

The Senate

Standing
Committee for the
Scrutiny of Bills

Scrutiny Digest 13 of 2017

15 November 2017

© Commonwealth of Australia 2017

ISSN 2207-2004 (print)

ISSN 2207-2012 (online)

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

Members of the Committee

Current members

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

Secretariat

Ms Anita Coles, Secretary

Mr Michael Sloane, Principal Research Officer

Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100

Parliament House

Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_scrutiny

TABLE OF CONTENTS

Membership of the committee	iii
Terms of reference	vii
Introduction	ix
Chapter 1 – Initial scrutiny	
Commentary on bills	
Agricultural and Veterinary Chemicals Legislation Amendment (Operational Efficiency) Bill 2017	1
Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017.....	2
Australian Broadcasting Corporation Amendment (Rural and Regional Measures) Bill 2017.....	3
Bankruptcy Amendment (Enterprise Incentives) Bill 2017	4
Coal-Fired Power Funding Prohibition Bill 2017	6
Coal-Fired Power Funding Prohibition Bill 2017 [No. 2]	7
Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017.....	8
Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017	20
Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017	22
Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017	28
Imported Food Control Amendment (Country of Origin) Bill 2017.....	33
Migration Amendment (Skilling Australians Fund) Bill 2017.....	34
Migration (Skilling Australians Fund) Charges Bill 2017	35
National Health Amendment (Pharmaceutical Benefits—Budget and Other Measures) Bill 2017.....	36
National Integrity Commission Bill 2017	38
Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017	46
Renewable Energy Legislation Amendment (Supporting Renewable Communities) Bill 2017	49
Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017	50
Treasury Laws Amendment (Banking Measures No. 1) Bill 2017.....	56

Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2017	59
Treasury Laws Amendment (Junior Minerals Exploration Incentive) Bill 2017	60
Treasury Laws Amendment (National Housing and Homelessness Agreement) Bill 2017	61
Commentary on amendments and explanatory materials	
Criminal Code Amendment (Firearms Trafficking) Bill 2017	64
Industrial Chemicals Bill 2017 and related bills	64
National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017	65
Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017	65
Chapter 2 – Commentary on Ministerial responses	
Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017	67
Defence Legislation Amendment (Instrument Making) Bill 2017	89
Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017	98
Investigation and Prosecution Measures Bill 2017	106
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017	110
Therapeutic Goods (Charges) Amendment Bill 2017	124
Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017	128
Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017	135
Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017	144
Chapter 3 – Scrutiny of standing appropriations	161
Chapter 4 – Proposed amendment to standing order 24	163

Terms of Reference

Extract from **Standing Order 24**

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

Introduction

Terms of reference

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

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

Nature of the committee's scrutiny

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

Publications

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

General information

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

Chapter 1

Commentary on Bills

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

Agricultural and Veterinary Chemicals Legislation Amendment (Operational Efficiency) Bill 2017

Purpose	<p>This bill seeks to amend a number of Acts in relation to agricultural and veterinary chemicals to:</p> <ul style="list-style-type: none"> • simplify reporting requirements for annual returns; • increase the ability of the Australian Pesticides and Veterinary Medicines Authority (the APVMA) to manage errors in an application at the preliminary assessment stage; • enable the APVMA to grant part of a variation application under section 27 of the Schedule to the <i>Agricultural and Veterinary Chemicals Code Act 1994</i> (the Agvet Code); • enable a person to apply to vary the relevant particulars or conditions of a label approval that is suspended, to the extent that the variation relates to the grounds for suspension; • enable a person to apply to vary the relevant particulars or conditions of a label approval that is suspended, to the extent that the variation relates to the grounds for suspension; • establish civil pecuniary penalties for contraventions of provisions relating to providing false or misleading information; • amend the notification requirements in section 8E of the Agvet Code • amend the definition of '<i>expiry date</i>' in the Agvet Code to mean the date after which a chemical product 'must not' be used; and • make minor and technical amendments including the repeal of redundant provisions
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 25 October 2017

The committee has no comment on this bill.

Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017

Purpose	This bill seeks to amend the Australian Broadcasting Corporation's Charter, as set out in the <i>Australian Broadcasting Corporation Act 1983</i> , to require gathering and presentation of news and information to be 'fair' and 'balanced' according to the recognised standards of objective journalism
Portfolio	Communications and the Arts
Introduced	Senate on 18 October 2017

The committee has no comment on this bill.

Australian Broadcasting Corporation Amendment (Rural and Regional Measures) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Australian Broadcasting Corporation Act 1983</i> to:</p> <ul style="list-style-type: none">• amend the Australian Broadcasting Corporation's (ABC) Charter in relation to the delivery of services• require the ABC Board to establish a Regional Advisory Council within a specified timeframe;• ensure a minimum level of representation by individuals with an understanding of rural and regional communities on the ABC Board;• require the Minister (in relation to non-executive directors) or the Prime Minister (in relation to the ABC Chair) to table a statement in each House of the Parliament outlining a person's substantial connection or experience in a regional community; and• introduce a number of additional annual obligations
Portfolio	Communications and the Arts
Introduced	Senate on 18 October 2017

The committee has no comment on this bill.

Bankruptcy Amendment (Enterprise Incentives) Bill 2017

Purpose	This bill seeks to amend the <i>Bankruptcy Act 1966</i> to: <ul style="list-style-type: none"> • reduce the default period of bankruptcy from three years to one year; and • extend income contribution obligations for discharged bankrupts for a minimum period of two years following discharge or, in the event that a bankruptcy is extended due to non-compliance, for five to eight years
Portfolio	Attorney-General
Introduced	Senate on 19 October 2017
Scrutiny principle	Standing order 24(1)(a)(i)

Strict liability offences¹

1.2 Subsection 80(1) of the *Bankruptcy Act 1966* currently requires bankrupts to 'immediately' inform the trustee in writing of a change to their name or their principal place of residence that occurs during their bankruptcy. Item 4 seeks to repeal this subsection and substitute a new subsection that would require bankrupts to tell the trustee 'within 10 business days' of a change to their name, principal place of residence or telephone number and to do so in a 'manner determined or approved by the trustee'.

1.3 Both the existing subsection and the proposed new subsection makes breach of this requirement an offence which is subject to up to 6 months imprisonment. Subsection 80(1A) of the Act currently specifies that the offence in subsection (1) is an offence of strict liability, and the proposed new offence would therefore also be a strict liability offence.

1.4 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

¹ Schedule 1, item 4. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability (including, in this case, the remaking of an offence which is subject to strict liability), including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.²

1.5 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.³ In this instance, the bill proposes an offence that is subject to imprisonment for up to 6 months, to which strict liability then applies. The committee reiterates its long-standing scrutiny view that it is inappropriate that strict liability is applied in circumstances where a period of imprisonment may be imposed.

1.6 In this instance, the explanatory memorandum does not explain that this offence is subject to strict liability, and so does not address the appropriateness of making the offence subject to up to six months imprisonment in circumstances where strict liability applies to the offence.

1.7 The committee therefore requests the Minister's advice as to the appropriateness of making an offence (for a bankrupt failing to notify of a change in contact details) subject to up to six months imprisonment where strict liability applies to the offence.

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

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

Coal-Fired Power Funding Prohibition Bill 2017

Purpose	This bill seeks to prohibit the Commonwealth government or its agencies from funding the refurbishment, building, purchasing or assisting in the transfer of ownership of, a coal-fired power station
Sponsor	Senator Richard Di Natale
Introduced	Senate on 17 October 2017

The committee has no comment on this bill.

Coal-Fired Power Funding Prohibition Bill 2017 [No. 2]

Purpose	This bill seeks to prohibit the Commonwealth government or its agencies from funding the refurbishment, building, purchasing or assisting in the transfer of ownership of, a coal-fired power station
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 23 October 2017

The committee has no comment on this bill.

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017

Purpose	This bill seeks to establish a Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse
Portfolio	Social Services
Introduced	House of Representatives on 26 October 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (ii), (iii), (iv) and (v)

Significant matters in delegated legislation⁴

1.8 The bill seeks to establish a redress scheme for survivors of institutional child sex abuse. A number of important elements of the scheme are proposed to be left to delegated legislation to determine. In particular, clause 16 sets out when a person is eligible for redress. It provides that person is eligible for redress if the person was sexually abused, the sexual abuse is within the scope of the scheme and the person is an Australian citizen or permanent resident at the time they apply for redress. However, subclause 16(2) provides that the rules may prescribe that a person is eligible for redress on other grounds and subclause 16(3) provides that the rules may prescribe circumstances when a person is *not* eligible for redress.

1.9 The committee's view is that significant matters, such as who is or is not eligible under the redress scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no explanation as to why it is necessary to allow the rules to prescribe persons who are or are not eligible under the scheme. It merely restates the effect of the provision and notes that it is intended that rules will be made to prescribe three categories of persons that are eligible: child migrants who are non-citizens and non-permanent residents; non-citizens and non-permanent resident currently living in Australia and former Australian citizens and permanent residents.⁵ If the intention is that these categories of persons should be eligible for redress, it is not clear to the committee why these have not been included in the primary legislation.

1.10 In addition, clause 21 sets out when a participating institution will be considered responsible for the abuse of a person. Subclause 21(7) provides that

4 Clauses 16, 21, 23, 25, 26 and 34. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

5 Explanatory memorandum, p. 13.

despite provisions setting out when an institution will be held responsible, a participating institution will not be responsible if it occurs in circumstances prescribed by the rules. The explanatory memorandum provides that this is intended to ensure that institutions are not found responsible for abuse that occurred in circumstances where it would be unreasonable to hold the institution responsible.⁶ However, it is not clear to the committee why such circumstances should be left to the rules to determine rather than setting out the relevant criteria as to when it is considered that it would be unreasonable to hold an institution responsible in the primary legislation.

1.11 Furthermore, clause 22 defines what is a participating institution (and so captured by the redress scheme), but paragraphs 23(2)(c) and 25(2)(b) and subclause 26(3) provide that an institution will not be considered to be a participating institution if the rules so prescribe. This therefore excludes the institution from the scheme, and a survivor of child sexual abuse would not be able to seek redress under the scheme in relation to abuse occurring in such an institution. The explanatory memorandum states that the power in paragraphs 23(2)(c) and 25(2)(b) is intended to be used to exclude an institution where it is more appropriate for that institution to pay redress to a person (rather than the Commonwealth or a Territory), which would presumably mean the person would need to pursue their own civil litigation.⁷ In relation to subclause 26(3) the explanatory memorandum explains that this subclause covers the case where an institution was established in a Territory but not at the time the abuse occurred. The committee notes that these provisions would allow rules to be made reducing the scope of the application of the scheme, which would appear to have significant policy implications.

1.12 The committee also notes that clause 34 gives the Minister the power to declare a method, or matters to take into account, for working out the amount of redress payment for a person. The committee notes that this issue is of central importance to the scheme, given that it will determine the amount of redress which may be payable to a person under the scheme. The explanatory memorandum provides no explanation as to why this matter cannot be determined in the primary legislation so that Parliament may consider its appropriateness. Notably subclause 34(3) provides that the declaration is exempt from section 42 disallowance under the *Legislation Act 2003*. According to the explanatory memorandum, this is appropriate so the amounts of redress payments are certain for applicants and decision-makers.⁸ However, the committee notes that such certainty could also be achieved if these matters were included in the primary legislation. The explanatory memorandum also states that these declarations would ordinarily be of an

6 Explanatory memorandum, pp 16-17.

7 Explanatory memorandum, pp 17-18.

8 Explanatory memorandum, p. 26.

administrative character and they have been made legislative instruments to ensure certainty and transparency. However, it is not clear to the committee why such declarations should not be characterised as having a legislative character, as they change the law to be applied in working out the amount of redress payable in each successful application.

1.13 In addition, the committee also notes that these significant matters are to be included in 'rules' rather than in 'regulations'. The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in the committee's *First Report of 2015*.⁹ In relation to this matter, the committee has 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.¹⁰

1.14 Finally, where the Parliament delegates its legislative power in relation to significant 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.¹¹

1.15 The committee's view is that significant matters, such as who is eligible for redress and what institutions are captured by the scheme, 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:

9 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 21–35.

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

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

- **why it is considered necessary and appropriate to leave the elements of this new scheme, as described above, to delegated legislation;**
- **what type of institutions may be prescribed as not constituting a Commonwealth institution or Territory institution;**
- **the appropriateness of exempting from disallowance a Ministerial declaration regarding the method or matters to take into account for working out the amount of redress payments, in light of the above comments;**
- **if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations; and**
- **the type of consultation that 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).**

Standing appropriation¹²

1.16 Clause 54 provides that the Consolidated Revenue Fund is appropriated for the purposes of paying or discharging the costs incurred by the Commonwealth in providing redress payments, counselling and psychological services.

1.17 As set out in Chapter 3 of this Digest, 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.

1.18 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.

1.19 The committee's long-standing expectation is that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the explanatory memorandum provides no explanation of the reason

12 Clause 54. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

for this standing appropriation. However, the committee notes that the scheme has a sunset date of 10 years after the scheme commences (although this can be extended by the rules).¹³

1.20 The committee draws this standing appropriation to the attention of the Senate.

Civil penalty¹⁴

1.21 Sub clause 71(1) of the bill states that a participating institution or person must not refuse or fail to comply with a requirement under section 70. The provision is then stated to constitute a civil penalty of a maximum of 100 penalty units. Subclause (2) states that subsection (1) does not apply if the institution or person has a reasonable excuse. The note at the end of subclause (2) states that a defendant bears an evidential burden in relation to this matter under subsection 13.3(3) of the Criminal Code. The explanatory memorandum states that the note alerts the reader that the burden of proof is on the defendant by virtue of the Criminal Code.¹⁵ However, subsection 13.3(3) of the Criminal Code applies to reverse the evidential burden of proof in relation to provisions that create 'offences'. In this case the provision does not create an offence but imposes a civil penalty for a failure to comply with the relevant requirements.

1.22 The committee seeks the Minister's advice as to whether it is the intention that subclause 71(1) be subject to a civil, rather than a criminal penalty, and why the note at the end of subclause 71(2) alerts readers to provisions of the Criminal Code when the penalty is civil rather than criminal in nature.

Broad discretionary power¹⁶

1.23 Clause 77 provides that the Commonwealth Redress Scheme Operator (the Operator)¹⁷ may disclose protected information acquired by an officer in the performance of their functions or duties, or in the exercise of their powers under the bill. 'Protected information' is information about a person that is or was held in the

13 Clause 129.

14 Clause 71. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

15 Explanatory memorandum, p. 41.

16 Paragraph 77(1)(a). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

17 Which is to be the Secretary of the Department of Social Services acting in their capacity as the Operator; see the definition of 'Operator' in clause 9.

records of the relevant government departments.¹⁸ Paragraph 77(1)(a) provides that the Operator can disclose such protected information if the Operator certifies that the disclosure is necessary in the public interest to do so, and the disclosure is to 'such persons and for such purposes as the Operator determines'. Subclause 77(2) provides that in making such a certification the Operator must act in accordance with 'any rules' made for this purpose (although subclause 77(3) does not require that any rules be made, rather it states that rules 'may' be made). The explanatory memorandum gives no reason as to why this provision is necessary, only giving a short example of the types of matters that may be subject to certification as where 'it is necessary for the investigation of a criminal offence or to locate a missing person'.¹⁹ However, the committee notes that clause 78 specifically provides that the Operator may disclose information to specified enforcement or protection agencies if the disclosure is reasonably necessary for the enforcement of the criminal law or for the purposes of child protection.

1.24 The committee notes that the proposed power in paragraph 77(1)(a) gives an extremely broad basis on which the Operator can disclose protected information (which would likely include highly sensitive allegations regarding child sexual abuse) to *any* person and for *any* reason, so long as the person seeking to disclose the information considers it necessary in the public interest to do so. The committee notes that unlike disclosures made to specified agencies in clause 78, the Operator is not required to have regard to the impact the disclosure might have on the person.²⁰ There is also no requirement that rules be made in relation to the Operator's power to disclose the information and no information on the face of the primary legislation as to the circumstances in which the power can be exercised (other than that the Operator must be satisfied that it is in the public interest to make the disclosure). There is also no requirement that before disclosing personal information about a person, the Operator 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.

1.25 The committee therefore requests the Minister's advice as to:

- **why (at least high-level) rules or guidance about the exercise of the Operator's disclosure power cannot be included in the primary legislation;**
- **what circumstances are envisaged might necessitate the use of this power noting the provisions of clause 78, which already proposes allowing disclosure for the enforcement of the criminal law or for the purposes of child protection; and**

18 See subclause 75(2).

19 Explanatory memorandum, p. 43.

20 See clause 78(3).

- **why there is no positive requirement that rules must be made regulating the exercise of the Operator's power (i.e. the committee requests advice as to why the proposed subsections have been drafted to provide that the Operator act in accordance with 'any rules' made and that rules 'may' make provision for such matters, rather than requiring that the rules must make provision to guide the exercise of this significant power).**
-

Reversal of evidential burden of proof

Strict liability offence²¹

1.26 Clause 84 makes it an offence to offer to supply protected information about another person, or for a person to hold themselves out as being able to supply such information. Clause 84(3) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply to an officer acting in the performance or exercise of his or her powers, duties or functions under the Act. In addition, subclause 100(6) provides that a person commits an offence if a person is a nominee and refuses or fails to comply with a relevant notice. Clause 100(7) provides an exception (offence-specific defence) to this offence if the person has a reasonable excuse.

1.27 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.

1.28 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.

1.29 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 reversal of the evidential burden of proof in subclauses 84(3) and 100(7) has not been addressed in the explanatory materials.

1.30 The committee notes that the *Guide to Framing Commonwealth Offences*²² 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:

21 Clauses 84 and subclause 100(7) and 100(8). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

- 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.²³

1.31 In relation to clause 84, it is not apparent that matters such as whether an officer is acting in the performance or exercise of his or her powers, duties or functions under the Act, are matters *peculiarly* within the defendant's knowledge, or that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence (as it is not clear to the committee why the burden should fall on the officer who is acting in accordance with his or her duties to seek to avoid the commission of a criminal offence).

1.32 In addition, subclause 100(8) provides that an offence under subclause 100(6) is an offence of strict liability. 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*.²⁴ The explanatory memorandum provides no justification as to why the offence is subject to strict liability.

1.33 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 these instances. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant**

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

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

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

principles as set out in the *Guide to Framing Commonwealth Offences*; ²⁵ and

- a detailed justification from the Minister for the proposed application of strict liability to this offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.²⁶

Limitation on merits review²⁷

1.34 Clause 87 provides that an application for redress apply to the Operator to review a determination to approve, or not approve, the application. Subclause 88(3) provides that when reviewing the original determination, the reviewer may only have regard to the information and documents that were available to the person who made the original determination.

1.35 However, the default rule for merits review (such as reviewed by the Administrative Appeals Tribunal (AAT)) is that the reviewing body should be able to consider material that was not before the original decision-maker. The explanatory memorandum provides no justification as to why the review would be limited in this way. As the purpose of the scheme is to provide redress to abuse victims, it is not clear to the committee why an applicant should not be able to provide further material in support of their case on review. For example, it may be that further evidence becomes available between the time of the original application and the internal review, or material may have inadvertently not been included in the original application or not included because its relevance had not been properly understood at the time the original application was made. This is particularly relevant given the bill provides that a person may only make one application for redress under the scheme.²⁸

1.36 In addition, the bill only provides for internal review of decisions made under it. No provision has been made for a person affected by the decision to be entitled to seek external merits review before the AAT, or to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.²⁹ The explanatory memorandum

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

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

27 Clause 88. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

28 Clause 30.

29 In relation to judicial review, see the committee's comments in relation to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017, at pp 20-21 of this Digest.

states that limiting rights to internal review was made on the recommendation of the Independent Advisory Council on redress and that:

[t]he lower evidentiary thresholds under the Scheme and the broad discretion of the decision-makers mean that merits review and judicial review under the ADJR Act are not appropriate for decisions under the Scheme. The Scheme is to be supportive, survivor-focussed and non-legalistic and decisions will be made expeditiously.³⁰

1.37 However, AAT review is designed to be an alternative and less legalistic form of review than judicial review. It is therefore not clear to the committee why providing AAT review would be inconsistent with the listed objectives of the scheme. This is of particular concern to the committee as there is no legislative mechanism to ensure the quality of the persons to be appointed as decision-makers (either the original decision-makers or the decision-makers on review), see paragraphs [1.45] to [1.46] below.

1.38 The committee seeks the Minister's advice as to:

- **why an internal reviewer of the original determination will only be able to have regard to information and documents that were available to the person who made the original determination; and**
- **the justification for excluding external merits review for applicants dissatisfied with the original decision or decision on review, particularly in the context of the committee's concerns regarding the lack of any legislative guidance on the quality of the persons to be appointed as decision-makers.**

Reversal of legal burden of proof³¹

1.39 Clause 109(3) makes it an offence for a financial institution not to comply with a notice given to it by the Operator regarding the recovery of amounts. Clause 109(4) proposes introducing a defence to this offence, to provide that the offence does not apply if the institution proves it was incapable of complying with the notice. A legal burden of proof is proposed to be placed on the defendant, ensuring that the defendant would need to prove, on the balance of probabilities, that they were incapable of complying with the notice.

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

30 Explanatory memorandum, p. 7.

31 Subclause 109(4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

a defendant to disprove one or more elements of an offence, interferes with this common law right.

1.41 As the reversal of the legal burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of those affected being the paramount consideration. In this instance the explanatory memorandum gives no justification for the imposition of this legal burden.

1.42 As the explanatory materials do not address this issue, the committee requests the Minister's advice as to why it is proposed to reverse the legal burden of proof in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.³²

Broad delegation of administrative powers³³

1.43 Clause 120 provides that the Operator may delegate all or any of his or her powers or functions under the Act (other than in relation to making a determination on an application or review of the determination and in relation to the application of civil penalties) to 'an officer of the scheme'. An officer of the scheme is a person performing duties, or exercising powers or functions, under or in relation to the Act.³⁴ This would presumably apply to any APS employee within the relevant government department.

1.44 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. In this instance the explanatory memorandum provide no information about why these powers are proposed to be delegated to any level of officer.

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

33 Clause 120. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference

34 See clause 9.

1.45 Clause 120(3) also provides that the Operator may delegate his or her powers and functions which relate to whether an application for redress is to be approved (on the initial application or on review) to an 'independent decision-maker', who is not required to comply with any directions of the Operator. Clause 121 provides that the Operator may engage persons to be independent decision-makers, and the duties of public officials under the *Public Governance, Performance and Accountability Act 2013* apply to such persons. However, there is no legislative guidance as to the categories of persons that may be appointed as independent decision-makers and no requirement that they possess relevant skills, training or experience.

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

- **allow much of the Operator's powers and functions to be delegated to an APS employee at any level; and**
- **allow independent decision-makers to be appointed without any legislative guidance as to their skills, training or experience.**

Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017

Purpose	This bill seeks to provide for consequential amendments to be made to Commonwealth legislation for the purpose of the Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse
Portfolio	Social Services
Introduced	House of Representatives on 26 October 2017
Scrutiny principle	Standing Order 24(1)(a)(iii)

Exclusion of judicial review³⁵

1.47 This bill is consequential to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, which seeks to establish a redress scheme for survivors of institutional child sex abuse. This bill seeks to make decision made under the redress scheme exempt from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

1.48 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 also provides for the right to reasons in some circumstances. Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a justification for the exclusion. In this instance, the explanatory memorandum offers a number of reasons for exempting decisions made under the scheme from the ADJR Act, namely:

- to ensure a timely response to eligible survivors;
- to prevent undue administrative delay;
- that protections provided by the ADJR Act are unlikely to be required, as the 'reasonable likelihood' threshold means it more likely a person who has experienced institutional child sexual abuse will have access to redress;
- internal review is available under the scheme; and
- legal proceedings may risk re-traumatising an applicant.

³⁵ Schedule 3, item 1. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

1.49 However, the committee notes that as any judicial review application would be at the election of a person who is dissatisfied with a decision made under the scheme, it is unclear why any delays thereby created or the risk of re-traumatisation cannot be considered as part of a person's decision about whether to seek a judicial review. Nor is it clear why the fact that access to redress is determined by the reasonable likelihood standard or the provision of internal review are cogent reasons for the exclusion of judicial review. In light of the fact that judicial review of decisions made by the Operator (or delegate) will still be available under s 39B of the *Judiciary Act 1903*, it is therefore unclear why ADJR Act review is to be excluded. The committee considers, from a scrutiny perspective, the proliferation of exclusions from the ADJR Act should be avoided.

1.50 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding judicial review under the *Administrative Decisions (Judicial Review) Act 1977* of decisions made under the redress scheme.

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

<p>Purpose</p>	<p>This bill seeks to amend the <i>Fair Work (Registered Organisations) Act 2009</i> and the <i>Fair Work Act 2009</i> to:</p> <ul style="list-style-type: none"> • prohibit terms of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity; • require any term of a modern award or enterprise agreement that names a worker entitlement fund or insurance product to allow an employee to choose another fund or insurance product; • prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund for an industrial association; • prohibit any action with the intent to coerce an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme; • require registered organisations to adopt, and periodically review, financial management policies; • require registered organisations to keep credit card records and to report certain loans, grants and donations • require specific disclosure by registered organisations and employers of the financial benefits obtained by them and persons linked to them in connection with employee insurance products; and • introduce a range of new penalties to ensure compliance with financial management, disclosure and reporting requirements
<p>Portfolio</p>	<p>Employment</p>
<p>Introduced</p>	<p>House of Representatives on 19 October 2017</p>
<p>Scrutiny principles</p>	<p>Standing order 24(1)(a)(i),(ii) and (iii)</p>

Privacy³⁶

1.51 Currently section 237(4) of the *Fair Work (Registered Organisations) Act 2009* provides that a statement lodged with the Fair Work Commissioner, which details its loans, grants and donations, may be inspected by a member of the organisation concerned. The bill proposes amending the level of detail to be set out in such statements, including adding a requirement to include the name and address of the person to whom a grant or donation was made, or who made a grant or donation.³⁷ Proposed subsection 237(4A) would require the Commissioner, when allowing a member of a registered organisation to inspect such statements, to omit residential addresses and allows the omission of 'other personal information' at the discretion of the Commissioner.

