny Digest 15/18](#)
- Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019
[Scrutiny Digest 13/17](#) and [Scrutiny Digest 15/17](#)
- Higher Education Support (Charges) Bill 2019
[Scrutiny Digest 12/18](#) and [Scrutiny Digest 14/18](#)
- Higher Education Support Amendment (Cost Recovery) Bill 2019
[Scrutiny Digest 12/18](#) and [Scrutiny Digest 14/18](#)
- Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018
[Scrutiny Digest 9/18](#)
- Migration Amendment (Streamlining Visa Processing) Bill 2019
[Scrutiny Digest 15/18](#) and [Scrutiny Digest 1/19](#)
- Migration Amendment (Strengthening the Character Test) Bill 2019
[Scrutiny Digest 13/18](#)
- Migration Legislation Amendment (Regional Processing Cohort) Bill 2019
[Alert Digest 9/16](#) and [Scrutiny Digest 1/17](#)
- Murray-Darling Basin Commission of Inquiry Bill 2019
[Scrutiny Digest 2/19](#)
- Treasury Laws Amendment (2018 Measures No. 2) Bill 2019
[Scrutiny Digest 2/18](#) and [Scrutiny Digest 3/18](#)

Bills with no committee comment

1.83 The committee has no comment in relation to the following bills which were either restored to the *Notice Paper*, introduced or reintroduced into the Parliament between 2 – 4 July 2018:

- Agriculture Legislation Repeal Bill 2019;
- Australian Multicultural Bill 2018;
- Australian Research Council Amendment (Ensuring Research Independence) Bill 2018;
- Australian Veterans' Recognition (Putting Veterans and Their Families First) Bill 2019;
- Broadcasting Services Amendment (Audio Description) Bill 2018;
- Civil Aviation Amendment Bill 2019;
- Coal-Fired Power Funding Prohibition Bill 2017;
- Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018;
- Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019;
- Competition and Consumer Amendment (Truth in Labelling—Palm Oil) Bill 2017
- Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019;
- Constitution Alteration (Water Resources) 2019
- Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Bill 2019;
- Crimes Legislation Amendment (Police Powers at Airports) Bill 2019;
- Customs Amendment (Immediate Destruction of Illicit Tobacco) Bill 2019;
- Discrimination Free Schools Bill 2018;
- Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017;
- Farm Household Support Amendment Bill 2019;
- Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018;
- Health Insurance Amendment (Bonded Medical Programs Reform) Bill 2019;
- Live Animal Export (Slaughter) Prohibition Bill 2019;

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- Military Rehabilitation and Compensation Amendment (Single Treatment Pathway) Bill 2019;
 - Ministers of State (Checks for Security Purposes) Bill 2019;
 - National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019;
 - National Health Amendment (Pharmaceutical Benefits) Bill 2019;
 - National Rental Affordability Scheme Amendment Bill 2019;
 - Nuclear Fuel Cycle (Facilitation) Bill 2017;
 - Passenger Movement Charge Amendment (Timor Sea Maritime Boundaries Treaty) Bill 2019;
 - Regional Forest Agreements Legislation (Repeal) Bill 2017;
 - Road Vehicle Standards Legislation Amendment Bill 2019;
 - Social Services Legislation Amendment (Ending the Poverty Trap) Bill 2018;
 - Telecommunications Legislation Amendment (Unsolicited Communications) Bill 2019;
 - Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2019;
 - Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019;
 - Treasury Laws Amendment (Putting Members' Interests First) Bill 2019;
 - Treasury Laws Amendment (Tax Relief So Working Australians Keep More of Their Money) Bill 2019; and
 - Water Amendment (Indigenous Authority Member) Bill 2019.

Commentary on amendments and explanatory materials

1.84 No amendments were proposed and no explanatory materials were tabled during this sitting period.

Chapter 2

Commentary on ministerial responses

2.1 No responses received.

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 Dean Smith
Acting 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](#).