1.52 The explanatory memorandum states these provisions give 'the Commissioner the necessary power to ensure that other personal or sensitive material can be redacted to protect the privacy of such information during an inspection.'³⁸ However, the committee notes that the Commissioner would not be obliged to omit such 'other personal information'; it is left to the Commissioner's discretion. The statement of compatibility acknowledges that this provision engages the right to privacy and states that it is necessary to ensure adequate financial transparency in relation to the affairs of registered organisations.³⁹ However, it does not explain why it is necessary to leave the protection of personal information to the discretion of the Commissioner, rather than making such protection a statutory requirement.

1.53 The committee therefore requests the Minister's advice as to why it is necessary and appropriate to leave the protection of personal information to the discretion of the Commissioner, rather than making this a statutory requirement.

Broad delegation of administrative powers⁴⁰

1.54 The bill seeks to place a number of obligations on the operator of a registered worker entitlement fund with respect to the fund's constitution and the provision of information.⁴¹ Proposed section 329MB seeks to make these obligations

36 Schedule 1, item 6. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

37 See Schedule 1, item 10.

38 Explanatory memorandum, p. 5.

39 Statement of compatibility, p. xiii.

40 Schedule 2, item 13, proposed section 329MB. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

41 See Schedule 2, item 13, proposed sections 329ME and 329MF.

subject to the infringement notice regime under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*. Proposed paragraph 329MB(2)(b) and subsection 329MB(3) would allow the Registered Organisations Commissioner (the Commissioner) to delegate the authority to issue infringement notices to any member of staff working for the Registered Organisations Commission (the Commission), which can be any APS level employee.⁴² In addition, proposed subsection (3) would allow the Commissioner to authorise any other person assisting the Commissioner, including employees of agencies, officers and employees of a State or Territory or of authorities of the Commonwealth or a State or Territory whose services are available to the Commissioner.

1.55 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.

1.56 In addition, the committee notes that the *Guide to Framing Commonwealth Offences* notes that the legitimacy of an infringement notice scheme depends on the existence of a properly managed process for the issuing of notices and that a common approach is to require that a person issuing the notice possess special attributes, qualifications or qualities and a provision that allows 'an APS employee' to issue a notice is likely to be inappropriate.⁴³

1.57 In this instance, the explanatory memorandum states that the delegation of functions with respect to issuing infringement notices will, in practice, be restricted to 'a small group of persons with particular expertise in the regulation of registered organisations and their associated entities.'⁴⁴ However, there is nothing in the bill that would limit the delegation of powers to persons with such appropriate expertise.

42 See section 329CA of the *Fair Work (Registered Organisations) Act 2009*.

43 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 60.

44 Explanatory Memorandum, p. 27.

1.58 The committee considers it may be appropriate to amend the bill to require persons authorised to issue infringement notices be confined to officers that hold special attributes, qualifications or qualities, and seeks the Minister's advice in relation to this.

Procedural fairness⁴⁵

1.59 Proposed Subdivision B of Division 4 of proposed Part 3C sets out a deregistration process for non-compliant registered worker entitlement funds. Under proposed section 329MG, where the Commissioner proposes to deregister a fund he or she must give written notice to the fund operator setting out the grounds for and proposed date of deregistration, and inviting submissions from the operator. In deciding to exercise this power, the Commissioner must consider the seriousness of non-compliance, any previous non-compliance with ongoing conditions, whether deregistration would be in the best interests of fund members and whether it may be more appropriate to exercise powers other than deregistration in the circumstances.

1.60 Proposed section 329MK states that this Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Commissioner's decision to deregister a registered worker entitlement fund.

1.61 The natural justice hearing rule enables the courts to consider whether a hearing provided prior to an adverse decision is fair in the circumstances of the case, including in the statutory context of the power being exercised. If the natural justice hearing rule is excluded, the only available procedural fairness requirements would be those set out in the Subdivision itself. Given that what constitutes a fair hearing is necessarily dependent on the context of the inquiry, the consequence could be that a fund may be deregistered in circumstances where it has not been afforded a fair opportunity to put its case. The explanatory memorandum provides no explanation as to why it is necessary to limit procedural fairness requirements in this way.

1.62 The committee requests the Minister's advice as to why it is necessary and appropriate to exclude aspects of the natural justice hearing rule in relation to the deregistration process.

45 Schedule 2, item 13, proposed section 329MK. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

Exclusion of merits review⁴⁶

1.63 Proposed section 329NI lists a number of decisions made by the Commissioner that are reviewable by the Administrative Appeals Tribunal (AAT). However, this does not include decisions taken under proposed section 329MA. Proposed section 329MA seeks to provide the Commissioner with the power to direct the operator of a registered worker entitlement fund to take, or stop taking, one or more actions. As it is not listed in proposed section 329NI, such decisions are not subject to any form of merits review. The explanatory memorandum justifies this exclusion on the grounds that the decisions taken under proposed section 329MA are of a law enforcement nature.⁴⁷ However, it is not clear to the committee that decisions made under proposed section 329MA are akin to law enforcement decisions. The decision the Commissioner takes is based on whether a condition of registration is being breached and the Commissioner must be satisfied that issuing a notice would be in the best interests of the fund's contributors or members. It is not clear to the committee that these determinations are of a law enforcement nature.

1.64 The committee requests the Minister's more detailed explanation of why decisions taken under proposed section 329MA are considered to be of a law enforcement nature and therefore appropriate for excluding merits review.

Reversal of evidential burden of proof⁴⁸

1.65 Proposed section 329NF seeks to provide the Commissioner with the power to require a person to produce documents or information relevant to determining whether a registered worker entitlement fund has complied or is complying with its ongoing conditions of registration, or with requirements concerning final reports following deregistration.

1.66 Proposed subsection 329NF(4) seeks to make a failure to comply with a notice from the Commissioner an offence subject to a maximum punishment of 30 penalty units. Proposed subsection 329NF(5) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the person has a reasonable excuse.

1.67 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.

46 Schedule 2, item 13, proposed section 329NI. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

47 Explanatory memorandum, p. 31.

48 Schedule 2, item 13, proposed section 329NF. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

1.68 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.

1.69 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.

1.70 In this instance, the explanatory memorandum describes proposed section 329NF as providing for a civil penalty and so does not address the question of why it is proposed to reverse the burden of proof.⁴⁹ However, proposed section 329NF clearly appears to impose a criminal, not civil, penalty to a person who fails to comply with a notice requiring the person to give or produce certain information or documents.⁵⁰

1.71 As the explanatory materials do not adequately address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.⁵¹ The committee also requests the Minister's clarification as to whether it is intended that this provision be subject to a civil or criminal penalty.

49 Explanatory memorandum, p. 30.

50 See paragraph 4D(1)(b) of the *Crimes Act 1914* which provides that a penalty set out at the foot of any provision of an Act, where the provision does not expressly create an offence, indicates that contravention of the provision is an offence against the provision.

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

Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

Purpose	<p>This bill seeks to amend various Acts in relation to the financial sector by amending:</p> <ul style="list-style-type: none"> • Australian Prudential Regulation Authority's (APRA) statutory and judicial management regimes; • APRA's existing directions powers; • APRA's ability to implement a transfer under the <i>Financial Sector (Business Transfer and Group Restructure) Act 1999</i>; • APRA's ability to respond when an Australian branch of a foreign regulated entity (foreign branch) may be in distress; • stay provisions and ensure that the exercise of APRA's powers does not trigger certain rights in the contracts of relevant entities within the same group; • the operation of the Financial Claims Scheme; • APRA's powers in relation to the wind-up or external administration of regulated entities; • APRA's powers to make appropriate prudential standards on resolution planning and • conversion and write-off of capital instruments to which the conversion and write-off provisions in APRA's prudential standards apply
Portfolio	Treasury
Introduced	House of Representatives on 19 October 2017
Scrutiny principle	Standing order 24(1)(a)(i)

Reversal of evidential burden of proof⁵²

1.72 The bill seeks to provide the Australian Prudential Regulation Authority (APRA) with the power to issue certain directions and to determine that that direction is covered by a secrecy provision. Proposed sections 11CI, 109A and 231A make it an offence if certain persons disclose information that reveals the fact that

52 Schedule 1, item 56, proposed subsection 11CI(3), Schedule 2, item 135, proposed subsection 109A(3); and Schedule 3, item 102, proposed subsection 231A(3). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

the direction was made by APRA. Each proposed provision provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the disclosure is:

- information that has already been lawfully made available to the public;
- permitted by APRA as set out in the determination;
- provided to a legal representative for the purpose of seeking legal advice;
- authorised by the secrecy provisions in the *Australian Prudential Regulation Authority Act 1998*;
- made in circumstances specified in the regulations;
- for the same purpose as set out above (but disclosed by a different person); or
- required by an order or direction of a court or tribunal.

1.73 Each proposed offence carries a maximum penalty of up to two years imprisonment.

1.74 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.

1.75 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.

1.76 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.

1.77 In this instance, the explanatory memorandum states that the evidentiary burden rests on the person bound by the secrecy provision 'because they are best positioned to provide the evidence as it is within their knowledge'.⁵³ However, the committee notes that the *Guide to Framing Commonwealth Offences*⁵⁴ 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

53 Explanatory memorandum, p. 85.

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

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁵⁵

1.78 The committee notes that this requires more than just the defendant knowing that a certain fact exists, it must be a matter that is *peculiarly* within their knowledge. As such, it is not clear to the committee that matters such as whether the disclosure has been permitted by APRA, authorised by relevant legislative provisions or required by an order or direction of a court or tribunal, would be matters peculiarly within the defendant's knowledge. These matters appear to be matters more appropriate to be included as an element of the offence.

1.79 The committee requests the Minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences (which reverse the evidential burden of proof). 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*.⁵⁶

Removal of cause of action⁵⁷

1.80 A number of provisions in the bill provide that a person cannot begin or continue a proceeding in a court or tribunal in respect of certain body corporates if a statutory manager is in control of the body corporate's business. This prohibition does not apply if the court or tribunal grants leave for the proceedings to be begun or continued on the ground that the person would be caused hardship if leave were not granted. This provision thereby removes a person's right to bring a cause of action against certain body corporates.

1.81 The explanatory memorandum explains that when a statutory manager is appointed to an ADI or insurer, or a judicial manager is appointed to an insurer, it is important that they not be subjected to a multiplicity of litigious and enforcement actions and so these provisions 'assist with one of the primary aims of statutory or judicial management, which is to stabilise the relevant entity and prepare for implementation of the resolution, by ensuring this can be done without the

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

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

57 Schedule 1, item 190, proposed section 15B; Schedule 2, item 33, proposed section 62P; item 58, proposed section 62ZOR; Schedule 3, item 28, proposed section 161; item 52, proposed section 179AR. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

constraints of creditor or other third party actions that could otherwise impede the orderly nature of a resolution'.⁵⁸

1.82 The committee notes the explanation as to why it is necessary to remove the right of creditors and third parties to bring a cause of action against certain body corporates, noting also that a court or tribunal has the discretion to grant leave to begin or continue proceedings in certain circumstances. However, it is not clear to the committee whether the rights of creditors and third parties would be adversely affected by these provisions even once a statutory manager is no longer in control of the body corporate. For example, it is unclear whether a person could lose their right to bring an action against a body corporate because of statutory time limits having passed while the body corporate's business was under the control of a statutory manager.

1.83 The committee therefore seeks the Minister's advice as to whether creditors and third parties would be adversely affected by the bar on beginning or continuing court or tribunal proceedings at the point in time that the statutory manager is no longer in control of the body corporate's business.

Privilege against self-incrimination⁵⁹

1.84 Proposed sections 62ZOD and 179AD provide that an Insurance Act and Life Insurance Act statutory manager may require a person to give any information relating to a body corporate that the manager requires. Subsection 62ZOD(4) and 179AD(4) provides that a person is not excused from complying with a requirement to give information on the ground that doing so would tend to incriminate the individual or make the individual liable to a penalty. This provision therefore overrides the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.⁶⁰

1.85 The committee recognises there may be certain circumstances in which the privilege can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty.

58 Explanatory memorandum, p. 43.

59 Schedule 2, item 58, proposed section 62ZOD and Schedule 3, item 52, proposed section 179AD. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

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

1.86 A use immunity is included in proposed subsections 62ZOD(5) and 179AD(5) as it provides that information given in compliance with the requirement is not admissible in evidence against the individual in a criminal proceeding or a proceeding for the imposition of a penalty, other than a proceeding in respect of the falsity of the information. However, this does not include a derivative use immunity, meaning that any information obtained as an indirect consequence of the production of the information or documents, may be admissible in evidence against the person.

1.87 The explanatory memorandum does not appear to provide any explanation of these provisions, and while the statement of compatibility gives some justification in relation to the abrogation of the privilege against self-incrimination, this appears to reference other provisions in the bill.⁶¹ It also does not explain why a derivative use immunity is not included.

1.88 The committee requests the Minister's advice as to why it is proposed to abrogate the privilege against self-incrimination in these two instances, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences*.⁶²

61 Statement of compatibility, pp 224-225.

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

Imported Food Control Amendment (Country of Origin) Bill 2017

Purpose	This bill seeks to amend the <i>Imported Food Control Act 1992</i> to incorporate the Country of Origin Food Labelling Information Standard 2016 by reference
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 19 October 2017

The committee has no comment on this bill.

Migration Amendment (Skilling Australians Fund) Bill 2017

Purpose	This bill seeks to amend the <i>Migration Act 1958</i> to: <ul style="list-style-type: none"> • provide for the collection of a nomination training contribution charge from employers nominating overseas skilled workers; • allow nominations to be accepted from persons that have applied to be an approved sponsor, or have entered into negotiations for a work agreement; and • allow the Minister to determine, by legislative instrument, the manner in which labour market testing in relation to a nominated position must be undertaken, and the kinds of evidence that must accompany a nomination
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 18 October 2017
Scrutiny principle	Standing Order 24(1)(a)(iv)

Penalty in delegated legislation⁶³

1.89 Proposed section 140ZN sets out what may be prescribed in the regulations. Paragraph (e) provides that the regulations may make provision for, or in relation to, the payment of a penalty in relation to the underpayment of a nomination training contribution charge.

1.90 The bill sets no upper limit on the level of the penalty. The explanatory memorandum states that the penalty may be a prescribed fee that reflects the cost to the Department of Immigration and Border Protection of administering multiple payments; or may take the form of an interest payment to reflect the loss of interest revenue resulting from the underpayment.⁶⁴ However, there is nothing in the legislation that would limit the amount of the penalty prescribed in this way.

1.91 The committee seeks the Minister's advice as to why the bill proposes delegating to the regulations the power to impose a penalty in relation to the underpayment of a nomination training contribution charge without setting an upper limit in relation to the penalty.

63 Schedule 1, item 12, proposed paragraph 140ZN(e). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

64 Explanatory memorandum p. 7.

Migration (Skilling Australians Fund) Charges Bill 2017

Purpose	This bill seeks to impose a nomination training contribution charge payable by persons who are liable to pay the charge under the <i>Migration Act 1958</i> and the Migration Regulations 1994
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 18 October 2017

The committee has no comment on this bill.

National Health Amendment (Pharmaceutical Benefits—Budget and Other Measures) Bill 2017

Purpose	This bill seeks to amend the <i>National Health Act 1953</i> to: <ul style="list-style-type: none"> • making price variations for a number of drugs listed on the PBS; • introduce Ministerial discretion regarding the application of statutory price reductions (SPR) in certain circumstances; • provide new circumstances whereby a new presentation of a brand of pharmaceutical item may be listed, without triggering first new brand SPRs; • remove the cessation provisions for the Australian Community Pharmacy Authority and the pharmacy location rules; and • make minor amendments to price disclosure arrangements
Portfolio	Health
Introduced	House of Representatives on 18 October 2017
Scrutiny principles	Standing order 24(1)(a)(iv) and (v)

Broad instrument making power

Instruments not subject to disallowance⁶⁵

1.92 The bill seeks to make amendments to Part VII of the *National Health Act 1953* (the Act), which regulates the Pharmaceutical Benefits Scheme (PBS). These amendments include a number of alterations to the size, timing and application of statutory price reductions currently contained in the Act. The bill contains a number of provisions that would give the Minister the power to determine not to apply, or to reduce, a statutory price reduction to brands of pharmaceuticals in certain circumstances.⁶⁶ The bill would also allow the Minister to determine how brands are to be categorised under the PBS, and therefore how statutory price reductions would apply to those brands, in certain circumstances.⁶⁷

65 Schedule 1, items 14, 24, 34 and 38; Schedule 2, item 11; Schedule 4, items 4 and 7; and Schedule 6, item 1. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

66 Schedule 1, items 14, 24, 34 and 38; and Schedule 2, item 11.

67 Schedule 4, items 4 and 7; and Schedule 6, item 1.

1.93 The explanatory memorandum states that the bill seeks to introduce ministerial discretion with respect to the application of statutory price reductions. This discretion would apply to medicines that have already been subject to price reductions since 1 January 2016; first new brand medicines and brands subject to a flow-on reduction; and medicines subject to anniversary price reductions.⁶⁸ However, the explanatory memorandum does not explain why there is a need to exempt medicines from statutory price reductions in certain circumstances, nor the need to leave the application of such exemptions to the discretion of the Minister rather than setting out the criteria for applying an exemption in the bill.

1.94 In granting this discretionary power to the Minister the bill provides that the Minister may make the determinations by 'written instrument' or in some cases, by 'notifiable instrument'. Neither of these categories of instrument are subject to disallowance and written instruments are not required to be registered on the Federal Register of Legislation. The explanatory memorandum does not provide a justification for allowing ministerial determinations to be made by written or notifiable instruments.

1.95 The committee's view is that a sound justification should be provided where a bill seeks to allow the Minister discretion to determine significant matters. The committee also considers that a sound justification should be provided when it is proposed to allow such ministerial discretion to be exercised by way of written or notifiable instruments, as such instruments, which are not disallowable, would be subject to no parliamentary oversight.

1.96 The committee requests the Minister's advice as to why the bill proposes to provide the Minister with a broad discretionary power to apply statutory price reductions and to do so by way of written or notifiable instrument (noting that such instruments are not subject to disallowance).

68 Explanatory memorandum, p. 3.

National Integrity Commission Bill 2017

Purpose	This bill seeks to establish a National Integrity Commission for: <ul style="list-style-type: none"> • the investigation and prevention of misconduct and corruption in all Commonwealth departments, agencies, federal parliamentarians and their staff; • the investigation and prevention of corruption in the Australian Federal Police and the Australian Crimes Commission; and • providing independent advice to Ministers and parliamentarians on conduct, ethics and matters of proprietary
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 23 October 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Fair hearing⁶⁹

1.97 The bill provides that a National Integrity Commissioner (Commissioner) may conduct an investigation into whether a public official has engaged or may engage in corrupt conduct. Clause 33 provides that after completing an investigation the Commissioner must prepare a report of the investigation. Clause 31 provides that the Commissioner must not disclose findings or opinions critical of an agency or a person in a report, unless the Commissioner has first given the head of the agency or the person an opportunity to be heard.

1.98 However, subclause 31(2) states that a hearing is not required if the Commissioner is satisfied that a person:

- may have committed a criminal offence, contravened a civil penalty provision, could be subject to disciplinary proceedings or whose conduct could constitute grounds for the termination of their employment; and
- affording the statutory procedural fairness requirements may either compromise the investigation of a corruption issue or an action taken as a result of such an investigation.

1.99 In effect, in particular circumstances the bill attempts to exclude an obligation to give a person a fair hearing prior to the completion of a report. Yet

⁶⁹ Clause 31. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

subclause 33(3) specifically provides that a report may recommend that a person's employment be terminated. This raises questions as to whether this provision unduly trespasses on a personal right, given that a fair opportunity to be heard is thought to be a fundamental common law right.⁷⁰

1.100 The explanatory memorandum does not justify the exclusion of a fair hearing, but merely repeats the terms of the bill.⁷¹ The committee notes that although the Commissioner *may* decide to exclude from its report 'sensitive information' where it is desirable in the circumstances⁷² there is no requirement to do so in relation to critical findings or opinions which are contained in the report in relation to persons who have not been afforded a fair hearing. In addition, although sensitive information which is excluded from the report must be included in a supplementary report (which sets out the information and the reasons for excluding it), only the primary report must be tabled in Parliament.⁷³ However, both the report and any supplementary report must be given to the Prime Minister.

1.101 Given the capacity of findings and opinions mentioned in subclause 31(2) to adversely affect a person's reputation⁷⁴ and the characterisation of the right to be heard as a fundamental common law right, the bill may, without further clarification, give rise to considerable interpretive difficulties in the courts. For example, it may be that a court could imply a right to be heard prior to the Prime Minister tabling a report in Parliament in relation to any critical findings or opinions that had not been disclosed pursuant to subclause 31(2) and which was not excluded from the report as 'sensitive' information.

1.102 The committee accepts that the need to preserve the efficacy of any continuing or future investigations in relation to corruption is clearly a legitimate public interest, but it is unclear whether there are sufficient protections in place to protect an individual who is not afforded a right to be heard.

1.103 In addition, paragraph 31(7)(b) provides that a person against whom the Commissioner intends to make a critical finding or opinion, may appear before the Commissioner in person or may, with the Commissioner's approval, be represented by another person. This therefore gives the Commissioner the power to refuse to approve that a person may be represented by another person, including their lawyer. Given the nature of the interests and rights at stake and the potential complexity of the issues which may be raised, there may be circumstances where a fair hearing may be compromised if a person is refused permission to be represented.

70 See eg, *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 [14-15].

71 Explanatory memorandum, note on clause 33.

72 See subclause 33(4).

73 See clause 157.

74 See *Ainsworth v Criminal Justice Commission (Qld)* (1992) 175 CLR 564.

1.104 The committee therefore requests the Member's justification for:

- **excluding the right to a hearing (in subclause 31(2)), and whether additional protections can be included for an individual who is not afforded a right to be heard; and**
- **giving the National Integrity Commissioner the power to approve whether a person, against whom the Commissioner intends to make a critical finding or opinion, may be represented in a hearing before the Commissioner rather than giving the person the right to be represented (in subclause 31(7)).**

Legal professional privilege⁷⁵

1.105 Clause 43 provides that, for the purposes of investigating a corruption issue, the Commissioner may request that a person give specified information or produce specified documents or things. Subclause 43(5) states that for the purposes of clauses 45 to 48, the power to request or require a person to produce information and documents includes the power to request or require the production of materials that are subject to legal professional privilege. Although clauses 46 and 47 indicate a person may refuse or fail to provide information on the ground of legal professional privilege, there are a number of limitations and the Commissioner may, after considering materials over which privilege has been claimed, determine whether to accept or reject the claim. In relation to the production of a document or thing, a person may refuse a request if a court has found the document or thing to be subject to legal professional privilege.⁷⁶ If the Commissioner accepts the claim of privilege they must 'disregard' the material for the purposes of any report or decision he or she makes.⁷⁷ However, given that the Commissioner would have received the material by this point, it is unclear how well this prohibition in relation to any decision would work in practice. Similar issues arise in relation to clauses 64, 65 and 66.

1.106 The committee has long taken the view that legal professional privilege is a fundamental principle of the common law, and will closely examine legislation which removes or diminishes this right. The explanatory memorandum is silent on the extent to which the legislation is intended to modify the applicable common law principles and the justification for these modifications.⁷⁸

75 Clauses 43 and 45–48 and clauses 64–66. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

76 Subparagraph 47(1)(a).

77 Subparagraph 47(4).

78 Explanatory memorandum, notes on clauses 46, 47 and 48.

1.107 The committee requests the Member's justification as to why the bill seeks to limit the application of legal professional privilege.

Strict liability offences

Reverse evidential burden of proof⁷⁹

1.108 Clause 48 creates two offences for a person to refuse or fail to comply with a request to produce documents or give information if the Commissioner has decided to reject a claim that the information or document is subject to legal professional privilege. The offences are punishable by a fine of \$1000 or imprisonment for 6 months. The offences are stated to be subject to strict liability.⁸⁰ Similar issues arise in relation to clause 66, with subclause 66(3) attaching strict liability to the relevant offences, which are also punishable by a fine of \$1000 or imprisonment for 6 months. The explanatory memorandum provides no justification as to why the offences are subject to strict liability.

1.109 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*.⁸¹

1.110 In addition, 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.⁸² In this instance, the bill proposes applying strict liability to offences that are subject to up to 6 months imprisonment. The committee reiterates

79 Clauses 48 and 66. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

80 Subclause 48(3).

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

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

its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

1.111 In addition, subclauses 48(4) and (6) and subclauses 66(4) and (6) also introduce a number of exceptions (offence-specific defences) to these strict liability offences. Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.112 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.

1.113 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 clauses 48 and 66 have not been addressed in the explanatory materials.

1.114 As the explanatory materials do not address these issues, the committee requests the Member's justification:

- **for each proposed strict liability offence; and**
- **for why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in these instances.**

1.115 The committee's consideration of the appropriateness of a provision which imposes strict liability or reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.⁸³

Privilege against self-incrimination⁸⁴

1.116 Clauses 49 and 67 of the bill provides that the privilege against self-incrimination is abrogated in relation to requests for information, documents or things made by the Commissioner when investigating a corruption issue, or from requirements to answer a question or produce a document or thing when

83 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25 and 50-52.

84 Clauses 49 and 67. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

summoned to attend a hearing. The privilege is not completely abrogated as it is subject to a 'use immunity', which means that self-incriminatory disclosures cannot be used against the person who makes the disclosure in criminal proceedings or other proceedings for the imposition or recovery of a penalty. However, this use immunity only applies if a person, prior to producing information or documents or things, claims that doing so may tend to incriminate them or expose them to a penalty. The use immunity is stated as operating only as a 'direct' use immunity (i.e. applying in relation to information, documents or things provided as a result of clause 49) and does not amount to a 'derivative' use immunity, which would prevent the use of the compelled information in the gathering of other evidence against the person. In addition, subclause 49(4) sets out a number of proceedings in which the use immunity will not be available, including a number of criminal proceedings and, in the case of a Commonwealth employee, disciplinary proceedings.

1.117 The explanatory memorandum states that the abrogation of the privilege against self-incrimination, is necessary so as to ensure that the Commissioner can be given access to information, documents and things relevant to an investigation into a corruption issue. It also states that the inclusion of a use immunity ensures that a person's compliance with a request for information, documents or things under clause 43 cannot be used against them in criminal proceedings or proceedings for the recovery of a penalty, except in those proceedings specified in subclause 49(4).⁸⁵

1.118 The committee accepts that the privilege against self-incrimination may be overridden where there is a compelling justification for doing so. In general, however, the committee considers that any justification for abrogating the privilege will be more likely to be considered appropriate if accompanied by both a use and derivative use immunity (providing that the information or documents produced or answers given, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings). In this case, the committee notes that the bill includes a use immunity but not a derivative use immunity (meaning anything obtained as a consequence of the requirement to produce a document or answer a question can be used against the person in criminal proceedings). In addition, a person is required to, before giving the information, documents or things, claim that doing so may incriminate them. This has the potential to mean the use immunity could become unavailable simply because a person has not had adequate legal advice prior to producing the information, documents or things and therefore was not aware of the need to make a claim of self-incrimination prior to providing the information.

1.119 To assist its consideration of whether the proposed abrogation of the privilege against self-incrimination is justified, the committee requests the

85 Explanatory memorandum, note on clause 49.

Member's advice on the following matters, with particular reference to the matters outlined in the *Guide to Framing Commonwealth Offences*.⁸⁶

- **why the use immunity will only be available to persons who make a prior claim that compliance may tend to incriminate or expose them to a penalty;**
- **why a derivative use immunity has not been included; and**
- **how each of the proposed exceptions to the use immunity is justified.**

Search and entry powers⁸⁷

1.120 Clause 71 gives an 'authorised officer' the authority to execute an arrest warrant and, if the officer believes on reasonable grounds that a person is on any premises, to break and enter into those premises. Authorised officers may also apply for search warrants (including ordinary and frisk searches of the person) and carry out such searches.⁸⁸ As set out in clause 110, the National Integrity Commissioner may appoint a person to be an authorised officer if they are either a staff member of the National Integrity Commission whom the Commissioner considers has suitable qualifications or experience, or a member of the Australian Federal Police (AFP).

1.121 Although it is possible to identify circumstances in which an appropriate person may not be a current member of the AFP (for example, if they were a former member or a member of a State or Territory police force) the committee is concerned that 'police powers' such as the powers of arrest and the power to conduct personal searches may be conducted by persons other than sworn police officers. The explanatory memorandum notes that it is essential that authorised officers are 'experienced, diligent and trustworthy' because they will be given powers to arrest and to apply for and execute search warrants.⁸⁹ However, the explanatory memorandum does not explain why it is appropriate to allow these powers to be exercised by persons other than police officers, nor does it explain why it is not possible to specify what constitutes 'suitable qualifications or experience' in the bill, rather than this being left to the discretion of the Commissioner.

1.122 Clause 78 also sets out conditions under which an authorised officer may apply for a number of different search warrants. Subclause 78(4) seeks to allow an

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

87 Clauses 71. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

88 Clauses 78-87.

89 Explanatory memorandum, note on clause 110.

authorised officer to apply for a warrant to carry out 'an ordinary search or a frisk search of a person' if they have reasonable grounds for suspecting the person possesses or will possess in the next 72 hours any evidential material and for believing the material might be concealed, lost, mutilated or destroyed if the person was served with a summons.

1.123 The committee takes the view that any new powers to search persons require strong justification, a position that is also taken by the *Guide to Framing Commonwealth Offences*.⁹⁰ While there may be circumstances in which the granting of new powers to search persons can be justified, the committee expects that the reasons for any such proposal would be addressed in detail in the explanatory memorandum. In this instance, the explanatory memorandum provides no justification as to the need to provide personal search powers to authorised officers.

1.124 The committee considers it may be appropriate to amend the bill to limit the exercise of search and arrest powers to police officers, or, at a minimum, to include greater legislative guidance on what constitutes 'suitable qualifications or experience' with respect to appointing a person as an authorised officer, and seeks the Member's advice in relation to this.

1.125 The committee also requests the Member's justification for providing authorised officers with the power to apply for a warrant to carry out an ordinary or frisk search of a person, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.⁹¹

90 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 102–3.

91 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 102–3.

Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Proceeds of Crime Act 2002</i> (the Act) to:</p> <ul style="list-style-type: none"> align the Commonwealth unexplained wealth regime with other types of orders in the Act to ensure that it covers situations in which wealth is 'derived or realised, directly or indirectly' from certain offences; clarify that property becomes 'proceeds' or an 'instrument' of an offence under the Act when 'proceeds' or an 'instrument' are used to improve the property or discharge an encumbrance security or liability incurred in relation to the property; and clarify that property or wealth will only be 'lawfully acquired' in situations where the property or wealth is not 'proceeds' or an 'instrument' of an offence
Portfolio	Justice
Introduced	House of Representatives on 18 October 2017
Scrutiny principle	Standing order 24(1)(a)(i)

Retrospective application⁹²

1.126 The bill seeks to amend the *Proceeds of Crime Act 2002* (POC Act) to provide that property will be considered to become 'proceeds' or an 'instrument' (and therefore be liable to being restrained or forfeited under the POC Act) where proceeds or instruments of crime are used to make improvements on property, service mortgage repayments on property and/or service loans taken out in relation to property. It also seeks to provide that wealth or property will only be 'lawfully acquired' (and therefore not liable to restraint, freezing or forfeiture) in situations where property or wealth is not 'proceeds' or an 'instrument' of an offence, to seek to ensure a court examines the origins of property or wealth used to discharge securities or encumbrances or to make improvements to property, as well as situations where property may be gifted to another person.

1.127 The POC Act also currently requires a court to make an 'unexplained wealth'⁹³ order where the court is not satisfied that the whole or any part of the

92 Schedule 1, item 14. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

person's wealth was not 'derived from' one or more relevant offences.⁹⁴ The bill seeks to amend the POC Act so that it additionally covers wealth that is 'derived or realised, directly or indirectly' from certain offences.

1.128 Item 14 of the bill seeks to make these amendments apply in relation to certain property derived, realised, acquired or allegedly tainted *before* or after commencement and to offences committed *before* or after commencement. This applies the amendments made in the bill retrospectively.

1.129 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.130 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.131 In this instance, the explanatory memorandum notes that the provisions apply retrospectively but states that this is necessary to ensure that relevant orders 'are not frustrated by requiring law enforcement agencies to obtain evidence of, and prove, the precise point in time at which certain property or wealth was derived, acquired or became tainted'.⁹⁵ The explanatory memorandum gives examples of why such a requirement would be onerous and practically impossible to satisfy in complex cases of fraud or money laundering. It also suggests that if the amendments were only to apply prospectively and a proceeds of crime authority cannot establish the date that property was acquired or a particular payment was made, a court could rely on existing case law to determine the question, which would not be consistent with what the bill seeks to achieve.⁹⁶

1.132 The committee notes that it has previously raised concerns that the POC Act appears to trespass on the rights of persons who have neither been charged with, nor convicted of, any wrong-doing.⁹⁷ In this context, retrospectively applying amendments which widen the scope of the property that can be restrained, frozen or forfeited, raises particular scrutiny concerns. The committee has particular scrutiny concerns that part of the intention behind retrospectively applying these

93 'Unexplained wealth' refers to an amount that is the difference between a person's total wealth and the wealth shown to have been derived lawfully: see section 179E(2) of the Act.

94 See section 179E(1) of the POC Act.

95 Explanatory memorandum, pp 14-15.

96 Explanatory memorandum, p. 15.

97 See Scrutiny of Bills committee, *Alert Digest 14 of 2001*, 13.

amendments is to bypass current judicial case law which has applied the law as it currently stands, noting the effect this may have on individuals relying on the current interpretation of the existing law.⁹⁸

1.133 The committee reiterates its long-standing scrutiny concern that provisions that apply retrospectively challenge a basic value of the rule of law that, in general, laws should only operate prospectively, not retrospectively. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of retrospectively applying amendments which widen the scope of the property that can be restrained, frozen or forfeited.

98 Explanatory memorandum, p. 15.

Renewable Energy Legislation Amendment (Supporting Renewable Communities) Bill 2017

Purpose	<p>This bill seeks to amend two Acts in relation to renewable energy to:</p> <ul style="list-style-type: none"> • amend the functions of the Australian Renewable Energy Agency (ARENA) to allow for the funding of planning, development or implementation of community energy projects; • clarify that ARENA has a role in collecting, analysing, interpreting and disseminating information and knowledge on community energy models and advising the Minister on these matters; and • amend the functions of the Clean Energy Finance Corporation to allow investments in community joint partnerships, or other community energy models to support sector development
Portfolio	Ms Cathy McGowan
Introduced	House of Representatives on 16 October 2017

The committee has no comment on this bill.

Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

Purpose	This bill seeks to amend the <i>Banking Act 1959</i> to establish the Banking Executive Accountability Regime
Portfolio	Treasury
Introduced	House of Representatives on 19 October 2017
Scrutiny principles	Standing order 24(1)(a)(i)

Reversal of evidential burden of proof⁹⁹

1.134 Subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* currently makes it an offence for a person who is or has been an officer to disclose, directly or indirectly, protected information or documents to any person or to a court.¹⁰⁰ The offence carries a maximum penalty of imprisonment for two years.

1.135 Item 5 of Schedule 1 of the bill seeks to introduce three exceptions (offence-specific defences) to this offence, stating that the offence does not apply if the protected information:

- is disclosed to an authorised deposit-taking institution (ADI) and is contained in the register of accountable persons kept by the Australian Prudential Regulation Authority (APRA);¹⁰¹
- is disclosed to an individual, contains only personal information about that individual, and is information contained in the register of accountable persons;¹⁰² or
- is disclosed by APRA and discloses whether a person is disqualified from acting as an accountable person, or the reasons for such a decision.¹⁰³

99 Schedule 1, item 5, proposed new subsections (7D), (7E) and (7F). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

100 A number of existing offence-specific defences to this offence are set out in the following subsections of section 56 of the *Australian Prudential Regulation Authority Act 1998*: (3), (4), (5), (5AA), (5A), (5B), (5C), (6), (7), (7A), (7B) and (7C).

101 Schedule 1, item 5, proposed subsection (7D);

102 Schedule 1, item 5, proposed subsection (7E).

103 Schedule 1, item 5, proposed subsection (7F).

1.136 The explanatory memorandum states that these provisions would allow APRA to publicly disclose information about a decision it has taken to disqualify a person under the Banking Executive Accountability Regime.¹⁰⁴

1.137 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.

1.138 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.

1.139 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 subsections (7D), (7E) and (7F) have not been addressed in the explanatory materials.

1.140 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 it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.¹⁰⁵

Privilege against self-incrimination¹⁰⁶

1.141 Subsection 52F(1) of the Act currently provides that a person is not excused from providing information to APRA under the Act or the *Financial Sector (Collection of Data) Act 2001* on the ground that 'doing so would tend to incriminate the person or make the person liable to a penalty.' This provision therefore overrides the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material which may tend to

104 Explanatory memorandum, p. 38.

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

106 Schedule 2, items 2 to 6. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

incriminate himself or herself.¹⁰⁷ Item 2 of Schedule 2 seeks to expand the scope of this existing abrogation of the privilege against self-incrimination by introducing additional requirements to produce a book, account or document or to sign a record.

1.142 Subsection 52F(2) provides a use immunity with respect to such self-incriminating information. It states that, in the case of individuals, the information provided 'is not admissible in evidence against the individual in criminal proceedings or in proceedings for the imposition of a penalty, other than proceedings in respect of the falsity of the information'. Items 3 to 5 seek to amend the terms of the corresponding use immunity to cover the expanded range of requirements (of producing a book, account or document or signing a record).

1.143 The committee recognises there may be certain circumstances in which the privilege against self-incrimination can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. The committee will also consider the extent to which the use of self-incriminating evidence is limited by use or derivative use immunity provisions.¹⁰⁸ The committee notes that section 52F does not contain a derivative use immunity (meaning anything obtained as a consequence of the requirement to produce a document or answer a question can be used against the person in criminal proceedings) in its current form and that the proposed amendments would not introduce such an immunity.

1.144 The statement of compatibility gives a justification for why it is necessary to abrogate the privilege against self-incrimination, noting that the information which would be obtained by APRA is critical in performing its regulatory functions and this material and evidence is likely to only be available from certain individuals.¹⁰⁹ The explanatory memorandum acknowledges that a use immunity has been provided but no derivative use immunity, which means that the book, account or documents, or the signed records can be used to gather other evidence against that person. However, it states that it is appropriate not to limit the use of the information, book, account or documents provided, or of the signed record of an examination, because

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

108 A use immunity generally provides that the relevant information or documents produced in response to the statutory requirement will not be admissible in evidence against the person that produced it, in most proceedings. A derivative use immunity generally provides that anything obtained as a direct or indirect consequence of the production of the information or documents will not be admissible in evidence against the person that produced it, in most proceedings.

109 Explanatory memorandum, p. 79.

doing so would 'significantly limit APRA's ability to regulate the Banking Act and address matters related to prudential risk.'¹¹⁰

1.145 However, it is not clear to the committee as to why the introduction of a derivative use immunity would undermine APRA's ability to perform its regulatory functions.

1.146 The committee also notes that the use immunity under subsection 52F(2) of the Act is only available if, before giving the information, the person claims that giving the information might tend to incriminate them or make them liable to a penalty'.¹¹¹ As noted above, items 4 and 5 of Schedule 2 seek to amend the wording of this limitation to accommodate the expanded requirement to also sign a record or produce a book, account or document. This has the potential to mean the use immunity could become unavailable simply because a person has not had adequate legal advice prior to an examination and therefore was not aware of the need to make a claim of self-incrimination prior to providing the information.

1.147 The committee notes that the explanatory materials provide no justification for this limitation, despite the bill seeking to expand the scope of both the abrogation and the associated use immunity on which the limitation would operate.

1.148 The committee therefore requests the Minister's advice as to:

- **the appropriateness of not providing a derivative use immunity with respect to the abrogation of the privilege against self-incrimination; and**
- **the justification for limiting the use immunity to cases where a person has made a claim in advance of providing the potentially self-incriminating material.**

Procedural fairness¹¹²

1.149 Proposed section 61E contains provisions concerning who may be present at examinations conducted by APRA and provides powers to the investigator to regulate the conduct of the examinee's lawyer at such examinations. Proposed subsection 61E(4) provides that the examinee's lawyer may, 'at such times during the examination as the investigator determines', address the investigator and examine their client about matters on which the investigator has examined them. Proposed subsection 61E(5) provides that the investigator may require a person to stop

110 Explanatory memorandum, p. 39.

111 See paragraph 52F(2)(a) of the *Banking Act 1966*.

112 Schedule 2, item 9, proposed sections 61E, 61F, and item 10, proposed section 62AA. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

addressing the investigator or examining them if, in the investigator's opinion, the person is trying to obstruct the examination by exercising rights under subsection (4). Failure to comply with this requirement would constitute a criminal offence subject to a maximum penalty of 30 penalty units.¹¹³ The explanatory material does not explain the operation of, or justification for, these proposed measures, beyond restating the powers of the investigator to stop an examination or a line of inquiry if they believe the examinee's lawyer is obstructing the examination.¹¹⁴

1.150 Given the complexity of matters that would be the focus of APRA examinations, it is likely that examinee's would often require legal assistance. The committee is concerned that these provisions appear to grant an investigator a broad discretion to limit the involvement of an examinee's lawyer.

1.151 In addition, following an examination, proposed subsection 61F(2) would allow an investigator to require the examinee to read, or have read to him or her, a written record of any statements made at the examination and the investigator may require the examinee to sign the written record. A signed record would be prima facie evidence in a proceeding and a failure to comply with a requirement to sign the record would be a criminal offence carrying a maximum penalty of 30 penalty units.¹¹⁵

1.152 The committee notes that these provisions make no explicit allowance for an examinee to include in a record of examination, prior to signing it, any objections he or she may have as to its accuracy. The explanatory materials also provide no clarification as to whether this would be allowed.

1.153 Finally, proposed section 62AA addresses the operation of legal professional privilege in circumstances where a lawyer has been required under the Act to give information or produce a book, account or document and complying with such a requirement would disclose a privileged communication.¹¹⁶ A lawyer would be entitled to refuse to comply with a requirement to produce information on the grounds that it is a privileged communication, unless the person to whom, or by or on behalf of whom, the communications was made consents to the lawyer complying with the requirement.¹¹⁷

1.154 However, if a lawyer refuses to comply, he or she must provide the name and address, if known, to whom, or by or on behalf of whom, the required communication was made. The lawyer would also be required to provide sufficient particulars to identify the relevant document, book or account in which the

113 See Schedule 2, item 9, proposed section 61G.

114 Explanatory memorandum, p. 39.

115 See Schedule 2, item 9, proposed subsection 61H(7) and section 61G.

116 Schedule 2, item 10, proposed section 62AA.

117 Schedule 2, item 10, proposed subsection 62AA(2).

communication was made. Failure to comply with these requirements would be a criminal offence carrying a maximum penalty of 30 penalty units.

1.155 The explanatory memorandum does not explain the effect of this provision in detail, merely referring to the fact that it allows a lawyer to refuse to comply with a requirement to give information or provide certain documents if they contain privileged communications.¹¹⁸

1.156 The committee therefore requests the Minister's detailed advice as to:

- **whether the discretion granted to an investigator to limit the involvement of an examinee's lawyer in an APRA examination will be subject to an overarching obligation that the examinee be given a fair hearing;**
- **whether an examinee would be able to include in a record of examination any objections he or she may have as to its accuracy prior to signing it; and**
- **the extent to which the requirement that a lawyer must provide the name and address of a party to a privileged communication, and the particulars of the relevant document, book or account, would limit the application of legal professional privilege.**

118 Explanatory memorandum, p. 40.

Treasury Laws Amendment (Banking Measures No. 1) Bill 2017

Purpose	<p>This bill seeks to amend various Acts relating to banking, insurance, credit, registrable corporations and financial system regulation</p> <p>Schedule 1 amends the application of the provisions relating to non-Authorised Deposit-taking Institution (ADI) lenders</p> <p>Schedule 2 provides for consequential amendments to the <i>Banking Act 1959</i> (Banking Act) in relation to non-ADI lenders</p> <p>Schedule 3 enables an ADI to assume or use the word 'bank' in its business name, unless the Australian Prudential Regulation Authority (APRA) has issued a determination preventing this</p> <p>Schedule 4 inserts an objects provision in the Banking Act</p> <p>Schedule 5 amends the <i>National Consumer Credit Protection Act 2009</i> in relation to credit card contracts</p>
Portfolio	Treasury
Introduced	House of Representatives on 19 October 2017
Scrutiny principle	Standing Order 24(1)(a)(iv) and (v)

Incorporation of material as in force from time to time¹¹⁹

1.157 Proposed subsection 38C(7) provides that a rule may provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The explanatory memorandum provides no explanation as to what type of instruments or documents may need to be applied, adopted or incorporated and does not explain why it would be necessary for the material to apply as in force or existing from time to time.

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

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future

¹¹⁹ Schedule 1, item 2, proposed subsection 38C(7). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

changes to that document would operate to change the law without any involvement from Parliament);

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

1.159 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

1.160 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.¹²⁰ This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

1.161 Noting the above comments, the committee requests the Treasurer's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subsection 38C(7), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

Consultation prior to making delegated legislation¹²¹

1.162 Proposed subsection 38F(4) states that APRA must consult with ASIC before making a non-ADI lender rule, or varying or revoking a non-ADI lender rule. The committee welcomes the inclusion of this specific consultation obligation, however, the committee notes that proposed subsection 38F(5) provides that a failure to comply with the consultation obligation does not invalidate the client money reporting rule. The explanatory memorandum provides no explanation as to why this

120 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

121 Schedule 1, item 2, proposed subsections 38F(4) and (5). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

clause, which appears to nullify the effect of imposing a requirement on APRA to consult with ASIC, has been included in the bill.

1.163 The committee therefore requests the Treasurer's advice as to the rationale for including a no-invalidity clause in this provision, which has the effect that a failure to appropriately consult prior to making a non-ADI lender rule will not invalidate the rule.

Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2017

Purpose	This bill seeks to amend the <i>Income Tax Rates Act 1986</i> and the <i>Income Tax Assessment Act 1997</i> to ensure that a corporate tax entity will not qualify for the lower corporate tax rate if more than 80 per cent of its assessable income is income of a passive nature
Portfolio	Treasury
Introduced	House of Representatives on 18 October 2017

The committee has no comment on this bill.

Treasury Laws Amendment (Junior Minerals Exploration Incentive) Bill 2017

Purpose	This bill seeks to replace the former Exploration Development Incentive with the Junior Minerals Exploration Incentive
Portfolio	Treasury
Introduced	House of Representatives on 19 October 2017

The committee has no comment on this bill.

Treasury Laws Amendment (National Housing and Homelessness Agreement) Bill 2017

Purpose	This bill seeks to amend the <i>Federal Financial Relations Act 2009</i> to introduce new funding arrangements for Commonwealth support for housing and address homelessness and repeal the National Special Purpose Payment for Housing Services.
Portfolio	Treasury
Introduced	House of Representatives on 25 October 2017
Scrutiny principle	Standing order 24(1)(a)(v)

Exemption from disallowance¹²²

1.164 The bill seeks to introduce new funding arrangements between the Commonwealth and the States by repealing the current National Special Purpose Payment for Housing Services and replacing it with a new funding framework based on primary, supplementary and designated housing agreements. Proposed sections 15C and 15D seek to allow the Minister to make payments, by determination, to a State that is a party to a primary and a supplementary housing agreement, or to a designated agreement.

1.165 Proposed subsections 15C(2) and 15D(2) each provide that a determination made by the Minister is a legislative instrument but it is not subject to disallowance under section 42 of the *Legislation Act 2003*. The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum justifies the exemption from the disallowance provisions on the grounds that the determinations 'facilitate the operation an intergovernmental scheme involving the Commonwealth and a State and are made for the purpose of that scheme', and that this arrangement is consistent with payment arrangements under other National Specific Purpose Payments and National Health Reform Payments.¹²³

1.166 The committee is of the view that the removal of parliamentary oversight is a serious matter. However, the committee notes that, in this instance, the removal of parliamentary oversight appears to be consistent with subparagraph 44(1)(a) of the *Legislative Act 2003*, which provides that the section 42 disallowance process does

122 Schedule 1, item 4. The committee draws Senators' attention to this provision pursuant to principle 1(a)(v) of the committee's terms of reference.

123 Explanatory memorandum, p. 14.

not apply to instruments if the enabling legislation ‘facilitates the establishment or operation of an intergovernmental body or scheme’.

1.167 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of exempting these determinations from disallowance.

Parliamentary scrutiny—section 96 grants to the States¹²⁴

1.168 With respect to primary and supplementary housing agreements, proposed section 15C sets out a number of terms and conditions under which financial assistance will be payable to a state or territory. These conditions include that the State must have and make publicly accessible both a housing strategy and a homelessness strategy; match the financial assistance provided by the Commonwealth in relation to homelessness; and provide relevant information to the Minister.¹²⁵

1.169 However, in contrast, proposed subsection 15D(4) states that financial assistance is payable subject only to such additional terms and conditions, if any, as are set out in the designated housing agreement itself. The explanatory memorandum states that designated housing agreements will not be contingent on a primary or supplementary housing agreement, but does not further explain the decision not to include any terms and conditions applicable to designated agreements in the bill.

1.170 The committee notes that the bill also contains no provisions that would require the Minister to table in Parliament, or publish on the internet, primary, supplementary or designated housing agreements made under the new funding arrangements.

1.171 The committee takes this opportunity to highlight that the power to make grants to the States and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution.¹²⁶ Where the Parliament delegates this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 of the Constitution and the role of Senators in representing the people of their State or Territory. While some information in relation to grants to the States is publicly available, the

124 Schedule 1, item 4. The committee draws Senators’ attention to this provision pursuant to principle 1(a)(v) of the committee’s terms of reference.

125 Schedule 1, item 4, proposed subsections 15C(4) to (8)

126 Section 96 of the Constitution provides that: ‘the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’.

committee has previously noted that effective parliamentary scrutiny is difficult because the information is only available in disparate sources.

1.172 Noting this, and the fact that the terms and conditions of financial assistance made available under a designated housing agreement may be of significance to housing and homelessness policy generally, the committee suggests it may be appropriate for the bill to be amended to:

- include some high-level guidance as to the terms and conditions that States will be required to comply with in order to receive payments of financial assistance under a designated housing agreement; and
- include a legislative requirement that any primary, supplementary or designated housing agreements are:
 - tabled in the Parliament within 15 sitting days of being made, and
 - published on the internet within 30 days of being made.

1.173 The committee seeks the Minister's advice in relation to the above.

Commentary on amendments and explanatory materials

Criminal Code Amendment (Firearms Trafficking) Bill 2017

[Digest 3/17]

1.174 On 24 October 2017 the Minister for Justice (Mr Keenan) presented a supplementary explanatory memorandum. On 25 October 2017 the House of Representatives agreed to two Government amendments and the bill was read a third time.

1.175 The amendments to the bill provide mandatory minimum sentences of five years' imprisonment for firearms trafficking offences for offenders aged 18 and over.

1.176 The committee has consistently noted that mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. While a court retains a discretion as to the non-parole period, a mandatory minimum sentence still requires that a person be subject to a penalty for that period (either in prison or subject to parole conditions).

1.177 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing mandatory minimum sentences for firearm trafficking offences.

Industrial Chemicals Bill 2017 and related bills¹²⁷

[Digest 6 & 8/17]

1.178 On 17 October 2017 in the House of Representatives the Assistant Minister for Immigration and Border Protection (Mr Hawke) presented addendums to the explanatory memoranda to these bills in response to concerns raised by the committee.¹²⁸

1.179 The committee thanks the Assistant Minister for providing these addendums to the explanatory memoranda which includes key information previously requested by the committee.

127 Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017; Industrial Chemicals Charges (Customs) Bill 2017; Industrial Chemicals Charges (Excise) Bill 2017 and Industrial Chemicals Charges (General) Bill 2017.

128 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 8 of 2017*, 9 August 2017, pp 89-102.

National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017

[Digest 6 & 8 /17]

1.180 On 16 October 2017 the Minister for Defence (Senator Payne) tabled an addendum to the explanatory memorandum in response to concerns raised by the committee.¹²⁹

1.181 The committee thanks the Minister for providing this addendum to the explanatory memorandum which includes key information previously requested by the committee.

Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017

[Digest /17]

1.182 On 26 October 2017 the House of Representatives agreed to 10 Government amendments, the Minister for Veterans' Affairs (Mr Tehan) presented a supplementary explanatory memorandum and the bill was read a third time.

1.183 Amendment 5 seeks to amend the bill to provide that instead of the Minister being empowered to delegate any of his or her functions or powers to a Commission member or any APS employee, the Minister can only delegate to a Commission member or an SES employee in the Department. This addresses concerns previously raised by the committee regarding the broad delegation of administrative powers.¹³⁰

1.184 The committee welcomes the amendments that appropriately limit the categories of people to whom the Minister's powers and functions under the *Military Rehabilitation and Compensation Act 2004* may be delegated.

No comments

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

- Competition and Consumer Amendment (Competition Policy Review) Bill 2017;¹³¹ and

129 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 8 of 2017*, 9 August 2017, pp 107-124.

130 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 6 of 2017*, 14 June 2017, pp 158-159.

131 On 16 October 2017 the Senate agreed to one Opposition amendment. On 18 October 2017 the House of Representatives agreed to the Senate amendment and the bill passed both Houses.

-
- Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017.¹³²

132 On 19 October 2017 the Senate agreed to five Government amendments and Senator McGrath tabled a supplementary explanatory memorandum. On the same day the House of Representatives agreed to the Senate amendments and the will was passed.

Chapter 2

Commentary on ministerial responses

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

Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017

<p>Purpose</p>	<p>This bill seeks to amend various Acts relating to criminal law to:</p> <ul style="list-style-type: none"> • insert community safety as a factor that can be taken into account to revoke the parole of a federal offender without notice; • remove the requirement to seek leave before a recorded interview of a vulnerable witness can be admitted as evidence in chief; • prevent children and other vulnerable witnesses from being cross-examined at committal proceedings; • insert new aggravated offences for child sexual abuse that involves subjecting the child to cruel, inhuman or degrading treatment, or which causes the death of the child; • insert new offences to criminalise the grooming of third parties for the purpose of procuring a child for sexual activity and to criminalise the provision of an electronic service to facilitate dealings with child abuse material online; • increase the maximum penalties for certain Commonwealth child sex offences and for breach of the obligation on internet service providers and internet content hosts to report child abuse material to police; • introduce a mandatory sentencing scheme to apply to the Commonwealth child sex offences that attract the highest maximum penalties, and all other Commonwealth child sex offences if the offender is a repeat child sex offender; • insert a presumption against bail for Commonwealth child sex offences that attract the highest maximum penalties; • revise the factors which must be taken into account when sentencing all federal offenders to ensure that considerations of a guilty pleas cover any benefit to the community, or any victim of, or witness to, the offence;
-----------------------	---

- make it an aggravating factor in sentencing if a federal offender used their standing in the community to assist in the commission of an offence;
- ensure that when sentencing a Commonwealth child sex offender, the court must have regard to the objective of rehabilitating the person, including by considering whether to impose any conditions about rehabilitation and treatment and considering if the length of sentence is sufficient for the person to undertake a rehabilitation program while in custody;
- insert additional aggravating sentencing factors that apply when a court is sentencing for certain child sex offences, including considering the age and maturity of the victim and the number of people involved in the commission of the offence;
- insert a presumption in favour of cumulative sentences for Commonwealth child sex offences;
- insert a presumption in favour of Commonwealth child sex offenders serving an actual term of imprisonment;
- require that if a court is releasing a Commonwealth child sex offender on a recognizance release order, the offender must be supervised in the community, and undertake such treatment and rehabilitation programs as their probation officer directs;
- add 'residential treatment orders' as an additional sentencing alternative to allow intellectually disabled offenders to receive access to specialised treatment options;
- allow certain information to be withheld from an offender where it affects the decision about their release to parole in national security circumstances;
- reduce the amount of 'clean street time' that can be credited by a court as time served against the outstanding sentence following commission of an offence by a person on parole and license;
- require a period of time to be served in custody if a federal offender's parole order is revoked; and
- remove references to 'child pornography material' within Commonwealth legislation and replace with 'child abuse material'

Portfolio

Justice

Introduced

House of Representatives on 13 September 2017

Bill status	Before the Senate
Scrutiny principles	Standing Order 24(1)(a)(i) and (ii)

2.2 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Minister responded to the committee's comments in a letter received 1 December 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹

Procedural fairness and broad discretionary power²

Initial scrutiny – extract

2.3 Current section 19AU of the *Crimes Act 1914* provides that the Attorney-General may revoke a parole order or licence where a person has breached, or is suspected of having breached, a condition of their parole. Currently the Attorney-General must notify the parolee of the condition alleged to have been breached, the fact that the Attorney-General proposes to revoke parole, and give a person 14 days to provide written reasons why parole should not be revoked. There are current exceptions to when notice must be given, including when there are circumstances of urgency requiring revocation without notice. Schedule 1 proposes introducing an additional exception to the requirement that notice be given where, in the opinion of the Attorney-General, it is necessary in the interests of ensuring the safety and protection of the community or another person.

2.4 The explanatory memorandum states that the person would still be afforded procedural fairness as the person could still make a written submission to the Attorney-General as to why the parole order should not be revoked. However, the person would be in custody at the time of this hearing.³ The statement of compatibility states the current provision means that even when there are serious concerns for community safety, offenders must be given notice before their parole or licence can be revoked, thereby giving them the opportunity to reoffend or abscond as they know they may be taken back into custody.⁴

2.5 The committee notes that the proposed power in Schedule 1 confers a broad discretionary power on the Attorney-General, applying when it is the Attorney-General's 'opinion' that it is necessary to revoke without notice. The decision to

1 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

2 Schedule 1. The committee draws Senators' attention to this Schedule pursuant to principles 1(a)(i) and (ii) of the committee's terms of reference.

3 Explanatory memorandum, p. 17.

4 Statement of compatibility, p. 9.

remand a person in custody prior to any hearing adversely affects the person's interests before the hearing will take place, and thereby limits their right to procedural fairness. No examples are given in the explanatory materials as to whether the existing provisions have actually resulted in persons posing a risk to community safety or another person because they have been given 14 days' notice of an intention to revoke parole. It is unclear to the committee why existing paragraph 19AU(3)(b) of the *Crimes Act 1914*, which enables notification not to be given in circumstances of urgency, is insufficient to ensure that those that pose a serious and immediate safety concern are not notified in advance.

2.6 The committee emphasises that the scrutiny questions raised by the committee are separate to the overarching policy considerations underpinning this bill. Rather, each of the questions relate to how the new provisions will be exercised in practice and whether the bill provides appropriate safeguards to ensure it does not unduly trespass on personal rights and liberties.⁵

2.7 The committee requests the Minister's more detailed advice as to why it is necessary to provide the Attorney-General with a broad discretionary power not to give notice before revoking a person's parole and why the existing provisions in section 19AU of the *Crimes Act 1914* are insufficient to address any serious and immediate risks to safety.

Minister's response

2.8 The Minister advised:

Currently, unless certain circumstances apply, before the Attorney-General can revoke a person's parole order or licence, the person must be notified of the specific conditions they are alleged to have breached and given 14 days to respond. This time lag between when a person is notified of the intention to revoke and the actual revocation and subsequent imprisonment of the person is problematic if it is believed the person poses a danger to the community. In particular, it gives the person an opportunity to commit further offences or even to abscond.

To address this, the Bill introduces into the current list of exceptions to the requirement to provide notice of an intention to revoke, an ability to revoke parole where the Attorney-General is of the opinion that revocation without notice is necessary in the interests of ensuring the safety and protection of the community or of another person. Importantly, after parole has been revoked and the offender remanded in custody, that offender retains the opportunity to make a written submission to the Attorney-General as to why the parole order or licence should not be revoked. This has posed a particular problem with violent offenders. If the Attorney-General is satisfied of those reasons the offender would be immediately released from custody.

5 See Standing Order 24(1)(a)(i).

Existing provisions under section 19AU(3) of the Crimes Act

As currently drafted, it is unclear whether section 19AU(3) of the Crimes Act, which enables notification of revocation of parole not to be given in circumstances of urgency, includes matters of community safety and protection. Matters of community safety and protection may not necessarily meet the imminent time threshold required under section 19AU(3). Further, it is unclear whether section 19AU(3) permits the revocation of parole without notice where a person intends or attempts to commit further offences.

There have been instances where an offender has threatened to commit further violent offences and there has not been sufficient evidence to arrest the person for those offences. In these cases it has been necessary to give the offender 14 days' notice of the revocation of their parole, hence giving them ample time to reoffend. Giving notice of parole revocation can also give an offender an opportunity to abscond as they know that a parole revocation will result in them returning to custody.

This Bill clarifies that a person's parole can be revoked without notice if this is necessary to ensure the safety and protection of the community or of another person.

Committee comment

2.9 The committee thanks the Minister for this response. The committee notes the Minister's advice that the current requirements to give 14 days' notice to a person to respond before revoking parole has posed a particular problem with violent offenders, as matters of community safety and protection may not necessarily meet the current imminent time threshold requirements and it is unclear whether the existing provisions permit the revocation of parole without notice where a person intends or attempts to commit further offences. The committee also notes the Minister's advice that there have been instances where an offender has threatened to commit further violence and there has not been sufficient evidence to arrest the person and in such cases it has been necessary to give the offender 14 days' notice of the revocation of their parole.

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

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

Reversal of legal burden of proof⁶

Initial scrutiny – extract

2.12 Items 16, 18, 37 and 39 of Schedule 4 propose to introduce new defences or add to existing defences in relation to two new offences being introduced by this bill. The changes would make it a defence for a defendant to a prosecution for certain child sex abuse offences to prove that at the relevant time the defendant believed that the child was at least 16 years of age (or that another person was under 18). A legal burden of proof is thereby proposed to be placed on the defendant, ensuring that the defendant would need to prove, on the balance of probabilities, their belief at the relevant time.

2.13 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 one or more elements of an offence, interferes with this common law right.

2.14 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed. The committee has consistently taken the view that applying a legal burden to displace a presumption should only be imposed in rare instances.

2.15 In this instance, the explanatory memorandum provides in relation to items 16 and 18:

It will generally be much easier for a defendant, rather than the prosecution, to produce evidence showing that the circumstances to which the defence applies do in fact exist. This is especially the case where it may relate to circumstances that must be proven are particularly within the knowledge of the person concerned.

...

A legal burden is appropriate because the defences relate to a matter that is within the defendant's knowledge and not available to the prosecution.⁷

2.16 In relation to items 37 and 39 which expand an existing provision that reverses the legal burden of proof and inserts a new defence that reverses the legal burden of proof, the explanatory memorandum provides no reasoning as to the appropriateness of reversing the legal burden of proof.⁸

6 Schedule 4, items 16, 18, 37 and 39. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

7 Explanatory memorandum p. 25.

8 See explanatory memorandum pp 34-35.

2.17 The committee notes that the *Guide to Framing Commonwealth Offences*⁹ 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.¹⁰

2.18 The committee notes that the limited justification provided in the explanatory memorandum does not address both of these limbs, stating only that it will generally be much easier for the defendant to prove the matters, and not giving any reasons as to why the matters are peculiarly in the defendant's knowledge. The *Guide to Framing Commonwealth Offences* also states that where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden,¹¹ which has not been done in this instance.

2.19 It is also not clear to the committee how the defence provisions, which go to the defendant's belief as to the age of the relevant person, interact with the offence provisions themselves which provide that the offence applies when a relevant person is either a particular age or the defendant believes the person to be that age.¹² This would appear to provide, for example, where a victim was 16 years old or over, that the prosecution prove beyond a reasonable doubt that the defendant believed the person was under 16 years old, but that if the defendant wished to rely on a belief that the person was at least 16, the burden of proving this would then shift to the defendant. It is unclear how these provisions would operate together in practice.

2.20 As the explanatory materials do not adequately address this issue, the committee requests the Minister's advice as to why it is proposed to reverse the legal burden of proof in this instance (including why it is insufficient to apply a reverse evidential burden) and how the reversal of the burden of proof interacts with the obligation on the prosecution to prove the defendant's belief about age.

Minister's response

2.21 The Minister advised:

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

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

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

12 See item 5, proposed section 471.25A and item 27, proposed section 474.27AA.

Items 5 and 27 of Schedule 4 of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 introduce new offences into the *Criminal Code Act 1995* (the Criminal Code) to criminalise the grooming of a third party. The offences require the prosecution to prove, beyond reasonable doubt:

- the defendant intended to use a carriage service or postal service to transmit a communication or article to a recipient
- the sender did so with the intention of making it easier to procure a child under 16 years of age to engage in sexual activity with:
 - the sender, or
 - a participant who is, or who the sender believes to be, at least 18 years of age; or
 - another person who is, or who the sender believes to be, under 18 years of age, in the presence of the sender or participant who is, or who the sender believes to be, over 18 years of age; and
- the child was under 16, or the sender believed the child was under 16.

Items 7, 8, 28 and 29 of Schedule 4 apply absolute liability to the elements of the offence relating to the age of the child and/or the participant (where relevant). This means that the prosecution will not be required to prove that the defendant knew these elements. Rather, the prosecution will have to demonstrate that the child and/or the participant were in fact under 16 years of age and over 18 years of age respectively when the communication or article was sent.

Items 9 and 30 provide that evidence of representations made to the defendant that a person was under or over a particular age will serve as proof, in absence of evidence to the contrary, that the defendant believed the person to be under or over that age (as the case requires). These provisions offer a potential safeguard for the defendant in leading contradictory evidence as to his or her belief of the age of the child or participant.

The effect of applying absolute liability to these elements is ameliorated by the introduction of specific defences based on the defendant's belief about the child and/or participant's age (items 16, 18, 37 and 39). Section 13.4 and 13.5 of the Criminal Code provide that in the case of a legal burden of proof placed on the defendant, a defendant must discharge the burden on the balance of probabilities. If the defendant does this, it will then be for the prosecution to refute the matter beyond reasonable doubt.

The application of absolute liability, together with the belief about age defences, is consistent with the other grooming offences in the Criminal Code and is appropriate given the intended deterrent effect of these offences. Placing a legal burden of proof on the defendant in relation to belief about age defences is appropriate for these new offences as the

defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 and under the age of 18 respectively. The defendant's belief as to these circumstances at the relevant time is a matter peculiarly within his or her knowledge and not readily available to the prosecution.

It is important to note that an offence will still be committed where the defendant *believes* the child to be under the age of 16 years, regardless of the actual circumstances of the offending. This is necessary to accommodate a standard investigatory technique where a law enforcement officer assumes the identity of a fictitious child, interacting with a potential predatory adult and arresting the adult before they have the opportunity to sexually abuse a real child. A person who engages in conduct to procure a child to engage in sexual activity is not able to escape liability for an offence even if their conduct was not ultimately directed towards an actual child.

The application of absolute liability, together with the belief about age defences, is appropriate as the defendant is best placed to adduce evidence about his or her belief. The defences in the Bill are a reasonable and proportionate way to achieve the intended deterrent effect of these offences.

While it is true that a legal burden of proof places a higher burden on the defendant, it is justified in these circumstances given the defendant's belief as to the age of the child/participant is a matter peculiarly within his or her knowledge. A legal burden of proof in these circumstances also better achieves the intended deterrent effect of these offences noting the seriousness of the harm caused to children by sexual abuse. A legal burden of proof will provide consistency with existing belief about age defences in the Criminal Code. The Bill embodies the most significant reforms to the legal framework concerning child sex offenders since the establishment of the Criminal Code in 1995. The Australian Government is committed to protecting the community from the risks posed by child sex offenders by strengthening existing laws on child sexual abuse. The reforms will ensure that offenders are sufficiently punished and deterred from future offending. These measures support this policy objective.

Committee comment

2.22 The committee thanks the Minister for this response. The committee notes the Minister's advice that the defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 or under the age of 18 respectively and this belief is a matter peculiarly within his or her knowledge and not readily available to the prosecution. The committee also notes that the Minister's response acknowledges that a legal burden of proof places a higher burden on the defendant, but states that this is justified in the circumstances. Given the defendant's belief is a matter peculiarly within his or her knowledge, a

legal burden better achieves the intended deterrent effect of these offences and will provide consistency with existing belief about age defences in the Criminal Code.

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

2.24 In light of the detailed information provided, and that the defendant's belief about a person's age would appear to be a matter peculiarly within the defendant's knowledge and significantly more difficult for the prosecution to prove, the committee makes no further comment on this matter.

Mandatory minimum sentences¹³

Initial scrutiny – extract

2.25 Schedule 6 of the bill proposes to introduce mandatory minimum sentences of imprisonment if a person is convicted of certain serious child sexual abuse offences under the Commonwealth Criminal Code, or convicted of any Commonwealth child sex offences more than once.¹⁴ The minimum sentences to be imposed range from two years to six years.

2.26 The statement of compatibility states that the objective of the measure is to ensure the courts are handing down sentences 'that reflect the gravity of these offences and ensure that the community is protected from child sex offenders', stating that current sentences 'do not sufficiently recognise the harm suffered by victims of child sex offences' or 'that the market demand for, and commercialisation of, child abuse material often leads to further physical and sexual abuse of children'.¹⁵ The statement of compatibility goes on to state that courts will retain discretion as to the term of actual imprisonment because the mandatory sentencing scheme relates only to the length of the head sentence and not the term of actual imprisonment served by an offender.¹⁶ This is because the courts set the non-parole period and could set that the non-parole period as lower than the mandatory minimum sentence.

13 Schedule 6. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(i) of the committee's terms of reference.

14 See, Schedule 6, item 2, proposed section 16AAA. Mandatory minimum sentences would apply in relation to sections 272.8(1), 272.8(2), 272.9(1), 272.9(2), 272.10, 272.11, 272.18, 272.19, 273.7, 471.22, 474.23A, 474.25A(1), 474.25A(2), 474.25B of the Criminal Code.

15 Statement of compatibility, p. 10.

16 Statement of compatibility, p. 10.

2.27 However, the committee has consistently noted that mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. While a court retains a discretion as to the non-parole period, a mandatory minimum sentence still requires that a person be subject to a penalty for that period (either in prison or subject to parole conditions), and sentencing principles generally provide that a non-parole period is to be in proportion to the head sentence.

2.28 The committee therefore requests the Minister's detailed justification as to the appropriateness of removing judicial discretion in sentencing certain child sex offenders, whether there are examples of analogous offences that carry a mandatory minimum penalty, and how mandatory minimum sentences would interact with existing sentencing principles regarding the setting of a non-parole period.

Minister's response

2.29 The Minister advised:

The introduction of mandatory minimum sentencing for the most serious Commonwealth child sex offences and for repeat child sex offenders is central to achieving the Bill's objectives of protecting the community, adequately reflecting the harm inflicted on victims and ensuring that sexual predators receive a sentence that is commensurate to the severity of their offences. Addressing the current disparity between the seriousness of child sex offending and lenient sentences handed down by courts is at the core of the Bill.

Appropriateness of Mandatory Minimum Sentencing

Ensuring that perpetrators are adequately punished not only acknowledges the significant trauma caused by the offending behaviour, but also recognises the impact on the community if the individual reoffends. The Bill mitigates this risk by ensuring serious child sex offenders serve a meaningful period of time in custody. This means offenders will be punished appropriately, reflecting the seriousness of their crimes. This also means that offenders will have access to targeted rehabilitation and treatment programs in prison, ultimately reducing the risks those offenders pose to the community. Importantly, time that a sex offender spends in prison is time they cannot offend in the community.

Despite current Commonwealth child sex offences carrying significant maximum penalties, the courts are not handing down sentences that reflect the gravity of the offending, or the harm suffered by victims. Statistics on current Commonwealth child sex offences demonstrate the low rate of convictions resulting in a custodial sentence—meaning that a staggering number of convicted offenders are released into the community. Of the 652 Commonwealth child sex offences committed since 2012, only 58.7% of charges resulted in a custodial sentence. The most common length of imprisonment for an offence was 18 months and the most common period of actual imprisonment was just six months.

Current sentencing practice is inadequate and out of step with community expectations. These statistics demonstrate the clear need for legislation to guide the courts in applying more appropriate penalties for Commonwealth child sex offences.

Judicial Discretion

The mandatory minimum sentencing scheme introduced by the Bill limits judicial discretion, but does not remove it. A court is able to take into account a guilty plea or an offender's cooperation with law enforcement agencies and to discount the minimum penalty by up to 25% respectively. Courts will also retain the ability to impose a sentence of a severity appropriate in all the circumstances of the offence through exercising judicial discretion over the length of the non-parole period. The reforms do not impact the current requirement for the courts to consider all the circumstances, including the matters listed in section 16A of the Crimes Act, when fixing a non-parole period. This means that courts will be able to take into account individual circumstances and any mitigating factors in considering the most suitable non-parole period.

The Government understands that sentencing decisions involve careful analysis of numerous factors and circumstances. That is why the mandatory minimum sentencing regime includes mechanisms for courts to retain appropriate discretion to enable individual circumstances to be taken into account while still ensuring that sentences for child sex offenders reflect the serious and heinous nature of the crimes. Retaining this discretion allows for less restrictive approaches to be taken where necessary, within the framework of the mandatory minimum sentencing scheme.

Analogous offences

The Government considers that mandatory minimum sentences should be used sparingly and for the most serious offences. Mandatory minimums are already in place at the Commonwealth level for terrorist offenders and people smugglers, and the Government is firmly of the view that-with the safeguards set out in the Bill-the application of mandatory minimum sentences to offenders who commit serious or repeated sexual crimes against innocent children is reasonable, necessary and proportionate.

Queensland, South Australia and the Northern Territory have mandatory minimum sentencing for State child sex offences.

- Under section 161E of the *Penalties and Sentences Act 1992* (QLD), a repeat offender convicted of serious child sex offences is liable to a sentence of mandatory life imprisonment.
- Under section 20B of the *Criminal Law (Sentencing) Act 1988* (SA), the court may declare an offender a serious repeat offender if the person has committed at least two separate sexual offences against children under 14. Under this declaration, the court is not required to

ensure that the sentence is proportional to the offence and any non-parole period fixed must be at least four fifths of the sentence.

- Under section 78F of the *Sentencing Act (NT)*, where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve a term of actual imprisonment or a term of imprisonment that is suspended partly, but not wholly suspended. Where the offender is convicted of certain child sex offences (e.g. sexual intercourse or gross indecency with a child under 16, sexual intercourse or gross indecency by a provider of services to mentally ill or handicapped person) a mandatory minimum non-parole period of 75% of the head sentence applies.

Interaction with sentencing principles and setting the non-parole period

With the exception of a limited number of offences (such as terrorism, treason and espionage), the Crimes Act does not prescribe how a non-parole period should be determined. In sentencing Commonwealth offenders, there is no judicially determined norm or starting point, expressed as a percentage of the head sentence or otherwise, for setting the non-parole period. As such, judicial discretion is maintained in setting the non-parole period.

Committee comment

2.30 The committee thanks the Minister for this response. The committee notes the Minister's advice that despite current Commonwealth child sex offences carrying significant maximum penalties, the Minister considers the courts are not handing down sentences that reflect the gravity of offending or the harm suffered by victims, with only 58.7 per cent of Commonwealth child sex offenders committed since 2012 receiving a custodial sentence. The committee also notes the Minister's advice that while the bill limits judicial discretion, it does not remove it, particularly as judicial discretion over the length of the non-parole period remains. In particular, the committee notes the Minister's advice that with the exception of a limited number of offences, the Crimes Act does not prescribe how a non-parole period should be determined, and there is no judicially determined norm or starting point for setting the non-parole period in the sentencing of Commonwealth offenders.

2.31 The committee reiterates that it has consistently noted that mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. While a court retains a discretion as to the non-parole period, a mandatory minimum sentence still requires that a person be subject to a penalty for that period (either in prison or subject to parole conditions).

2.32 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic

material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.33 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of setting mandatory minimum sentences, which limits judicial discretion, for Commonwealth child sex offences.

Right to liberty—presumption against bail¹⁷

Initial scrutiny – extract

2.34 Schedule 7 to the bill would introduce a presumption against bail for persons charged with, or convicted of, certain Commonwealth child sex offences. Proposed section 15AAA provides that a bail authority must not grant bail unless satisfied by the person that circumstances exist to grant bail.

2.35 The presumption against bail applies to persons charged with, or convicted of, serious child sex offences to which mandatory minimum penalties apply. It also applies to all offences subject to a mandatory minimum penalty on a second or subsequent offence where the person has been previously convicted of child sexual abuse.

2.36 The presumption against bail applies both to those convicted of, but also those charged with, certain offences. The committee notes that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption. As such, the committee expects that a clear justification be given in the explanatory materials for imposing a presumption against bail and any evidence that courts are currently failing to consider the serious nature of an offence in determining whether to grant bail.

2.37 In this instance, the statement of compatibility provides that the presumption against bail aims to achieve the objective of community protection from Commonwealth child sex offenders while they are awaiting trial or sentencing, and where conditions of bail 'cannot mitigate the risk to the community, witnesses, and victims.'¹⁸ The statement of compatibility goes on to state that the presumption is rebuttable and provides judicial discretion in determining whether a person's risk on bail can be mitigated by appropriate conditions.¹⁹

17 Schedule 7, Part 2. The committee draws Senators' attention to this Part pursuant to principle 1(a)(i) of the committee's terms of reference.

18 Statement of compatibility, p. 10.

19 Statement of compatibility, p. 10.

2.38 However, no information is provided to demonstrate that the courts are currently not appropriately considering the risks posed by those accused of Commonwealth child sex offences.

2.39 The committee requests the Minister's detailed justification as to the appropriateness of imposing a presumption against bail, including information as to why the current bail requirements are insufficient, and why it is necessary to create a presumption against bail rather than specifying the relevant matters a bail authority must have regard to in exercising their discretion whether to grant bail.

Minister's response

2.40 The Minister advised:

The presumption against bail is designed to protect the community from child sex offenders while they await trial or sentencing. Not all child sex offences are subject to the presumption against bail. The measure only applies to offences that attract a mandatory minimum penalty, namely the most serious child sex offences and those persons who have previous convictions for child sex offences. The presumption against bail for this cohort of the most serious child sex predators is a necessary and effective crime prevention measure for a crime type that targets one of the most vulnerable groups in the community.

The measure does not remove the current balancing exercise undertaken by bail authorities and the courts. Rather, the measure puts the responsibility on a person charged with a child sex offence to demonstrate to the court that circumstances exist to grant bail. It is appropriate that child sex offenders take responsibility for explaining to the court why they do not pose a risk if released on bail. This is particularly the case for Commonwealth child sex offences, which often concern emerging technologies that are often difficult to detect.

The presumption is rebuttable and provides judicial discretion as to determining whether a persons' risk on bail can be mitigated through appropriate conditions which make the granting of bail appropriate in the circumstances. Flexibility is provided by the open nature of the presumption which is not limited to specific criteria.

Why current bail requirements are insufficient

The Bill includes matters that a bail authority must have regard to in determining whether circumstances exist to grant bail to a person charged with a serious child sex offence or who is a repeat child sex offender, including considerations relating to rehabilitation. However, this, on its own, has not been sufficient to protect the community.

Committee comment

2.41 The committee thanks the Minister for this response. The committee notes the Minister's advice that the presumption against bail is designed to protect the community from child sex offenders while they await trial or sentencing, putting the

responsibility on a person charged with a child sex offence to demonstrate that circumstances exist to grant bail. The committee also notes the Minister's advice that the presumption is rebuttable and flexibility is provided by the open nature of the presumption, which is not limited to specific criteria. The committee also notes the advice that including matters that a bail authority must have regard to in determining whether circumstances exist to grant bail, has not, on its own, been sufficient to protect the community.

2.42 However, the committee notes that no information is given as to why this is not sufficient to protect the community and no information has been provided demonstrating that bail authorities and the courts are currently not considering the risks posed by accused child sex offenders before setting bail. The committee reiterates that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption.

2.43 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing a presumption against bail.

Right to liberty—conditional release²⁰

Initial scrutiny – extract

2.44 Section 20(1)(b) of the *Crimes Act 1914* currently provides that, following conviction for an offence, the court may sentence a person to imprisonment but direct that the person be released after having given certain forms of security, such as being of good behaviour, paying compensation or paying the Commonwealth a pecuniary penalty or other conditions (known as a recognizance order or suspended sentence). Schedule 11 to the bill proposes removing this sentencing option for Commonwealth child sex offenders except in exceptional circumstances. As a result, those convicted of Commonwealth child sex offences will be required to serve a period of imprisonment that cannot be suspended, except in limited circumstances.

2.45 The statement of compatibility states that this presumption in favour of a term of actual imprisonment is necessary to ensure the courts are handing down sentences for child sex offenders that reflect the gravity of these offences and to ensure community protection.²¹

2.46 As with mandatory minimum sentences, the committee has consistently noted that severely limiting the court's discretion to make a recognizance order (or

20 Schedule 11. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(i) of the committee's terms of reference.

21 Statement of compatibility, p. 11.

suspend a sentence) undermines the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. The statement of compatibility states that the court retains a discretion as to how long the term of imprisonment will be. However, the committee notes that the proposed amendments in Schedule 6 would impose mandatory minimum sentences. In addition, while the court would retain a discretion to suspend a sentence in 'exceptional circumstances', the explanatory materials provide no examples of what might constitute exceptional circumstances.

2.47 The committee therefore requests the Minister's detailed justification as to the appropriateness of limiting judicial discretion in sentencing Commonwealth child sex offenders. The committee also requests the Minister's advice as to why the current sentencing options have proven ineffective in reflecting the gravity of the offences and protecting the community, and what type of matters would constitute 'exceptional circumstances' so as to justify the making of a recognizance order.

Minister's response

2.48 The Minister advised:

The presumption in favour of Commonwealth child sex offenders serving an actual term of imprisonment is in line with community expectations that offenders serve a period of imprisonment for abusing children. The presumption ensures community protection and reduces risk of reoffending through imprisonment and will also allow greater time for rehabilitation programs to be undertaken while in custody.

The presumption will provide clear guidance to courts for custodial sentences to be applied to predators who abuse children.

Current sentencing options are insufficient

Currently, child sex offenders who are sentenced to three years or less imprisonment are sentenced to recognizance release orders. This allows them to be released into the community immediately or after serving a period of imprisonment. Many such offenders receive wholly suspended sentences, meaning that they are immediately released without serving any period of time in custody.

The issuing of wholly suspended sentences for child sex offenders has not resulted in sentences that adequately reflect the gravity of child sex offending. Introducing a presumption in favour of imprisonment still allows the court to consider all the circumstances when making a recognizance release order.

Judicial discretion

This measure provides the courts with enough discretion in setting the pre-release period under a recognizance order to enable individual circumstances to be taken into account while still ensuring that sentencing of child sex offenders is of a level that reflects the serious and heinous nature of the crimes.

Exceptional circumstances

'Exceptional circumstances' was deliberately not defined in the Bill. Given the variable circumstances which may mitigate against or support a sentence of imprisonment, it would impose practical constraints if 'exceptional circumstances' was defined. Firstly, the phrase is not easily subject to general definition as circumstances may exist as a result of the interaction of a variety of factors which, of themselves, may not be special or exceptional, but taken cumulatively, may meet this threshold. Second, a list of factors said to constitute 'exceptional circumstances', even if stated in broad terms, will have the tendency to restrict, rather than expand, the factors which might satisfy the requirements for 'exceptional circumstances'.

Committee comment

2.49 The committee thanks the Minister for this response. The committee notes the Minister's advice that currently child sex offenders who are sentenced to three years or less imprisonment are sentenced to recognizance release orders, allowing them to be released in to the community immediately or after serving a period of imprisonment, with many offenders receiving wholly suspended sentences, resulting in sentences that do not adequately reflect the gravity of child sex offences. The committee also notes the Minister's advice that this measure provides the courts with enough discretion in setting the pre-release period under a recognizance order, and that 'exceptional circumstances' (under which the court retains a discretion to suspend a sentence) was deliberately not defined given the variable circumstances that could apply.

2.50 The committee reiterates that severely limiting the court's discretion to make a recognizance order (or suspend a sentence) undermines the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases.

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

2.52 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of limiting judicial discretion in sentencing Commonwealth child sex offenders.

Procedural fairness—restriction of information provided to offenders²²

Initial scrutiny – extract

2.53 Currently, section 19AL of the *Crimes Act 1914* provides that the Attorney-General must, before the end of a non-parole period for a federal offender, either make, or refuse to make, an order directing that the person be released from prison on parole. Subsection 19AL(2) provides that if the Attorney-General refuses to make a parole order the Attorney-General must give the person a written notice that includes a statement of reasons for the refusal. Schedule 13 to the bill proposes amending this so that a person would not be entitled to a copy of a report or another document (or a part of it) or any information about the content of the report of another document, if its provision to the person is, in the opinion of the Attorney-General, likely to prejudice national security.

2.54 The right to receive reasons as to why parole has been refused is an important element of the right to procedural fairness. The courts have found that procedural fairness in parole applications 'requires that an applicant's attention be drawn to the main issues or factors militating against success, so that an adequate opportunity is afforded to deal with them'.²³ This does not require access to all documents but does require that 'an applicant knows of, or anticipates, the facts and matters assuming significance in a decision to decline a parole application'.²⁴

2.55 The explanatory memorandum recognises that this amendment 'limits the procedural fairness afforded to federal offenders', however it argues that it only does so 'to the extent necessary and proportional to protect national security and the public interest'.²⁵ The statement of compatibility states that the measure is necessary to protect confidential information, such as intelligence information, and that there is a sufficiently high bar in place as it would only apply if the Attorney-General is satisfied that disclosure of the information would be likely to prejudice national security.²⁶

2.56 However, the committee notes that the explanatory materials provide limited reasoning as to why this provision is necessary, or whether there have been any instances where information has had to be disclosed under the current provisions that would have been likely to affect national security. In addition, the

22 Schedule 13. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(i) of the committee's terms of reference.

23 *Butler v Queensland Community Corrections Board* [2001] QCA 323, [19]. This was cited with approval by the Federal Court of Australia in relation to section 19AL of the *Crimes Act 1914*: see *Duxerty v Minister for Justice and Customs* [2002] FCA 1518, [22].

24 *Butler v Queensland Community Corrections Board* [2001] QCA 323, [19].

25 Explanatory memorandum, p. 51.

26 Statement of compatibility, p. 12.

committee notes that the only requirement that needs to be satisfied is that in the Attorney-General's subjective opinion the information is likely to prejudice national security. There are no grounds which the Attorney-General must have regard to when making this assessment, and there is no requirement that the assessment be made on reasonable grounds. There is also no provision for independent review of any such decision. While judicial review of decisions in relation to release on parole or licence is available under the *Administrative Decisions (Judicial Review) Act 1977*, judicial review is only available on limited grounds and if a person is unaware as to the reasons as to why parole has been refused, it would be difficult to challenge such a refusal.

2.57 The committee therefore requests the Minister's detailed advice as to:

- why it is necessary to empower the Attorney-General to refuse to provide any reasons as to why parole has been refused, and if the absence of this provision has caused difficulties when providing reasons for parole refusals (and if so, on how many occasions);
- why the Attorney-General's decision is based on the Attorney's subjective 'opinion' rather than on objective criteria;
- why the relevant information could not, at least, be provided to the applicant's legal representative and the gist of the information provided to the offender; and
- why the Attorney-General's decision is not subject to merits review.

Minister's response

2.58 The Minister advised:

The Bill introduces a provision to protect the security of reports, documents and information obtained for the purposes of informing parole decisions and ensures that information that could prejudice national security is not disclosed as a result of the operation of Part 1B of the *Crimes Act*. It is in the public interest to restrict certain information used as part of the decision to release an offender from custody. In practice, the measures are likely to only apply to offenders with terrorist links. For example, information may be provided to the Attorney-General's Department which relates to ongoing intelligence matters or investigations. The release of that information to the offender could jeopardise not only ongoing law enforcement matters but put the community at risk where that information relates to the capabilities or methodology of law enforcement or intelligence agencies.

A person sentenced to imprisonment does not have a right to be granted parole. Parole decisions are made giving consideration to the protection of the community, the rehabilitation of the offender and their reintegration into the community. It would be a perverse outcome if one of the fundamental pillars of parole considerations—the protection of the

community-could be undermined because national security information that informed a parole refusal had to be disclosed to the offender in the notice of refusal.

Why the Attorney-General's decision is based on the Attorney's subjective 'opinion' rather than on objective criteria

The agency that has provided the information-such as the AFP or ASIO-will advise the Attorney-General or a delegate as to whether information is likely to prejudice national security. The Attorney-General would make his assessment based on this advice and the circumstances of the case.

Why the relevant information could not, at least, be provided to the applicant's legal representative and the gist of the information provided to the offender

The reforms do not prevent the Attorney-General from providing a person with an overview of the information considered as part of making a parole decision. Such an overview could be given providing the information set out did not prejudice national security. All Commonwealth parole decisions are subject to judicial review in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*, including those which are refused on national security grounds.

Why the Attorney-General's decision is not subject to merits review

Parole decisions under Part 1B of the *Crimes Act* are judicially reviewable under the *Administrative Decisions (Judicial Review) Act 1977* but are not subject to merits review. This is in line with the approach taken by State and Territory parole authorities and reflects the fact that an offender has been convicted and sentenced through the judicial process, exhausted appeal avenues they may have wished to pursue, and that release on parole is not a right. The Attorney-General or his or her delegate must exercise discretion and consider whether to grant an offender release on parole by considering the protection of the community, rehabilitation of the offender and their reintegration into the community. This aspect is not altered by the Bill.

Committee comment

2.59 The committee thanks the Minister for this response. The committee notes the Minister's advice that in practice these measures are likely to only apply to offenders with terrorist links as information may be provided relating to ongoing intelligence matters or investigations. The committee also notes the Minister's advice that the Attorney-General would make his or her assessment on the basis of advice provided by an agency, such as the AFP or ASIO, and the circumstances of the case, which is why the decision is based on the Attorney-General's subjective opinion rather than objective criteria. The committee also notes the Minister's advice that the reforms 'do not prevent' the Attorney-General from providing a person with an overview of the relevant information, so long as it did not prejudice national security.

The Minister also advised that parole decisions are not subject to merits review, which reflects the fact that release on parole is not a right.

2.60 The committee notes that while it is expected that the Attorney-General would make his or her assessment on the basis of advice provided to him or her, the only condition for the exercise of the power is that 'in the opinion of the Attorney-General' the information is likely to prejudice national security. The committee notes that judicial review is of limited practical utility where a power is conditioned on a subjective opinion. In the absence of merits review, the committee notes that a requirement that the assessment be made on 'reasonable grounds' may encourage a more demanding form of judicial review.

2.61 The committee also notes the Minister's advice that nothing prevents the Attorney-General from providing an overview of relevant information if it did not prejudice national security. However, there is nothing in the legislation requiring that this be provided. The committee emphasises that the right of a person to reply to adverse information against them is an important element of the right to procedural fairness. The courts have found that procedural fairness in parole applications 'requires that an applicant's attention be drawn to the main issues or factors militating against success, so that an adequate opportunity is afforded to deal with them'.²⁷ This does not require access to all documents but does require that 'an applicant knows of, or anticipates, the facts and matters assuming significance in a decision to decline a parole application'.²⁸

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

2.63 The committee considers it would be appropriate, at a minimum, for the bill to be amended to require that, where it would not prejudice national security, the person be provided with an overview of the relevant information or document, prior to the making of the parole decision.

2.64 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of empowering the Attorney-General to refuse to provide any reasons as to why parole has been refused.

27 *Butler v Queensland Community Corrections Board* [2001] QCA 323, [19]. This was cited with approval by the Federal Court of Australia in relation to section 19AL of the *Crimes Act 1914*: see *Duxerty v Minister for Justice and Customs* [2002] FCA 1518, [22].

28 *Butler v Queensland Community Corrections Board* [2001] QCA 323, [19].

Defence Legislation Amendment (Instrument Making) Bill 2017

Purpose	This bill seeks to amend the instrument making powers in the <i>Defence Act 1903</i> (the Act) to ensure that, when re-making certain instruments made under the Act in the future, the instruments can reflect policy requirements and approaches to drafting
Portfolio	Defence
Introduced	House of Representatives on 14 September 2017
Bill status	Before the Senate
Scrutiny principles	Standing Order 24(1)(a)(ii), (iv)

2.65 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Minister responded to the committee's comments in a letter dated 26 October 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.²⁹

Significant matters in delegated legislation³⁰

Initial scrutiny – extract

2.66 Part 1 of Schedule 1 seeks to amend the regulation-making powers in the *Defence Act 1903* relating to inquiries. Currently the regulation-making power enables regulations to be made for or relating to the appointment, procedures and powers of courts of inquiry, boards of inquiry, Chief of Defence Force commissions of inquiry and inquiry officers. The proposed amendments would instead provide for a more general power to make regulations relating to inquiries into matters concerning the Defence Force, including their appointment, procedures and powers.

2.67 The committee notes that the power to appoint a commission of inquiry and the detail of the inquiry's procedures and powers contain matters that go beyond mere technical detail. The committee notes the regulations currently made using the existing powers contain offence provisions and significant detail about how an

29 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

30 Items 1-5 of Schedule 1 and item 7 of Schedule 2, proposed section 117AD. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

inquiry is to be conducted.³¹ The committee's view is that significant matters such as these should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.68 The committee notes that the explanatory memorandum simply states that the bill does not make any changes to the ability to make regulations to compel a person to appear before and answer questions at an inquiry.³² It does not state whether consideration was given as to whether the details regarding commissions of inquiry would be more appropriate for inclusion in the primary legislation.

2.69 In addition, Part 2 of Schedule 1 provides that the regulations may prescribe matters relating to the regulation or prohibition of all types of hazards to aviation and aviation-related communications within a defence aviation area, including what objects can be brought within defence aviation areas. It also provides that provisions of the regulations are subject to monitoring under the *Regulatory Powers (Standard Provisions) Act 2014*.³³ The explanatory memorandum states that consideration was given to whether the scheme as a whole should be moved into the principal Act, rather than being established in delegated legislation, but it was decided that it was appropriate to continue the scheme in delegated legislation to provide the necessary flexibility and consistency with similar legislation.³⁴ However, the committee notes that the regulation of all types of hazards to aviation and aviation-related communications, which includes prohibiting the construction or use of buildings, structures or objects within a defence aviation area, is a significant matter that may be more appropriate for inclusion in primary legislation, noting 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.

2.70 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee:

- seeks the Minister's advice as to why details regarding the appointment, procedures and powers of a defence force commission of inquiry are left to delegated legislation rather than set out in primary legislation (Part 1 of Schedule 1); and
- leaves to the Senate as a whole the appropriateness of leaving to delegated legislation the power to regulate or prohibit matters in defence aviation areas (Part 2 of Schedule 1).

31 See Defence (Inquiry) Regulations 1985.

32 See explanatory memorandum, p. 8.

33 See item 7 of Schedule 2, proposed section 117AE.

34 Explanatory memorandum, p. 10.

Minister's response

2.71 The Minister advised:

I understand the Committee is seeking advice as to why details regarding the appointment, procedures and powers of a Defence Force commission of inquiry are left to delegated legislation rather than set out in primary legislation (Part 1 of Schedule 1 of the Bill).

Matters relating to the appointment, procedures and powers of inquiries concerning the Defence Force have been dealt with under Regulations for many decades. Defence is not aware that any of the numerous reviews about military justice (including inquiry arrangements) recommended that delegated legislation relating to Defence inquiries be incorporated in primary legislation, or proposing a model which would maintain sufficient flexibility to meet the needs of the Defence Force in respect of such inquiries.

The *Defence Act 1903* (the Defence Act) has long permitted such regulations by expressly authorising provisions in regulations that, for example, create offences and compel individuals to provide evidence to Defence inquiries. When compared to current provisions in the Defence Act, this Bill does not propose changes that would permit increased powers concerning the appointment, procedures and powers of inquiries in Defence, including their capacity to affect personal rights and liabilities.

The current arrangements permit a necessary degree of flexibility for the Australian Government to determine forms of inquiry in the Defence Force, having regard to administrative, organisational and operational changes that occur from time to time. At the same time, appropriate Parliamentary oversight of the content of such regulations is maintained by the Senate Standing Committee on Regulations and Ordinances, as well as sunset arrangements under the *Legislation Act 2003*.

Further, it is noted that as recently as 2015, the regulation making powers in the Defence Act were modified to enable the creation of a separate regulation permitting the Inspector General Australian Defence Force (IGADF) to conduct inquiries into a range of matters concerning the Defence Force, including the procedures, powers and reporting requirements concerning such inquiries.

Lastly, it is noted that in its correspondence, the Committee referred to commissions of inquiry. This type of inquiry was generally used to inquire into Service-related deaths in the Defence Force. Following the recent amendments to the Defence Act in 2015, IGADF is now responsible for inquiring into Service-related deaths under the *Inspector-General of the Australian Defence Force Regulation 2016*, which means that commissions of inquiry have largely moved on from their original intended purpose.

Committee comment

2.72 The committee thanks the Minister for this response. The committee notes the Minister's advice that matters relating to the appointment, procedures and powers of inquiries concerning the Defence Force have been dealt with under regulations for many decades, no reviews have recommended that these matters be dealt with by primary legislation and this bill does not propose increasing any powers. The committee also notes the Minister's advice that the current arrangements permit a necessary degree of flexibility to determine forms of inquiry having regard to administrative, organisational and operational changes that occur from time to time.

2.73 The committee notes that the fact that certain powers have been contained in delegated legislation for many years without any recommendation that they be moved to primary legislation does not address the question of whether they would be more appropriate for inclusion in primary legislation.

2.74 The committee reiterates its view that the power to appoint a commission of inquiry and the detail of the inquiry's procedures and powers contain matters that go beyond mere technical detail and the committee's longstanding view is that significant matters such as these should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the justification provided is that the current arrangements permit a necessary degree of flexibility to determine forms of inquiry. However, the committee notes that it would appear to be possible to include significant matters regarding an inquiry's procedures and powers in primary legislation while leaving the details that may be affected by changes that may occur from time to time to the administrative, organisational and operational requirements to delegated legislation.

2.75 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving the appointment, procedures and powers of Defence Force inquiries to delegated legislation rather than setting these out in primary legislation.

Broad delegation of administrative power³⁵***Initial scrutiny – extract***

2.76 Proposed section 117AE triggers the monitoring powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions of the regulations made for the purpose of proposed section 117AD. Proposed subsection 117AE(4) provides that an authorised person may be assisted 'by other persons' in

35 Schedule 1, item 7, proposed subsection 117AE(4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

exercising powers or performing functions or duties in relation to monitoring. The committee notes that the powers conferred on a person assisting also include a power to use force against things when executing a monitoring warrant. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

2.77 The committee therefore requests the Minister's advice as to why it is necessary to confer monitoring powers on any 'other person' to assist an authorised person and whether it would be appropriate to amend the bill to require that any person assisting an authorised person have specified skills, training or experience.

Minister's response

2.78 The Minister advised:

I understand the Committee is also seeking a detailed justification as to why it is necessary and appropriate to confer monitoring powers on any 'other person' to assist an authorised person in a defence aviation area, and whether it would be appropriate to amend the Bill to require that any person assisting an authorised person have specified skills, training or experience.

Authorised persons for the purpose of the scheme are appointed by the Secretary or the Chief of the Defence Force, and must have the knowledge, training or experience necessary to properly exercise the powers of an authorised person in a defence aviation area.

In the majority of cases, Defence is able to reach agreements with landowners in relation to aviation hazards. However, there may be limited circumstances where it is necessary to engage an external expert to assist Defence in assessing the situation and determining what actions are appropriate and necessary. For example, Defence may require the assistance of:

- a qualified surveyor to provide Defence with specialist advice on a structure's height;
- an engineer to provide general advice on the site; and/or
- an arborist to provide advice in relation to tree lopping.

The intent of the proposed measure is allow Defence to use external experts with specialist skills that Defence may not have internally, in dealing with a particular situation. Further, it is intended that a person assisting an authorised person is only authorised to use force against 'things' (e.g. hazards and obstacles), not 'persons'.

The nature of defence aviation and the nature of hazards to aviation are rapidly changing. It is critical that the regulation of those hazards is flexible enough to address change as it happens. The current arrangements permit a necessary degree of flexibility for Defence to determine the specific skills, training or experience required to assist Defence in dealing with

aviation hazards, particularly in emergency situations. Therefore, it would not be appropriate to amend the Bill to require that any person assisting an authorised person have specific skills, training or experience. This matter is best dealt with on a case by case basis, depending on the particular hazard, site or situation.

Committee comment

2.79 The committee thanks the Minister for this response. The committee notes the Minister's advice that there may be limited circumstances in which it is necessary to engage an external expert, such as a qualified surveyor, engineer or arborist, to assist Defence in assessing the situation and determining what actions are appropriate and necessary. The committee also notes the Minister's advice that the nature of defence aviation and its hazards are rapidly changing and the current arrangements permit a degree of flexibility for Defence to determine the specific skills, training or experience required to assist Defence in dealing with aviation hazards, particularly in emergency situations. The committee also notes the advice that a person assisting an authorised person is authorised only to use force against 'things' not 'persons'.

2.80 The committee's consistent scrutiny position in relation to the exercise of coercive powers is that persons authorised to use such powers should have received appropriate training. The committee understands the need for flexibility in determining who may be appropriate 'other persons' in the particular circumstances of a defence aviation area. However, the committee remains concerned that 'other persons' will be authorised to assist in monitoring, and in this case use force against things, without any requirement for them to have received training in the use of the relevant monitoring powers.

2.81 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing 'other persons' to assist authorised persons in exercising potentially coercive powers,³⁶ including the use of force against 'things', in circumstances where there is no legislative guidance about the appropriate skills and training required of those 'other persons'.

Use of force³⁷

Initial scrutiny – extract

2.82 Proposed subsection 117AF(3) provides that in executing a monitoring warrant for the purpose of ensuring compliance with a relevant provision of the

³⁶ See Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014*.

³⁷ Schedule 1, item 7, proposed subsection 117AF(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

regulations, an authorised person may use such force against persons and things, and a person assisting may use such force against things, as is necessary and reasonable in the circumstances. This goes beyond the standard powers available in relation to monitoring as provided for in the *Regulatory Powers (Standard Provisions) Act 2014*.

2.83 The explanatory memorandum explains that it is necessary to modify the relevant Part of the *Regulatory Powers (Standard Provisions) Act 2014* as it is necessary to enable authorised persons to enter land and premises for a range of purposes, including removing or marking hazardous objects, such as removing destroying or modifying a building, structure or object.³⁸ The explanatory memorandum also states that it is important to ensure there is a mechanism to deal with hazardous objects if people are unwilling to comply with requirements. Thus, it may be inferred that a provision enabling the use of force against 'things' may be necessary. However, no explanation is given as to why a provision enabling the use of force against 'persons' is necessary. The committee notes that the *Guide to Framing Commonwealth Offences* states that the use of force against persons and things should be examined and justified separately, and that generally it will be easier to demonstrate a need for a provision authorising the use of force against things to execute a warrant, than it will be to demonstrate the need for a provision authorising the use of force against persons for regulatory regimes governing compliance.³⁹

2.84 The committee seeks the Minister's detailed justification as to why it is necessary and appropriate to empower an authorised person to use force against persons in executing a monitoring warrant in a defence aviation area.

Minister's response

2.85 The Minister advised:

I understand the Committee is also seeking detailed justification as to why it is necessary and appropriate to empower an authorised person to use force against persons in executing a monitoring warrant in a defence aviation area.

The proposed measures provide for authorised persons to enter land and premises for a range of purposes, including removing or marking hazardous objects. These powers are important aspects of the scheme ensuring that there is a mechanism to deal with hazardous objects if people are unwilling to comply with requirements.

In the vast majority of cases, Defence is able to reach agreement with landowners in relation to aviation hazards. However, there may be

38 Explanatory memorandum, pp 12-13.

39 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 80.

situations where an authorised person may be required to enter land to inspect or remove a hazard against the wishes of a landowner. For example:

- a crane operator under pressure from a client may not wish to have their crane lowered to a safe level;
- a landowner may refuse to move obstacles that have been erected without approval; and/or
- a landowner may try to stop an authorised officer investigating or dismantling an obstacle or lopping a hazardous tree.

It is critical that authorised persons are able to use necessary and reasonable force against persons or things, given the potential significant impact on aviation safety and Defence operation capability.

I have been advised that civilian authorities currently have similar powers in the *Civil Aviation (Buildings Control) Regulations 1988* which provides that '*the Authority may authorise any necessary action and the use of any reasonable force for the purpose of preventing a contravention of, or securing compliance with, these Regulations*' (see subsection 15(2)).

Committee comment

2.86 The committee thanks the Minister for this response. The committee notes the Minister's advice that the proposed measures provide for authorised persons to enter land and premises for a range of purposes, including removing or marking hazardous objects and there may be situations where authorised persons may be required to enter property against the wishes of a landowner. The committee notes the examples given by the Minister as to when an authorised person may need to enter without the landowners consent and the Minister's view that it is 'critical that authorised persons are able to use necessary and reasonable force against persons or things, given the potential significant impact on aviation safety and Defence operation capability'.

2.87 The committee notes that the examples provided by the committee appear to demonstrate the need for an authorised person to be able to use force against 'things' but does not necessarily provide a justification for empowering an authorised person to use force against 'persons'. The Minister's response does not specifically explain what use of force against persons could be required in the examples provided. It is unclear to the committee from the Minister's response whether, if persons are refusing to allow authorised persons to move equipment or obstacles or lop hazardous trees, it is intended that the authorised person could, using force, physically restrain or detain the landowner.

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

2.89 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of empowering authorised persons to use force against persons when executing a monitoring warrant in a defence aviation area.

Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017

Purpose	<p>This bill seeks to amend various Acts relating to family assistance and child support</p> <p>Schedule 1 amends the child support scheme to:</p> <ul style="list-style-type: none"> • extend the interim period that applies for recently-established court-ordered care arrangements and provide incentives for the person with increased care to take reasonable action to participate in family dispute resolution; • allow tax assessment to be taken into account for child support purposes in a broader range of circumstances; • allow for courts to set aside child support agreements made before 1 July 2008, as well as allowing all child support agreements to be set aside without having to go to court if certain circumstances change; and • amend methods in relation to recovering child support debts and make consequential amendments <p>Schedule 2 replaces the current FTB Part A immunisation requirement arrangements with new compliance arrangements</p>
Portfolio	Social Services
Introduced	House of Representatives on 14 September 2017
Bill status	Before the House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i) and (iii)

2.90 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Minister responded to the committee's comments in a letter dated 7 November 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁴⁰

40 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

Retrospective effect⁴¹

Initial scrutiny – extract

2.91 A number of provisions⁴² in the bill appear to operate on past events, for example, agreements which exist, or assessments which were made, prior to commencement. In addition, item 174 refers to matters for ascertaining or determining components of certain income for periods before 1 July 2008. The explanatory memorandum provides no explanation as to whether any of these provisions, which operate on past events, would have a retrospective effect on any individual. The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

2.92 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

2.93 It is unclear from the bill or the explanatory materials as to whether these provisions would have a retrospective effect, and if so, if any individual would suffer any detriment as a result.

2.94 The committee therefore requests the Minister's advice as to whether any of the provisions listed above would have a retrospective effect, and if so, whether any person would suffer any detriment as a result.

Minister's response

2.95 The Minister advised:

Amended tax assessments: Part 2, Schedule 1 of the Bill

Items 40 and 43 make amendments to sections 56 and 58A of the *Child Support (Assessment) Act 1989* (CSA Act), by providing for an amended tax assessment that is issued on or after 1 January 2018 to apply to a child support assessment retrospectively in certain circumstances.

Where the Australian Taxation Office (ATO) issues an amended tax assessment that is higher than the previous tax assessment (for the same financial year) on or after 1 January 2018, it will always be applied retrospectively to the relevant child support period, regardless of the

41 Schedule 1, item 43, new paragraph 58A(3B)(b)(iv) and 58A(3d)(c)(iii); and items 51; 74(3) and (6); 172(2) and (4); 174; 176; and 183. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

42 See Schedule 1, item 43, new paragraph 58A(3B)(b)(iv) and 58A(3d)(c)(iii); and items 51; 74(3) and (6); 172(2) and (4); 174; 176; and 183.

financial year for which the amendment is made. This may result in a child support overpayment or underpayment debt being raised against the person with the higher amended tax assessment. This outcome supports the principle that parents take financial responsibility for the costs of raising their children in line with their financial capacity to do so, and aligns with existing rules governing the retrospective application of taxable income (see subsections 58A(2) and 58A(3) of the CSA Act, which are being retained).

Where the ATO issues a lower amended tax assessment on or after 1 January 2018, the lower income will only be applied retrospectively to a child support assessment if the person took action to amend the assessment:

- within the lodgement timeframe for the original assessment; or
- within 28 days of being notified of the original assessment; or
- within 28 days of becoming aware of the error in the previous assessment (if the reason for not applying for an amendment earlier was due to reasons beyond the person's knowledge or control), or where special circumstances apply.

This will result in a retrospective adjustment to the child support assessment, and may create an overpayment or underpayment debt being raised against the other party in the child support case. Where the parent with the lower amended taxable income has taken timely action to amend their tax assessment, any debt raised against the other parent will be minimal. This outcome supports the fairer treatment of child support parents who take timely action to correct any errors made in their tax assessment, particularly where the error was made by another party, such as a tax agent or the ATO. These provisions also provide fairer outcomes for parents who, due to circumstances beyond their knowledge or control, or special circumstances such as serious ill health or natural disaster, are unable to amend their tax assessment earlier.

Backdating of a lower amended taxable income is also limited by the timeliness of the lodgement of the person's original tax assessment. Under current provisions, where a parent has not lodged their tax return when a new child support period starts, a provisional income is used. If the parent's original tax assessment is lodged late and is lower than the provisional income, the taxable income will only apply prospectively. If the parent then meets the relevant criteria under Item 43 (proposed new subsections 58A(3C) or 58A(3D) of the CSA Act) for retrospectively applying a lower amended tax assessment, the lower amended tax assessment would only retrospectively replace the original tax assessment, and would not replace the higher provisional income.

Child support agreements: Part 3, Schedule 1 of the Bill

Item 51

Items 46 and 47 make amendments to sections 35C and 95 of the *Child Support (Assessment) Act 1989* (the CSA Act) to ensure that where a child support agreement contains provisions that are taken to be an order made by consent by a court under Division 4 of Part 7 of the CSA Act, section 142 of the CSA Act (which provides for when such an order would cease to be in force) would also have effect.

These amendments are consistent with current policy that certain provisions in child support agreements would cease to have effect when a child support terminating event occurs due to section 142, for example where a child leaves their parents' care to live independently or becomes a member of a couple. However, the Government has put forward amendments to place the current policy beyond doubt given differing judicial opinions in a recent case.⁴³

The application provision for these amendments at item 51 provides that items 46 and 47 would apply to days in a child support period that occurs on or after commencement of item 51, but would apply regardless of whether the child support agreement was made before or after commencement of item 51. This is because the amendments affirm how the current policy has always been intended to operate and would therefore not result in detriment to any person.

Subitems 74(3) and (6)

Division 2 of Part 3, Schedule 1 of the Bill inserts new provisions which enable the termination or suspension of a child support agreement for a child where the payee under the agreement ceases to be an eligible carer for the child. It is contrary to the objectives of the CSA Act for a person who does not have care of a child to be receiving child support payments.

Subitem 74(3) provides that where a payee under the agreement ceased to be an eligible carer of a child before commencement of item 74, continues not to be an eligible carer immediately before commencement of item 74 and the agreement would have otherwise been terminated under the new provisions, the child support agreement would be terminated from commencement of item 74. This provision ensures the preservation of entitlements before commencement, while all child support assessment from commencement would reflect the new policy, regardless of when the child support agreement was entered into. This is important as it would remove the unfair outcome under the current policy where a parent may be required to continue paying child support to a

43 In the judgement of *Masters & Cheyne* [2016] FamCAFC 225, one of the judges (Murphy J) expressed a view consistent with the current policy while one of the other judges (Aldridge J) expressed a view inconsistent with the current policy.

parent who has ceased to be an eligible carer for a child. Subitem 74(4) provides that item 74 does not affect the operation of a child support agreement for any other purpose and therefore, for example, a parent who has ceased to be an eligible carer for a child may still have the option to privately enforce contractual obligations.

Subitem 74(6) ensures an outcome similar to subitem 74(3) for the suspension of child support agreements in cases of temporary care changes.

Overpayments: Part 4, Schedule 1 of the Bill

Subitems 172(2) and (4)

Division 1 of Part 4, Schedule 1 of the Bill inserts new provisions which extend existing administrative and court recovery mechanisms for child support debts to carer liabilities, which occur where a parent has been overpaid child support. This is to ensure equitable and consistent treatment in the collection of payer and payee debts.

Subitem 172(2) allows the expanded recovery mechanisms to be used where a payee was overpaid an amount before commencement of item 172. To enable this, subitem 172(4) provides that a debt raised under section 79 of the *Child Support (Registration and Collection) Act 1988* before commencement is taken to be a carer debt for the purpose of the expanded recovery mechanism provisions under Part 4. In these cases, the Department of Human Services would first consider whether recovery of the overpayment could occur through a reduction in future child support entitlements or through cash repayment arrangements (that is, through mechanisms currently available to them). The expanded recovery mechanisms would only be used where recovery from future child support entitlements is not possible or where negotiation with the payee on cash repayment arrangements has not been successful. Currently, the only alternative for the payer is to pursue recovery through the courts, in contrast with the range of options available for the recovery of payer debts.

Item 174

This amendment aligns the tax return rules for pre-1 July 2008 periods with those that apply for post-1 July 2008 periods where a tax return was lodged outside the Australian Tax Office lodgement timeframe and a provisional income had been applied in the child support assessment. These amendments are necessary to ensure that child support arrears or overpayments are not raised against parents, where it is through no fault of their own and is due to the other parent not complying with their legal obligations.

Currently, where a parent lodges a tax return for a period before 1 July 2008, there is no limitation to retrospectively applying a taxable income to a child support assessment. For tax returns lodged in respect of periods from 1 July 2008, a lower taxable income would not be applied where that

tax return was lodged outside the Australian Tax Office lodgement timeframe. This change was enacted so that a parent could not be disadvantaged in their child support assessment by the other parent not lodging a tax return in line with legal requirements.

The continuation of the pre-1 July 2008 rules has been raised by the Commonwealth Ombudsman as they have resulted in large overpayments being raised against payees who had received and spent the child support received in good faith (based on a provisional income).⁴⁴ Generally where a taxable income has been applied retrospectively and was not reflective of the other parent's earning capacity, a parent could seek a review under departure provisions. However parents can no longer access the departure provisions in these cases given the time elapsed and the seven year limitation on backdating departure orders.

Items 176 and 183

At present, a new care percentage would only have effect from the date of notification where notification of the care change is delayed (more than 28 days after the care change). Item 176 amends the current rules so that a decreased care percentage would be reflected in the child support assessment from the date of event (an increased care percentage would continue to be reflected from the date of notification).

Item 183 provides that these new rules would apply in general for care changes that occur after item 183 commences. However, where a care change occurs before item 183 commences but notification is received more than 26 weeks after item 183 commences, the new care percentage date of effect rules would also apply to those care changes. This provides parents who have delayed in notifying of a care change with a transitional 'grace' period of 26 weeks from commencement to notify of the care change before they become subject to the new care percentage date of effect rules.

As a result, a parent who had reduced their care of a child before commencement but failed to notify of the change until more than 26 weeks later, would have that reduced care percentage reflected in their child support assessment from the date of the care change. This could lead to a child support overpayment or arrears debt being raised against that parent in some cases. However, this is appropriate given the reduced care percentage is an accurate measure of the lower care costs incurred by that parent since the date of the care change and the ability to notify within a timely manner was within the parent's control.

Committee comment

2.96 The committee thanks the Minister for this detailed response. In relation to items 40 and 43, the committee notes the Minister's advice that these provisions provide for an amended tax assessment that is either issued on or after 1 January 2018 to apply a child support assessment retrospectively. The committee also notes the Minister's advice that when the ATO issues an amended tax assessment that is higher than the previous tax assessment (for the same financial year) it will always be applied retrospectively to the relevant child support period as it aligns with existing rules governing the retrospective application of taxable income, but that this supports the principle that parents take financial responsibility for the costs of raising their children in line with their financial capacity to do so.

2.97 In relation to item 51 the committee notes the Minister's advice that the amendments provide for items 46 and 47 to apply to the days in a child support period that occur on or after commencement of this provision, but would apply regardless of whether the child support agreement was made before or after commencement of item 51. The committee notes the Minister's advice that these amendments affirm how the current policy has always been intended to operate and would therefore not result in detriment to any person. However, the committee notes that the Minister has also advised that the government has put forward amendments because of differing judicial opinions in a recent case. The committee considers that although the justification provided is sufficient to justify amending the law with prospective application, the fact that a court has interpreted a law contrary to the executive government's understanding of the original provisions 'intended meaning' may not be a sufficient justification to apply the law retrospectively. It is unclear whether the proposed changes would apply to any cases currently before the courts involving the interpretation of the existing provisions.

2.98 In relation to subitems 74(3) and (6) the committee notes the Minister's advice that these provisions ensures that all child support assessments from commencement would reflect the new policy, regardless of when the agreement was entered into, as this removes the unfair outcome under the current policy where a parent may be required to continue paying child support to a parent who has ceased to be an eligible carer for a child.

2.99 In relation to subitems 172(2) and (4) the committee notes the Minister's advice that these new provisions extend existing administrative and court recovery mechanisms for child support debts to carer liabilities and the provisions allow the expanded recovery mechanisms to be used where a payee was overpaid an amount before commencement. The committee also notes the Minister advice that the expanded recovery mechanisms would only be used where recovery from future child support entitlements is not possible or where negotiation with the payee on cash repayment arrangements has not be successful.

2.100 In relation to item 174 the committee notes the Minister's advice that this provision aligns the tax return rules for pre-1 July 2008 periods with those that apply

for post-1 July 2008 periods where a tax return was lodged outside the ATO lodgement timeframe and a provisional income had been applied in the child support assessment, and that these amendments are necessary to ensure that child support arrears or overpayment are not raised against parents, where it is through no fault of their own and is due to the other parent not complying with their legal obligations.

2.101 In relation to items 176 and 183 the committee notes the Minister's advice that generally the new rules apply for care changes that occur after item 183 commences, but where notification is delayed the new care percentage date of effect rules would also apply to those care changes. The committee notes the Minister's advice that this provides parents who have delayed notifying of a change of care with a grace period of 26 weeks from commencement to notify of the change before they become subject to the new rules. The committee notes the Minister's advice that as a result, a parent would have that reduced care percentage reflected in their child support assessment from the date of the care change, but this is appropriate given the reduced care percentage is an accurate measure of the lower care costs incurred by that parent since the date of the care change and the ability to notify within a timely manner.

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

2.103 In light of the detailed information provided in relation to items 40, 43, 176 and 183 and subitems 74(3) and (6), 172(2) and (4), the committee makes no further comment on these matters.

2.104 In relation to item 51, the committee seeks the Minister's further advice as to whether the retrospective application of the provision would have any effect on cases currently before the courts involving an interpretation of existing sections 35C and 95 of the *Child Support (Assessment) Act 1989*.

Investigation and Prosecution Measures Bill 2017

Purpose	This bill seeks to amend various Acts relating to the Independent Commission Against Corruption and the prosecution of offences on Norfolk Island to: <ul style="list-style-type: none"> • support the restructure of the New South Wales Independent Commission Against Corruption; and • extend the functions, powers and duties of the Commonwealth Director of Public Prosecutions to laws of Norfolk Island
Portfolio	Attorney-General
Introduced	House of Representatives on 13 September 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.105 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Attorney-General responded to the committee's comments in a letter dated 9 November 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁴⁵

Retrospective effect⁴⁶

Initial scrutiny – extract

2.106 Schedule 2 to the bill seeks to amend the *Director of Public Prosecutions Act 1983* (DPP Act) to extend the functions, powers and duties of the Commonwealth Director of Public Prosecutions to Norfolk Island.

2.107 Specifically, the definition of 'laws of the Commonwealth' in subsection 3(1) of the DPP Act currently includes a law of a territory, but explicitly excludes the *Norfolk Island Act 1979* and laws made under or continued in force by that Act. The bill seeks to remove this limitation and item 3 of Schedule 2 provides that, for the purposes of the DPP Act and any instrument made under it, a reference to a law of a Territory includes a reference to 'a law in force in Norfolk Island at any time, whether before or after the commencement of this item.'

45 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest

46 Schedule 2, item 4. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

2.108 Item 4 of Schedule 2 seeks to validate things done under the *Director of Public Prosecutions Regulations 1984*, as amended by the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017* (DPP Regulations), in the event that they are found to be invalid. The DPP Regulations, which came into effect on 4 August 2017, purportedly prescribed functions, powers and duties of the Director of Public Prosecutions in relation to Norfolk Island.

2.109 The committee notes that item 4 would have a retrospective effect in that it seeks to validate actions already taken in reliance on regulations in the event that the latter regulations are found to be invalid.⁴⁷ If the DPP Regulations, as amended in August 2017, are invalid, any action taken by the Director of Public Prosecutions in relation to Norfolk Island is likely to have not been lawfully authorised. As such, validating any action taken by the Director of Prosecutions between August 2017 and when this bill may pass would have a retrospective effect.

2.110 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

2.111 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

2.112 The explanatory memorandum to the bill outlines the intended effect of item 4, but does not provide any reasons as to why such a provision is necessary. Although the statement of compatibility states that the provisions do not 'change any criminal offences, penalties or sanctions applicable to those subject to the laws of Norfolk Island',⁴⁸ the issue of any other possible detrimental effects the provisions may have on individuals has not been addressed in the explanatory material.

2.113 The committee therefore requests the Attorney-General's advice as to why it is necessary to validate with retrospective effect the *Director of Public Prosecutions Regulations 1984*, as amended by the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017*, and whether this measure may have a detrimental effect on any individual.

47 Explanatory memorandum, p. 13.

48 Explanatory memorandum, p. 8.

Attorney-General's response

2.114 The Attorney-General advised:

Part 3 of Schedule 2 of the Bill applies only if the amending Regulations were to be challenged and found to be invalid. Therefore, the retrospective application of that Part would only operate to validate anything done under the amending Regulations.

The Australian Government considers it appropriate to include a provision to this effect as a precaution to avoid any detrimental impact should the amending Regulations be found to be invalid. It is important to ensure the validity of any prosecutions conducted on Norfolk Island in reliance on the amending Regulations. To do otherwise would undermine the effective enforcement of the criminal law during this period. While the Australian Government considers the risk of invalidity to be small, the consequence would be significant for all concerned, not least of all the victims and defendants involved in any prosecutions.

It is important to note that the retrospective application of Part 3 of Schedule 2 of the Bill would not have any detrimental effect on an individual, or change the rights or liabilities of any person subject to prosecution during the period in which the amending Regulations were purportedly in force. The Bill does not in any way change the circumstances under which a person may be found to have committed a criminal act. The provision merely ensures the availability of an effective mechanism for prosecuting such acts.

Committee comment

2.115 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the retrospective validation of the regulations would only operate if the amending regulations were found to be invalid, and that the government considers the risk of invalidity to be small but that it is appropriate to include such a provision to avoid any detrimental impact that might arise as to do otherwise would undermine the effective enforcement of the criminal law during this period. The committee further notes the Attorney-General's advice that the retrospective validation would not have any detrimental effect on any individual, or change the rights or liabilities of any person subject to prosecution during the period the regulations were purportedly in force.

2.116 Although the Attorney-General has stated that the risk of invalidity is considered small, the committee notes that the Attorney's response does not answer the committee's question as to why it is necessary to validate these regulations (i.e. what are the features of the amending regulations that caused the government to believe there is any risk of invalidity). The committee also notes the difficulty in reconciling the Attorney-General's advice that it is necessary to ensure the validity of the amending regulations because the consequence of invalidity would be 'significant for all concerned', with the advice that the validation would not have any

detrimental effect on an individual, or change the rights or liabilities of any person subject to prosecution.

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

2.118 In light of the information provided, including the Attorney-General's assurance that the retrospective validation of the DPP Regulations would not have any detrimental effect on any individual, the committee makes no further comment on this matter.

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

Purpose	This bill seeks to amend the <i>Migration Act 1958</i> to prohibit narcotic drugs, mobile phones, SIM cards and other things of concern in relation to persons in immigration detention facilities The bill also amends the search and seizure powers, including the use of detector dogs for screening procedures
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 13 September 2017
Bill status	Before the House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (ii), (iv) and (iv)

2.119 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Minister responded to the committee's comments in a letter dated 2 November 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁴⁹

Undue trespass on personal rights and liberties⁵⁰

Initial scrutiny – extract

2.120 This bill seeks to amend the *Migration Act 1958* (Migration Act) to enable the Minister to determine, by legislative instrument, that any 'thing' is prohibited in an immigration detention centre, if satisfied that possession of the thing is prohibited by law or possession or use of the thing in the detention facility 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.⁵¹ A note in the bill gives examples of the things that might be considered to pose such a risk as including mobile phones; SIM cards; computers and tablets; medications or health care supplements in specified circumstances and publications or other material that could incite violence, racism or hatred.

2.121 The bill also proposes to give or extend powers to:

49 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest

50 General comment. The committee draws Senators' attention to the bill pursuant to principle 1(a)(i) of the committee's terms of reference.

51 See item 2, proposed section 251A.

- search a detainee's person, clothing and property to find out whether a prohibited thing is hidden on the person, in the clothing or in their property;⁵²
- require a detainee, or their possessions, to be strip-searched or screened by screening equipment to find out whether a prohibited thing is hidden on the person, in their clothing or in their possession;⁵³ and
- enable authorised officers and their assistants to search, without a warrant, the rooms and personal effects of immigration detainees to find out if a prohibited thing, weapon or other thing capable of being used to inflict injury or help a detainee escape is in the detention facility (and to use detector dogs for this purpose).⁵⁴

2.122 The bill also indirectly empowers authorised officers to use force against a person or property when conducting a search so long as it is reasonably necessary in order to conduct the search.⁵⁵

2.123 The explanatory memorandum gives the reason for the amendments as being because the profile of the detainees in immigration detention facilities has changed significantly over the past two years, with facilities now accommodating a number of higher risk detainees, including child sex offenders and members of organised crime groups.⁵⁶ The explanatory memorandum also states that evidence indicates that detainees are using mobile phones 'to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats'.⁵⁷ It also states that the existing search and seizure powers in the Migration Act are not sufficient to manage narcotic drugs, mobile phones, SIM cards or other things that are of concern in immigration detention facilities, and the amendments in the bill seek to enhance the health, safety and security of persons within the facilities.⁵⁸

2.124 The committee notes that the amendments in the bill, in restricting the possessions a detainee may have inside immigration detention and empowering authorised officers to search a detainee without a warrant (including strip-searches and searches of a detainee's room and personal effects), trespass on the detainee's rights and liberties, particularly their right to privacy. The committee's terms of

52 See items 3-7.

53 See items 10-14 and 15-18.

54 Items 21, proposed section 252BA and 252BB.

55 Item 21, proposed subsection 252BA(6).

56 Explanatory memorandum, p. 2.

57 Explanatory memorandum, p. 2.

58 Explanatory memorandum, p. 2.

reference require it to consider whether provisions *unduly* trespass on rights and liberties.⁵⁹ In this instance, the committee acknowledges the difficulties posed by detainees with serious criminal histories, and appreciates there may be a need to restrict access for high-risk detainees to items that could be used to attempt to commit offences.

2.125 However, the committee notes that persons detained in immigration detention facilities are detained on the basis that they are non-citizens who do not possess a valid visa. They are not detained, as is the case for those in prisons, as punishment for having committed a crime. The level of risk posed by persons detained due to the exercise of the Minister's character ground visa cancellation powers is likely to be very different to that posed by people seeking to be recognised as refugees or a tourist having overstayed their visa. Yet, the proposed amendments in the bill would apply to all immigration detainees equally, despite the fact that around half the detention population is not made up of high-risk individuals.⁶⁰

2.126 As the amendments in the bill would apply regardless of the level of risk posed by different detainees, the committee considers that the bill, in restricting individual privacy and autonomy by denying detainees the ability to possess things, such as mobile phones or computers, and the extensive search powers (without the need to obtain a warrant), unduly trespasses on personal rights and liberties. The committee notes these scrutiny concerns are heightened by the broad power given to the Minister to prescribe any 'thing' as being prohibited so long as the Minister is satisfied that possession or use of the thing 'might' be a risk to the health, safety or security of persons in the facility or to the order of the facility (as noted below at paragraphs [2.133] to [2.137]).

2.127 The committee draws these scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the amendments impacting on individual liberties made by this bill.

Minister's response

2.128 The Minister advised:

Immigration detention facilities (IDFs) contain detainees who are in immigration detention for different reasons, including:

- illegal maritime arrivals (IMAs);
- people who have overstayed their visa; and
- people who have had their visas cancelled, including on character grounds.

59 Senate Standing Order 24(1)(a)(i).

60 Statement of compatibility, p. 24.

These people are not lawfully permitted to remain in the Australian community unless or until they hold a visa.

Almost three quarters of the detainee population consists of high-risk individuals who do not hold a visa and includes individuals that have been transferred from a correctional facility, pending their removal from Australia. Members of this cohort have significant criminal histories, such as child sex offences or links to criminal gangs such as outlaw motorcycle gangs and other organised crime groups.

IMAs make up around 25 per cent of the detention population. This cohort is complex and includes people with criminal histories or other security concerns which present a risk to the Australian community.

The change to the demographics of the detention population is due to the Government's successful border protection policy and the increase in visa refusal or cancellation on character grounds.

As a result of the changing demographic of detainees, items such as mobile phones and food items being used to facilitate illegal activity within immigration detention facilities.

Activities facilitated or assisted by mobile phone usage include:

- drug distribution
- maintenance of criminal enterprises within and outside of immigration detention facilities
- as commodity of exchange or currency
- owners of mobile phones being subjected to intimidation tactics (including theft of the phone)
- facilitating threats and /or assaults between detainees including an attempted contract killing
- accessing child pornography.

Specific examples of mobile phones and other things being a risk to the health, safety or security of persons in the facility or to the order of the facility include:

- A detainee being held on Christmas Island used a mobile phone to arrange an attempted contract killing on another detainee being held at Maribyrnong Immigration Detention Centre. Another detainee used a mobile phone to successfully coordinate an escape from the Villawood Immigration Detention Centre by climbing a wall to a waiting car.
- Food items are also being used as a method for concealing contraband being brought into immigration detention facilities, this includes narcotic drugs and prescription medications.
- Recent screening procedures conducted on food being brought into detention facilities highlighted the lengths to which detainees will go

to smuggle illicit substances into immigration detention facilities. Narcotic drugs were discovered concealed in food items such as bread and chocolate bars.

- Medications or health care supplements in specified circumstances are listed in a note at the end of proposed subsection 251A(2) of the Bill. This is intended to capture circumstances where a person in an immigration detention facility may be in possession of medication that has been prescribed for another person. There has been a significant increase of prescription medication such as Xanax and Suboxone being found in the possession of detainees who do not hold a prescription for these medications. The misuse of medications poses a serious risk to health and safety of detainees and they are also being used as a form of currency.

The examples set out above highlight the need for me to have the ability to determine things to be prohibited things where I am satisfied that possession or use of the thing might be a risk to the health, safety or security of persons in an IDF or to the order of an IDF.

The necessary corollary to the restriction of such items is the ability to search for, and take possession of, these items.

The measures in the Bill need to apply to all individuals accommodated within an IDF, as well as people visiting an IDF. The current two-tiered approach has resulted in abusive and aggressive altercations between detainees, stand-over tactics and threats and an increase in use of force incidents as a result of having to remove controlled items. The proposed amendments in the Bill provide a consistent single-tier policy that mitigates the risks associated with allowing only some detainees access to items which may pose a risk to the health, safety and security of staff and detainees within IDFs, or to the order of the facilities.

For the reasons set out above, I do not consider that these amendments will unduly trespass on personal rights and liberties. Applying the new arrangements equally across the IDF is necessary and proportionate to maintain the health, safety and security of persons in an IDF and order of an IDF, and to manage the threat that things, including as mobile phones, pose to an IDF.

Committee comment

2.129 The committee thanks the Minister for this response. The committee notes the Minister's advice regarding the demographics of the detainee population⁶¹ and the examples given of things considered to be a risk to the health, safety or security

61 The committee notes the Minister's response states that 'almost three quarters' of the detainee population consists of high-risk individuals. In contrast, the statement of compatibility accompanying the bill states that 'more than half' of the population consists of high risk individuals (p. 24).

of persons in the facility or the order of the facility, including mobile phones and food items. The committee also notes the Minister's advice that the measures in the bill need to apply to all people detained in, and all people visiting, immigration detention facilities as the current two-tiered approach has resulted in abusive and aggressive altercations between detainees and this single-tier policy seeks to mitigate the risks associated with allowing only some detainees access to items which may pose a risk.

2.130 The committee acknowledges the difficulties posed by detainees with serious criminal histories, and appreciates there may be a need to restrict access for high-risk detainees to items that could be used to attempt to commit offences. However, the committee reiterates that persons detained in immigration detention facilities are detained on the basis that they are non-citizens who do not possess a valid visa. They are not detained, as is the case for those in prisons, as punishment for having committed a crime. The committee notes the difficulties in having a two-tiered approach to allowing different detainees access to things such as mobile phones, but notes that removing such access for persons that do not pose a risk effectively punishes those persons for the actions of others. The committee notes that much of the concerns appear to arise because high risk detainees are housed in the same facilities as low risk detainees.

2.131 The committee reiterates that as the amendments in the bill would apply regardless of the level of risk posed by different detainees, the committee considers that the bill, in restricting individual privacy and autonomy by denying detainees the ability to possess things, such as mobile phones or computers, and the extensive search powers (without the need to obtain a warrant), unduly trespasses on personal rights and liberties. The committee notes these scrutiny concerns are heightened by the broad power given to the Minister to prescribe any 'thing' as being prohibited so long as the Minister is satisfied that possession or use of the thing 'might' be a risk to the health, safety or security of persons in the facility or to the order of the facility (as noted below at paragraphs [2.133] to [2.142]).

2.132 The committee draws these scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the amendments impacting on individual liberties made by this bill.

Significant matters in delegated legislation⁶²

Initial scrutiny – extract

62 Item 2, proposed subsection 251A(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

2.133 As noted above, proposed subsection 251A(2) of the bill enables the Minister to make a legislative instrument that can determine that any 'thing' is prohibited in an immigration detention facility. The power can be exercised where the Minister is satisfied that possession of the thing is prohibited by law or possession or use of the thing in the detention facility 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.⁶³ There is otherwise no limit on the type of 'things' that the Minister may prescribe as being prohibited.

2.134 The committee's view is that significant matters, such as what is prohibited in immigration detention facilities, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case the explanatory memorandum states that the instrument will give the Minister flexibility to respond quickly if operational requirements change and, as a result, the things determined by the Minister and the things to be prohibited need to be amended'.⁶⁴ The explanatory memorandum also provides that it is currently intended to determine that narcotic drugs and child pornography will be prohibited using the power to prohibit unlawful things, and that the broader power to prohibit any thing that the Minister is satisfied might pose a risk is clarified by the note in the bill that gives examples of the things that might be considered to pose a risk. However, the committee notes that the bill does not directly prohibit any things; the actual things that are to be prohibited are left to be determined in delegated legislation. 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.

2.135 Generally the committee expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions. In this case the question of what is appropriate to be prohibited in an immigration detention facility would appear to differ depending on the risk factor posed by the individual detainee. As noted above, the risk posed by a person seeking asylum or a tourist having overstayed their visa, in possessing things such as mobile phones, is likely to be much lower than the risk posed by those with serious criminal records (who have had their visa cancelled on character grounds). As such, any decision to determine that certain things are to be prohibited for possession by *all* immigration detainees appears to be an important policy consideration. From a scrutiny perspective, the committee considers that giving this power to the Minister delegates important policy, as opposed to operational, decisions, which has not been appropriately justified in the explanatory materials.

63 See item 2, proposed section 251A.

64 Explanatory memorandum, p. 6.

2.136 In addition, where the Parliament delegates its legislative power in relation to significant matters 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.⁶⁵

2.137 The committee's scrutiny view is that significant matters, such as the type of things that are prohibited within an immigration detention facility, 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 delegate to the Minister the decision as to what items are to be prohibited in immigration detention facilities, particularly where such prohibitions will apply to all detainees regardless of their risk level; and
- the type of consultation that it is envisaged will be conducted prior to the making of the instrument 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).

Minister's response

2.138 The Minister advised:

The list of lawful things which are prohibited things within the context of an IDF has not been included in the primary legislation. The things to be captured in the list are items which are not covered by the definition of 'prohibited thing' in proposed subsection 251A(1)(a)(i) and may be lawful in Australian community, but present a risk to the health, safety, security of detainees and visitors to IDFs or order of IDFs

It is necessary and appropriate for the Minister to determine things to be prohibited things by legislative instrument, as this will enable the Minister

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

to respond quickly and flexibly to emerging threats to the health, safety or security of all persons in an IDF or the order of these facilities. This will also allow the Minister to amend the list at short notice to remove things that are no longer considered to be a risk. If the list of prohibited things was included in the primary legislation this would undermine the ability of the Minister to quickly respond to emerging threats across IDFs.

Proposed subsection 251A(2) of the Bill includes a note which lists of the kind of things which are the most common things currently being used to facilitate violence and anti-social behaviour and to disrupt the order within IDFs. This note has been included in the Bill to provide guidance as to the type of things the Department is seeking to prevent in IDFs in addition to things which are prohibited because of a law of the Commonwealth, or a State or Territory in which the person is detained.

The legislative instrument containing the list of prohibited things will be tabled in both Houses of Parliament for scrutiny; however, as the instrument will fall within the exemptions under the Legislation (Exemptions and Other Matters) Regulation 2015, it will not be disallowable.

Ongoing assessment will be undertaken in order to update this list to remove things which are no longer considered to be a threat or to add things which have become a risk, based on changing operational requirements within IDFs.

I will consult with my Department in order to determine those items to be included in the list of prohibited things. Due to the nature of the subject matter, I do not consider that it is appropriate that specific consultation obligations be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Committee comment

2.139 The committee thanks the Minister for this response. The committee notes the Minister's advice that determining things to be prohibited via legislative instrument will enable the Minister to respond quickly and flexibly to emerging threats and also allow the Minister to amend the list at short notice to remove things that are no longer considered to be a risk. The committee also notes the Minister's advice that the instrument will fall within the exemptions under the Legislation (Exemptions and Other Matters) Regulation 2015 and so will not be disallowable. The committee also notes the Minister's advice that he will consult within the Department of Immigration and Border Protection to determine the items to be included in the list of prohibited things but that the Minister does not consider it appropriate to include specific consultation obligations in the legislation, because of the nature of the subject matter.

2.140 The committee has particular scrutiny concerns that the Minister will be able to prohibit any 'thing' in an immigration detention facility and the list of things to be prohibited will not be subject to disallowance by the Parliament. As such, if the

Parliament were to delegate such significant matters to the Minister it would lose any oversight as to what type of 'things' are appropriate to be prohibited, and searched for, in immigration detention facilities. The committee notes that the explanatory materials accompanying the bill do not state that the legislative instrument prescribing such things is exempt from disallowance. The committee has consistently taken the view that removing parliamentary oversight is a serious matter and any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The committee notes that the Minister's response does not provide any justification as to why such a legislative instrument should be exempt from disallowance.

2.141 The committee reiterates that it generally expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions. In this case the question of what is appropriate to be prohibited in an immigration detention facility would appear to differ depending on the risk factor posed by the individual detainee. As noted above, the risk posed by a person seeking asylum or a tourist having overstayed their visa, in possessing things such as mobile phones, is likely to be much lower than the risk posed by those with serious criminal records (who have had their visa cancelled on character grounds). As such, any decision to determine that certain things are to be prohibited for possession by *all* immigration detainees appears to be an important policy consideration. From a scrutiny perspective, the committee reiterates that giving this power to the Minister delegates important policy, as opposed to operational, decisions, which has not been appropriately justified in the explanatory materials.

2.142 The committee seeks the Minister's detailed justification as to the appropriateness of exempting from the usual parliamentary disallowance process a legislative instrument made by the Minister prohibiting possession of any 'thing' in an immigration detention facility (such as mobile phones or food).

Broad delegation of administrative power⁶⁶

Initial scrutiny – extract

2.143 Proposed section 252BA provides that an authorised officer may, without warrant, conduct a search of a wide range of areas in immigration detention facilities, including of detainees' personal effects and rooms to find out whether certain things, including 'a prohibited thing', are at the facility. Proposed section 252BB provides that an authorised officer may be assisted by other persons in exercising these search powers if that assistance is necessary and reasonable. This

66 Item 21, proposed sections 252BA and 252BB. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

is a new general statutory search power. The explanatory memorandum explains that currently common law is relied on to search for prohibited items within an immigration detention facility to ensure the safety and security of people within the facility.⁶⁷ Proposed subsection 252BA also effectively gives an authorised officer the power to use force against a person or property, but no more than is reasonably necessary in order to conduct the search.

2.144 The explanatory memorandum provides no information as to the persons that will be authorised to use these coercive powers. The committee notes that section 5 of the Migration Act defines 'authorised officer' as an officer authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner. An 'officer' is defined in the same section as including any person, or classes of persons, authorised in writing by the Minister to be an officer. There is no requirement that these are to be government employees. In relation to an authorised officer's assistant, there appears to be no legislative guidance as to who these persons are, whether they are to have any particular expertise or training, or how they are to be appointed.

2.145 The committee's consistent scrutiny position is that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to Framing of Commonwealth Offences*⁶⁸ indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given relate to the need to appoint technical specialists in the collection of certain sorts of information.

2.146 The committee therefore requests the Minister's advice as to:

- who it is intended will be authorised as an 'authorised officer' and an 'authorised officer's assistant' to carry out coercive searches in immigration detention facilities and whether these will include non-government employees;
- why it is necessary to confer coercive powers on 'other persons' to assist an authorised person and how such a person is to be appointed; and
- what training and qualifications will be required of persons conferred with these powers, and why the bill does not provide any legislative guidance

67 Explanatory memorandum, p. 14.

68 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 73-75.

about the appropriate training and qualifications required of authorised persons and assistants.

Minister's response

2.147 The Minister advised:

As noted in the Explanatory Memorandum, authorised officers conducting searches will include departmental officers, and Serco officers who are non-government employees.

The term 'authorised officer's assistant' has been included in the Bill to cover people who are sometimes required to assist with a search under section 2528A or 252C or 252CA where assistance is necessary and reasonable. An example of such assistance would be if a locksmith is required on a one-off basis to unlock a door within an IDF in order to facilitate a search of that premises. The Bill does not require that "authorised officer's assistant" be appointed - they will be deployed as and when their skills are required in accordance with new section 25288.

Officers authorised to carry out searches in IDFs will be subject to strict training and qualification requirements whether they are departmental officers or non-government employees.

Under the existing contractual arrangements with Serco (detailed in the Facilities and Detainee Services Provider (FDSP) contract) all Service Provider Personnel who, in the performance of their duties exercise a search or seizure power in relation to detainees and persons entering an IDF must, prior to undertaking those duties successfully complete a training course provided by a Registered Training Organisation and delivered by a level IV accredited trainer. This training covers the proper exercise of these duties and, upon successful completion, the person will be issued with a certificate that demonstrates that the person has the competencies required to perform the power. The FDSP contract also requires a biennial rolling program of refresher training to ensure staff maintain their qualifications in the use of reasonable force.

In addition, all authorised officers must attend regular refresher training on the use of reasonable force in an IDF, the curriculum of which includes:

- legal responsibilities;
- duty of care and human rights;
- cultural awareness;
- occupational health and safety;
- mental health awareness;
- managing conflict through negotiation; and
- de-escalation techniques.

Under Ministerial Direction No. 51 - Strip search of immigration detainees, any individual who is appointed as an authorised officer for the purposes

of conducting a strip search under section 252A must satisfy the minimum training and qualification requirements, which include training in the following areas:

- civil rights and liberties;
- cultural awareness;
- the grounds for conducting a strip search;
- the pre-conditions for a strip search;
- the role of officers involved in conducting a strip search;
- the procedures for conducting a strip search;
- the procedures relating to items retained during a strip search;
- record keeping; and
- reporting.

As outlined in the Explanatory Memorandum to the Bill, officers authorised to use dogs for searches under section 252AA and 252A will also be required to undergo specific training in relation to handling dogs to ensure the dog is prevented from touching any person and is kept under control for the duration of the search.

Committee comment

2.148 The committee thanks the Minister for this response. The committee notes the Minister's advice that authorised officers conducting searches will include government and non-government employees, and authorised officers' assistants will include any person necessary and reasonable to assist with a search, such as a locksmith; such persons will not be appointed, they will be deployed as and when their skills are required. The committee also notes the Minister's advice that officers authorised to carry out searches will be subject to strict training and qualification requirements, as set out under the existing contractual arrangements with Serco and under a ministerial direction.

2.149 The committee reiterates that its consistent scrutiny position is that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to Framing of Commonwealth Offences*⁶⁹ indicates that there may be rare circumstances in which it is necessary for

69 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 73-75.

an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required.

2.150 The committee notes that while the Minister states that officers authorised to carry out searches in immigration detention facilities will be subject to strict training and qualification requirements, there is nothing in the bill that would require such training or qualification.

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

2.152 The committee considers that, from a scrutiny perspective, it would be appropriate for the bill to be amended to, at a minimum, require that authorised officers and any person assisting possess specified skills, training or experience.

2.153 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of conferring coercive search powers on non-government employees without a legislative requirement that they possess appropriate skills and training.

Therapeutic Goods (Charges) Amendment Bill 2017

Purpose	This bill seeks to amend the <i>Therapeutic Goods (Charges) Act 1989</i> to enable regulations to be made prescribing an annual charge for Australian corporations that are covered by a conformity assessment body determination
Portfolio	Health
Introduced	House of Representatives on 14 September 2017
Bill status	Before the House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.154 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Minister responded to the committee's comments in a letter dated 1 November 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁷⁰

Charges in delegated legislation⁷¹

Initial scrutiny – extract

2.155 This bill seeks to amend the *Therapeutic Goods (Charges) Act 1989* to enable regulations to be made prescribing the amount of an annual charge payable in respect of a conformity assessment body determination that is in force at any time during a financial year.

2.156 While the explanatory memorandum states that the annual charges are designed to ensure that the Department of Health is able to recover the costs of its post-market monitoring activities,⁷² no guidance is provided on the face of the bill or in the explanatory memorandum as to the method of calculation (for example, there is no provision limiting the charge to cost recovery) nor is a maximum charge specified.

2.157 One of the most fundamental functions of the Parliament is to levy taxation. The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax.

70 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest

71 Item 5, proposed subsection 4(2A). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

72 Explanatory memorandum, p. 1.

2.158 Where charges are able to be prescribed by regulation the committee generally considers that some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

2.159 The committee requests the Minister's advice on why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the bill.

Minister's response

2.160 The Minister advised:

The Australian Government Charging Framework requires cost recovery levies to be imposed as annual charges when a good, service or regulation is provided to a group of individuals or organisations rather than to a specific individual or organisation. Unlike general taxation, such levies are earmarked to fund activities provided to the group that pays the levy.

The annual charges relating to conformity assessment body determinations will be calculated after taking into account the total expected cost of the monitoring and compliance framework for conformity assessment bodies and will be set in accordance with the Australian Government Cost Recovery Guidelines.

Setting the amount, or the method for calculating the amount, of annual charges in the regulations, rather than the principal legislation, is designed to provide the appropriate level of flexibility to:

- impose different amounts of charges, or have different methods of calculation, depending on the scope of conformity assessment body determinations (that is, whether a determination is of general application or is limited to specified medical devices and/or specified conformity assessment procedures); and
- set the amount of annual charge, or its method of calculation, to accurately reflect the cost of regulation as the scheme evolves, and to adjust the amount over time to avoid over or under recovery.

Before prescribing the amount of annual charges in respect of conformity assessment body determinations, the Department of Health (through the TGA) will undertake detailed consultation with stakeholders, including medical device industry peak bodies through the TGA's Regulatory and Technical Consultative Forum (RegTech). A Cost Recovery Implementation Statement will be prepared and published on the TGA's website which will further facilitate transparency and accountability.

This approach, then, will prevent the need to amend primary legislation whenever there are changes to cost recovery arrangements, and is also consistent with the approach taken in relation to existing annual charges imposed on the registration, listing and inclusion of goods in the Australian

Register of Therapeutic Goods, and the licensing of manufacturers of therapeutic goods in the *Therapeutic Goods (Charges) Act 1989*.

The Bill does not include a maximum amount of charge, as the charge will be set in accordance with the Australian Government Cost Recovery Guidelines and because any such limit prescribed would be arbitrary and would need to be substantially in excess of the amount proposed to be charged, which would likely result in confusion for, and criticism by, stakeholders.

As legislative instruments, the regulations will be subject to the requirements of the *Legislation Act 2003*, including requirements in relation to consultation and parliamentary scrutiny, which will assist in ensuring that charges are not excessive. In particular, the regulations will be tabled in Parliament, and are disallowable by either House. They will also be subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

In addition, to help address the concerns raised by the Committee, the Explanatory Memorandum to the Bill will be amended to provide further clarity in relation to the process by which the amount of charges will be set.

Committee comment

2.161 The committee thanks the Minister for this response. The committee notes the Minister's advice that the annual charges relating to conformity assessment body determinations will be set in accordance with the *Australian Government Cost Recovery Guidelines*⁷³ and calculated by taking into account the total expected cost of the monitoring and compliance framework. The committee also notes the Minister's advice that the Department of Health will undertake consultation with stakeholders, including medical device industry peak bodies, prior to the amount of the charge being prescribed, and that a cost recovery implementation statement will then be published on the Therapeutic Goods Administration website.

2.162 The committee notes the Minister's further advice that allowing both the method for calculating the amount of the charge as well as the amount itself to be set by regulation is 'designed to provide the appropriate level of flexibility' and thereby avoid the need to amend primary legislation to change cost recovery arrangements. Finally, the committee notes the Minister's advice that the bill does not set a maximum charge as any such limit prescribed would be 'arbitrary and would need to be substantially in excess of the amount proposed to be charged, which would likely result in confusion for, and criticism by, stakeholders'.

73 Department of Finance, *Australian Government Cost Recovery Guidelines*, 3rd edition, July 2014, available at: <https://www.finance.gov.au/resource-management/charging-framework/>.

2.163 The committee welcomes the Minister's advice that the regulations will be tabled in, and be disallowable by, both Houses of Parliament and that the explanatory memorandum will be amended to provide further clarity in relation to the process by which the amount of charges will be set.

2.164 However, the committee takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation.⁷⁴ The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, where there is any possibility that a charge could be characterised as general taxation, the committee considers that guidance in relation to the level of a charge should be included on the face of the primary legislation.

2.165 The committee does not consider that including a maximum limit on the face of the bill would cause confusion among stakeholders as it would simply represent an upper limit on the amount of the charge that could be levied without amendment of the primary legislation. In addition, if setting a maximum limit is not considered appropriate, guidance as to the method of calculation of the charge (for example, a provision explicitly limiting the charge to cost recovery) could still be provided on the face of the primary legislation.

2.166 The committee welcomes the Minister's undertaking to amend the explanatory memorandum so as to clarify the process by which the amount of charges will be set, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.167 However, the committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing regulations to determine the amount of a charge payable without any guidance being provided on the face of the bill as to the method of calculation or the maximum amount of the charge.

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

74 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017

Purpose	This bill seeks to amend the <i>Therapeutic Goods Act 1989</i> to: <ul style="list-style-type: none"> • implement a number of recommendations of the Expert Panel Review of Medicines and Medical Devices Regulation; • clarify issues raised in relation to the processing of applications by the Department of Health, through the Therapeutic Goods Administration, by the Federal Court's decision in <i>Nicovations Australia Pty Ltd v Secretary of the Department of Health</i> [2016] FCA 394 (<i>Nicovations</i>); and • make a number of miscellaneous amendments to the Act
Portfolio	Health
Introduced	House of Representatives on 14 September 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i) and (iii)

2.169 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Minister responded to the committee's comments in a letter dated 1 November 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁷⁵

Review rights⁷⁶

Initial scrutiny – extract

2.170 The bill seeks to create a new class of therapeutic goods, to be known as 'provisionally registered goods', which can be registered on the Australian Register of Therapeutic Goods (Register). This would allow sponsors to apply for a time-limited provisional registration of certain prescription medicines on the basis of promising early clinical data on safety and efficacy.⁷⁷ To successfully make such a registration, a sponsor of a medicine would require approval by the Secretary of the Department of

75 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

76 Schedule 1, items 14–17 and Schedule 2, item 19. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iii) of the committee's terms of reference.

77 Explanatory memorandum, p. 2.

Health or their delegate of both a determination application and, subsequently, a provisional approval registration application.

2.171 Items 14 to 17 of Schedule 1 seek to amend section 60 of the *Therapeutic Goods Act 1989* (the Act), which specifies review mechanisms with respect to decisions made by the Secretary or his or her delegate. These amendments would limit the ability to request a review of decisions about provisional determinations and provisional registration to 'the person in relation to whom the medicine is registered' or is the person who made the application for registration. In contrast, section 60 of the Act currently allows 'persons whose interests are affected by an initial decision' to request a review. In addition, item 19 of Schedule 2 seeks to amend section 60 of the Act to specify that only the applicant is able to request such a review of the Secretary's decision to refuse to make a recommendation to the Minister that a determination be varied.

2.172 The explanatory memorandum states that this restriction on review rights is necessary in the specific case of decisions concerning provisional registration of a medicine because an 'interested party' could be either another competitor sponsor or 'a consumer with, having regard to the very nature of medicine that may use this pathway, necessarily limited information'.⁷⁸ The explanatory memorandum further states that 'providing an opportunity for one sponsor to appeal a decision made in relation to the medicine of another sponsor is antithetical to the purpose of the "Provisional Approval" Pathway of encouraging promising new medicines for a limited time to be brought to the market sooner.'⁷⁹

2.173 In relation to review of decisions to refuse an application for a recommendation to vary the permitted indications determinations,⁸⁰ the explanatory memorandum states that this restriction is necessary as the range of 'interested parties' could potentially extend to a large number of people (other than the applicant), and 'this could create significant uncertainty in the predictability in the application process'.⁸¹

2.174 The committee accepts that preventing commercial competitors from seeking review may be justified in this context. However, the committee is concerned that the exclusion of other interested parties, such as consumers, from requesting a review has not been adequately justified in the explanatory memorandum. The explanatory memorandum suggests that the exclusion of consumers is justified on the grounds that they will have 'necessarily limited

78 Explanatory memorandum, p. 24.

79 Explanatory memorandum, pp 24–25.

80 See item 19 of Schedule 2.

81 Explanatory memorandum, p. 35.

information'.⁸² However, the committee notes that consumers may have a legitimate interest in whether particular medicines are provisionally registered and it is not clear that any disadvantage they may have in terms of access to relevant information is a sufficient basis on which to exclude them from requesting a review.

2.175 The committee therefore requests the Minister's detailed justification as to the appropriateness of restricting merits review in relation to decisions about provisional determinations and registrations, or determinations regarding permitted indications, so that consumers who may be affected by a decision (but who are not the applicant) would not have a right to seek review.

Minister's response

2.176 The Minister advised:

The Bill establishes a system for the provisional registration of medicines. This system will allow medicines to be made available to patients with life-threatening or seriously debilitating conditions, and unmet clinical needs, significantly earlier than might otherwise be the case. The medicines will be evaluated by the Therapeutic Goods Administration (TGA) on the basis of promising early clinical data, and if the Secretary is satisfied that the safety and efficacy of the medicine have been established, the medicine will be provisionally registered for a period of two years (renewable two times) while further clinical studies are ongoing. The person in relation to whom the medicine is registered may then apply for full registration of the medicine.

The Committee has noted in its Scrutiny Digest that preventing commercial competitors from seeking review may be justified in this context, but has sought a response in relation to the inability of consumers or consumer groups to seek review of a decision not to register a medicine or grant a provisional determination.

There are a number of reasons why rights to merits review have been limited to applicants in these cases, which are as follows:

- Expediting processes to address significant unmet clinical needs;
- Technically complex decisions;
- Other measures to promote administrative accountability;
- Alternative means to obtain medicines;
- Lack of use of appeal pathways by consumers.

Expediting processes to address significant unmet clinical needs

The principal reason for limiting appeal rights to applicants is to expedite processes for these applications. Introducing a system of provisional registration is intended to enable promising new medicines to proceed to

82 Explanatory memorandum, p. 24.

market more quickly. It is estimated that as a result of these measures, some new medicines may be able to be provisionally registered up to two years earlier than under the current framework providing clear benefits to very sick patients. Limiting appeal rights to applicants is intended to give greater certainty and finality to applicants, expedite decision-making, and ensure that resources are directed to considering new applications. A negative decision does not preclude future applications for provisional determination by the sponsor, nor further applications by the sponsor as further clinical data becomes available.

Technically complex decisions

As the Explanatory Memorandum for the Bill notes, in seeking a review, consumers would not have access to the same information as the TGA, given the nature of the evidence available. The Secretary's decision to provisionally register a medicine requires that he or she be satisfied, on the basis of preliminary clinical data, that the safety and efficacy of the medicine have been satisfactorily established. This decision will be based on highly technical data, and will require a high degree of expertise, given that the safety and effectiveness of the medicine will only be able to be judged in relation to a limited number of patients and perhaps on surrogate endpoints. TGA has access, through its Committees, to medical experts who can provide advice to the Secretary to assist in making these decisions and may consult with other regulators.

Consumers may not be able to access all relevant information through the Freedom of Information process as some information may be commercial-in-confidence. Public information available to consumers or consumer groups about the merits of the medicine will be limited, as information about the product will be confined to the preliminary data obtained by the applicant. Consumers may not be able to access a comparable degree of medical expertise to successfully challenge such a decision. Further, as applicants will be best placed to advocate in respect of their products, the targeting of review and appeal rights to applicants is likely to benefit consumers where the exercise of such rights by applicants is successful.

Other measures to promote administrative accountability

TGA consulted consumer, patient and industry stakeholders concerning the provisional approval process during 2016-2017. Following this consultation, it was decided that in the interests of expediting provisional approval applications, appeals would be limited to the applicant in relation to certain decisions. This decision does not preclude consumers or consumer groups supporting a sponsor who is making an appeal.

This approach to appeal rights will be balanced by increased transparency of decision-making in relation to provisional registration, including publication of provisional approval determinations; rapid publication of TGA decisions relating to provisional registration; and full details of decisions relating to provisionally registered medicines in the Australian Public Assessment Reports (AusPARs) for prescription medicines. The

criteria for the Secretary's decisions to grant or refuse to grant a provisional determination are intended to be set out in amendments to the *Therapeutic Goods Regulations 1990*, which will also be subject to Parliamentary scrutiny.

Information will be published on such matters as the automatic lapsing of provisional registration; the extension, suspension or cancellation of provisional registration; and the transition from provisional to full registration. It is intended that health professionals and consumers will have transparency of TGA decision-making processes to inform their treatment decisions and maintain confidence in the TGA's regulatory standards. Meetings with sponsors prior to submission of applications are intended to clearly set out the requirements of the application process, and to minimise the chance that an application will be refused by the Secretary.

Alternative means to obtain medicines

If the Secretary decides that a medicine is not suitable for provisional registration, but individual patients still wish to access the medicine, there are a number of other methods by which patients may obtain that medicine. The Special Access Schemes (Categories A and B) and the Authorised Prescriber Scheme provide ways for patients to access medicines which are not on the Australian Register of Therapeutic Goods, provided their medical practitioner believes that they are suitable for the patient. A product at this stage of its development may also be the subject of continuing clinical trials within Australia.

Lack of use of appeal pathways by consumers

Finally, under existing processes for registration, there have not been any AAT appeals by consumers or consumer groups against decisions not to register medicines in at least the last 10 years, so the lack of appeal rights would not appear to adversely impact on consumers. Drafting an exemption to enable consumers only to appeal these decisions could have broader implications for the interpretation of other review provisions in the Act and Regulations. Such an exemption would need to be considered in the context of review and appeal rights generally through the Act and Regulations, and would require further consultation with consumers and other relevant groups.

To assist in addressing the concerns of the Committee, the explanatory memorandum will be amended to clarify the intention behind restricting appeal rights in relation to these decisions concerning provisional registration to applicants only.

Permitted indications

The Bill represents the second stage of the legislative response to the Expert Panel Review of Medicines and Medical Devices Regulation (the Review). The Therapeutic Goods Amendment (2016 Measures No. 1) Act 2017 (which was assented to on 19 June 2017), implemented Review

Recommendation 4 7, to provide rights of review and appeal for applicants for new ingredients to be added to the list of permitted ingredients. Subsection 60(2B) of the Act limits appeal rights to the applicant. This was consistent with the recommendations of the Review (at page 40), in which the Expert Panel noted that existing appeal mechanisms under section 60 were not appropriate for new ingredients, as:

"the range of 'interested parties' could potentially extend to a large number of people, and create significant uncertainty in the predictability of the application process. This could be overcome if the review and appeal rights are restricted to the person who made the application only. This approach would allow for appropriate review of such decisions whilst ensuring that the [TGA] was not exposed to review requests from a potentially large class of people, tying up [TGA] resources in responding to appeals. "

In the current Bill, a similar approach has been taken to the question of appeal rights for new permitted indications. Under Schedule 2, Item 15, new section 26BJ of the Bill, a person may apply to the Secretary for a recommendation that the Minister vary a determination under section 26BF. The Secretary must consider such applications, and then either make a recommendation that the Minister vary the instrument, or refuse to do so. Review and appeal rights are available to the applicant in respect of any refusal by the Secretary to make the requested variation.

Consistently with the approach taken in relation to applicants for permitted ingredients, and for the same reasons, review rights for new permitted indications are limited to the applicant (Schedule 2, Item 19, new subsection 60(2C)).

Third parties who might wish to object to a permitted indication will be able to do so once a product with that indication appears in the marketplace by lodging a complaint with the TGA. Although this is after the event it will provide a means for consumers to voice their concerns and potentially have a review undertaken.

To assist in addressing the concerns of the Committee, the explanatory memorandum will be amended to clarify the intention behind restricting appeal rights in relation to this decision to applicants only.

Committee comment

2.177 The committee thanks the Minister for this detailed response. The committee notes the Minister's advice that the proposed limitation on merits review is based principally on the need to bring promising new medicines to market more quickly and is intended to give greater certainty and finality to applicants, expedite decision-making, and ensure that resources are directed to considering new applications.

2.178 The committee also notes the Minister's advice on the following matters relevant to the limiting of review rights:

- provisional registration decisions will be based on highly complex technical considerations and on data that will not be fully accessible to the public, which means applicants will be best placed to advocate for the registration of their products;
- consumers and consumer groups will not be precluded from supporting a sponsor who is making an appeal;
- the criteria under which the Secretary will make decisions will be set out in the Therapeutic Goods Regulations 1990 and the transparency of decision-making will be increased through publication of provisional approval determinations, TGA decisions relating to provisional approval and full details of provisionally registered medicines;
- the Special Access Schemes and the Authorised Prescriber Scheme provide alternative means by which individual patients can seek access to medicines which are not on the Australian Register of Therapeutic Goods; and
- there have been no Administrative Appeals Tribunal appeals made by consumers or consumer groups for more than 10 years under existing registration processes.

2.179 With respect to applications to vary a permitted indications determination, the committee notes the Minister's advice that the limitation of review rights has been proposed in order to minimise uncertainty in the application process. The committee also notes the Minister's advice that this limitation of review rights would mirror alterations made to review rights with respect to permitted ingredients made by the *Therapeutic Goods Amendment (2016 Measures No. 1) Act 2017*, and that third parties will be able to object to a permitted indication by lodging a complaint with the TGA once a product appears in the marketplace.

2.180 The committee welcomes the Minister's undertaking to amend the explanatory memorandum so as to clarify the intention behind restricting appeal rights to applicants only, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017

Purpose	<p>This bill seeks to amend various Acts in relation to superannuation</p> <p>Schedule 1 replaces the 'scale test' with a broader 'outcomes test' which MySuper trustees must consider to ensure that maximum outcomes for members</p> <p>Schedule 2 provides the Australian Prudential Regulation Authority (APRA) the power to refuse a registerable superannuation entity (RSE) licensee a new authority to offer a MySuper product or to cancel an existing authority</p> <p>Schedule 3 imposes civil and criminal penalties on directors of RSE licensees who fail to execute their responsibilities</p> <p>Schedule 4 increases APRA's supervision and enforcement powers when a change of ownership or control of an RSE licensee takes place</p> <p>Schedule 5 amends APRA's supervision and enforcement powers to include the power to issue a direction to an RSE licensee where APRA has prudential concerns</p> <p>Schedule 6 requires RSE licensees to make publically available their portfolio holdings</p> <p>Schedule 7 requires RSE licensees to hold annual members' meetings</p> <p>Schedule 8 provides APRA with the authority to obtain information on expenses incurred by RSE and RSE licensees in managing or operating the RSE</p>
Portfolio	Treasury
Introduced	House of Representatives on 14 September 2017
Bill status	Before the Senate
Scrutiny principles	Standing Order 24(1)(a)(i) and (iv)

Strict liability offences⁸³

Initial scrutiny – extract

2.182 Proposed section 29JCB introduces a new provision which makes it an offence of strict liability for a person to hold a controlling stake in a registrable superannuation entity (RSE) licensee without approval. The offence is subject to a maximum penalty of 400 penalty units for each day on which the person holds a controlling stake without approval. The explanatory memorandum justifies the strict liability offence by stating that it is necessary to ensure the integrity of the regulatory regime.⁸⁴

2.183 Proposed section 131DD introduces a new provision which makes it an offence if a person fails to comply with a direction given by the Australian Prudential Regulation Authority (APRA) to an RSE licensee or a connected entity. Each offence is stated to be one of strict liability and subject to a maximum penalty of 100 penalty units. The explanatory memorandum states that the gravity of consequences following non-compliance with a direction makes it appropriate for the non-compliance to be a strict liability offence, and that 'this is also likely to significantly enhance the effectiveness of the enforcement regime in deterring the conduct'.⁸⁵

2.184 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 justification for any imposition of strict liability, including clearly outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.⁸⁶

2.185 In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that strict liability should be applied only where the penalty does not include imprisonment and the fine does not exceed 60 penalty units

83 Schedule 4, item 9, proposed section 29JCB; Schedule 5, item 11, proposed section 131DD. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

84 Explanatory memorandum, p. 47.

85 Explanatory memorandum, p. 69.

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

for an individual (or 300 penalty units for a body corporate).⁸⁷ In this instance, the proposed offences are subject to a maximum penalty of 100 penalty units or 400 penalty units (applicable each day of the contravention). The explanatory memorandum does not explain why these proposed penalties exceed the 60 penalty unit amount set out in the *Guide to Framing Commonwealth Offences*.

2.186 The committee requests the Minister's justification as to the proposed penalty applicable to each strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.⁸⁸

Minister's response

2.187 The Minister advised:

Penalty for proposed section 29JCB of the SIS Act

Proposed section 29JCB is contained in Schedule 4 to the Superannuation Measures Bill.

As noted by the Committee in its Digest, proposed section 29JCB makes it an offence of strict liability for a person to hold a controlling stake in an Registrable Superannuation Entity (RSE) licensee without approval to hold the stake under proposed section 29HD. The offence is subject to a maximum penalty of 400 penalty units for each day on which the person holds a controlling stake without approval.

The amount of this penalty exceeds the upper threshold for penalties for strict liability offences that is specified in the general principle set out in Chapter 2 of the Attorney-General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) (that is, that generally the penalty for an offence of strict liability should not exceed 60 penalty units for an individual or 300 for a body corporate).

However, the amount of the penalty is justified because the prohibition on persons holding unapproved controlling stakes in an RSE licence is specifically designed to prevent such controlling interests preventing a trustee from being able to fulfil its obligations in respect of the members of a superannuation fund. The amount of the penalty reflects the importance of protecting superannuation members' interests and is justified given the value of funds under management in the superannuation system, the number of members potentially adversely impacted by a single RSE licensee being unable to fulfil its obligations, and the compulsory nature of the superannuation system.

87 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 24.

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

I also note that the amount of the penalty is consistent with existing penalties that apply to similar offences of strict liability under the *Corporations Act 2001* for contraventions of section 850C (acquiring shares in a widely held market body that results in an inappropriate control situation) and subsection 852B(2) (anti-avoidance provision in relation to increasing voting power) - see section 1311 and table items 258A and 258C of Schedule 3 to the *Corporations Act 2001*. Applying the same penalties to offences of similar types is consistent with principle 3.1.2 of the Guide (which discusses the relevance of considering penalties for existing offences of a similar kind or of a similar seriousness).

Penalty for proposed section 131DD of the SIS Act

Proposed section 131DD is contained in Schedule 5 to the Superannuation Measures Bill.

As noted by the Committee in its Digest, proposed section 131DD establishes various offences of strict liability for particular persons who fail to comply with a direction given by the Australian Prudential Regulation Authority (APRA) under Division 1 of proposed Part 16A of the SIS Act (which sets out the grounds for giving directions to RSE licensees and their connected entities, and the types of directions that can be given). The offence is subject to a maximum penalty of 100 penalty units.

The amount of this penalty exceeds the upper threshold for penalties for strict liability offences that is specified in the general principle set out in Chapter 2 of the Guide (that is, that generally the penalty for an offence of strict liability should not exceed 60 penalty units for an individual or 300 for a body corporate).

However, the amount of the penalty is justified because directions that are given under Division 1 of proposed Part 16A are specifically designed to protect the interests of the members of a superannuation fund and the stability of Australia's financial system. As with the penalty for proposed section 29JCB, the amount of the penalty reflects the importance of protecting superannuation members' interests and is justified given the value of funds under management in the superannuation system, the number of members potentially adversely impacted by a failure to comply with a direction, and the compulsory nature of the superannuation system.

I also note that the amount of the penalty is consistent with existing penalties that apply to similar offences of strict liability under the SIS Act for failing to comply with other directions. See for example section 63 (failure to comply with a direction not to accept employer contributions made by an employer-sponsor) and section 141 (failure of an acting trustee to comply with a direction). As noted above in respect of the penalty for proposed section 29JCB, applying the same penalties to offences of similar types is consistent with principle 3.1.2 of the Guide.

Committee comment

2.188 The committee thanks the Minister for this response. The committee notes the Minister's advice that the maximum penalties for both offences reflect the importance of protecting superannuation members' interests and are justified given the value of funds under management in the superannuation system, the number of members potentially adversely impacted by a single RSE licensee being unable to fulfil its obligations, and the compulsory nature of the superannuation system. The committee also notes the Minister's advice that the proposed maximum penalties are consistent with penalties that apply to similar offences of strict liability under the *Corporations Act 2001* and the *Superannuation Industry (Supervision) Act 1993*.

2.189 However, the committee notes that the Minister's response does not address why it is appropriate to penalise persons lacking fault in these circumstances. The committee reiterates its expectation that the explanatory memorandum and any ministerial response will provide a justification for any imposition of strict liability and notes that this is also a requirement set out in the *Guide to Framing Commonwealth Offences*.⁸⁹

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

2.191 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 the offences set out in proposed sections 29JCB and 131DD, noting also that the proposed offences are subject to a maximum penalty of 100 penalty units or 400 penalty units (applicable each day of the contravention), exceeding the 60 penalty unit amount set out in the *Guide to Framing Commonwealth Offences*.

89 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 22.

Reversal of evidential burden of proof

Broad scope of offence

Significant matters in delegated legislation⁹⁰

Initial scrutiny – extract

2.192 Proposed subsection 29PA(1) makes it an offence for directors of an RSE licensee (and certain other persons) not to attend an annual members' meeting (AMM) if they had been given prior notice of the AMM. Proposed subsection 29PA(6) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if other directors would be attending and those directors would constitute a quorum of directors for a board of directors meeting.⁹¹ The offence carries a maximum penalty of 50 penalty units.

2.193 Proposed subsections 29PB(2), 29PC(2), 29PD(2) and 29PE(2) make it an offence for a responsible officer of an RSE licensee, an individual trustee, an auditor or an actuary not to answer questions raised at an AMM. Proposed subsections 29PB(3), 29PC(3), 29PD(3) and 29PE(3) provide exceptions (offence-specific defence) to these offences, stating that the offence does not apply when the responsible person does not answer questions in certain circumstances.⁹² The offence carries a maximum penalty of 50 penalty units.

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

2.195 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.

2.196 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 subsections 29PA(6), 29PB(3), 29PC(3), 29PD(3) and 29PE(3) have not been addressed in the explanatory materials.

90 Schedule 7, item 5, proposed subsections 29PA(6), 29PB(3), 29PC(3), 29PD(3) and 29PE(3). The committee draws Senators' attention to these provisions pursuant to principles 1(a)(i) and (iv) of the committee's terms of reference.

91 Explanatory memorandum, p. 94.

92 Explanatory memorandum, p. 96.

2.197 In addition, in relation to both the obligation to attend an AMM and the requirement to answer questions at an AMM, it appears the matters contained in the defences to these broadly framed offences could be more appropriately framed as elements of the offence. The committee considers that the offence-creating provision should state the essential elements of the offence and a matter that is relevant to whether an offence has been committed should generally form part of the offence itself, and should not unnecessarily be included as an offence-specific defence. For example, the offence provision relating to the requirement to answer questions at an AMM could provide that it is a requirement to answer any questions that are relevant, that would not be in breach of the governing rules or any law, and that would not result in detriment to the members taken as a whole (rather than these matters being listed as exceptions to the offence).

2.198 In addition, the offence not to answer questions at an AMM⁹³ includes an offence-specific defence to provide that the requirement to answer questions does not apply in any circumstances prescribed by the regulations. The committee's view is that significant matters, such as exceptions to offence provisions, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case, the explanatory memorandum does not explain why it is considered necessary to provide that the regulations may prescribe other exceptions to the offence relating to the obligation to answer questions.

2.199 The committee requests the Minister's advice as to the appropriateness of amending the bill to provide that the exceptions to these offences be included as elements of the offence, rather than as exceptions.

2.200 If this approach is not considered appropriate, the committee requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.⁹⁴

2.201 In addition, the committee also requests the Minister's advice as to why it is proposed to allow the regulations to prescribe other exceptions to the offence relating to the obligation to answer questions.

Minister's response

2.202 The Minister advised:

Schedule 7 to the Superannuation Measures Bill contains proposed subsections 29PA(6), 29PB(3), 29PC(3), 29PD(3) and 29PE(3).

93 See proposed subsections 29PB(3)(d), 29PC(3)(d), 29PD(3)(d) and 29PE(3)(d).

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

As noted by the Committee in its Digest, each of these subsections contain offence-specific defences to proposed offences of strict liability. In the case of subsection 29PA(6), the defence relates to the offence in proposed subsection 29PA(1) that applies to a director for not attending an annual members meeting (AMM) if they had been given prior notice of the AMM. Subsection 29PA(6) ensures that a director does not commit an offence for failing to attend an AMM if the other directors that attend would constitute a quorum of directors for a board of directors meeting.

Framing this exception as a defence is appropriate because a director who does not attend an AMM should have a positive obligation in ensuring that a quorum of directors is present in their absence, given the aim of the Schedule is to ensure accountability of directors. Placing this onus on absent directors also reflects that it would be significantly more difficult for the prosecution to establish whether or not a director had taken steps to ensure that a sufficient number of directors were in attendance at the AMM. As also noted by the Committee in its Digest, subsections 29PB(3), 29PC(3), 29PD(3) and 29PE(3) contain defences where there is a failure by an RSE licensee, an individual trustee, an auditor or an actuary to answer certain questions raised at an AMM in certain circumstances. The related offences for not answering these questions are contained in proposed subsections 29PB(2), 29PC(2), 29PD(2) and 29PE(2). These circumstances include situations where a question is not relevant, where answering the question would breach the governing rules of the RSE or a law, and where answering a question would cause detriment to the members of the RSE taken as a whole.

A person who refuses to answer a question that is asked at an AMM should only do so where they have made a subjective and considered assessment that a particular circumstance applies. Framing these circumstances as offence-specific defences is appropriate because the person who refuses to answer a question is best placed to raise evidence about why the circumstances existed that justified them not answering the question. Requiring the prosecution to establish that a particular circumstance did not apply where a question was not answered would substantially undermine the efficacy of the requirement to answer questions as knowledge about things like the relevance of questions and potential determinant of members is far more likely to be established by the person who is asked a question at an AMM.

Committee comment

2.203 The committee thanks the Minister for this response. The committee notes the Minister's advice that the offence-specific defence contained in proposed subsection 29PA(6) is appropriate because a director who does not attend an AMM should have a positive obligation to ensure a quorum of directors is present in their absence and placing the onus on absent directors reflects that it would be 'significantly more difficult for the prosecution to establish whether or not a director

had taken steps to ensure that a sufficient number of directors were in attendance at the AMM.'

2.204 The committee also notes the Minister's advice that the offence-specific defences set out in proposed subsections 29PB(3), 29PC(3), 29PD(3) and 29PE(3) are appropriate because a person who refuses to answer a question at an AMM is 'best placed' to raise evidence about why the circumstances existed that justified them not answering the question. The committee further notes the Minister's advice that knowledge about things like the relevance of questions and potential detriment to members is far more likely to be established by the person who is asked a question at an AMM.

2.205 However, the committee remains of the view that these matters may be more appropriately framed as elements of the offence, rather than as offence-specific defences. The committee considers that the offence-creating provision should state the essential elements of the offence and a matter that is relevant to whether an offence has been committed should generally form part of the offence itself, and should not unnecessarily be included as an offence-specific defence. If it is intended that a director has a positive obligation to ensure a quorum of directors is present at an AMM, this should form an element of the offence rather than being left to a defence. It is also not clear to the committee on the basis of the advice that the matters set out in these defences would be considered peculiarly within the knowledge of the defendant, nor why they would be significantly more difficult or costly for the prosecution to disprove than for the defendant to establish.

2.206 The committee further notes that the Minister's response does not address the question of why it is considered necessary to allow the prescription, by regulation, of additional circumstances in which it would not be an offence not to answer questions at an AMM. The committee reiterates its view that exceptions to offence provisions are significant matters and should generally be included in primary legislation.

2.207 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of provisions that reverse the burden of proof and allow the creation of additional offence-specific defences in delegated legislation.

Treasury Laws Amendment (Putting Consumers First— Establishment of the Australian Financial Complaints Authority) Bill 2017

Purpose	This bill seeks to amend <i>Corporations Act 2001</i> and other related legislation to introduce a new external dispute resolution framework and an internal dispute resolution framework for the financial system
Portfolio	Treasury
Introduced	Senate on 14 September 2017
Bill status	Before the Senate
Scrutiny principles	Standing Order 24(1)(a)(i), (iii) and (iv)

2.208 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The Minister responded to the committee's comments in a letter dated 6 November 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁹⁵

Delegated legislation not subject to disallowance⁹⁶

Initial scrutiny – extract

2.209 Proposed subsection 1050(1) provides that the Minister may authorise an external dispute resolution (EDR) scheme, by notifiable instrument, if the Minister is satisfied that the scheme will meet certain mandatory requirements under proposed section 1051. Once an EDR scheme has been authorised, the operator of the authorised EDR scheme will be known as the Australian Financial Complaints Authority (AFCA) and the authorised EDR scheme will be known as the AFCA scheme. Proposed paragraph 1050(5)(b) provides that the Minister may specify, vary or revoke conditions relating to the authorisation. In addition, proposed subparagraph 1051(5)(a)(i) provides that the operator of the EDR scheme (i.e. AFCA) must ensure that any conditions specified under proposed paragraph 1050(5)(b) are complied with.

95 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest

96 Schedule 1, item 2, proposed section 1050. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

2.210 The committee notes that unlike legislative instruments, notifiable instruments are not subject to parliamentary disallowance or scrutiny by the Senate Standing Committee on Regulations and Ordinances, nor are they subject to sunset after 10 years.⁹⁷ There is no detail in the explanatory memorandum as to why it is proposed that the authorisation of the scheme, and the specification of conditions relating to the authorisation, is to be done by notifiable instrument, rather than legislative instrument. There is also no detail as to the type of conditions it is envisaged may be specified under this provision.

2.211 The committee therefore requests the Minister's advice as to why it is proposed that the authorisation of the external dispute resolution scheme, and the specification of conditions relating to the authorisation, will not be subject to parliamentary disallowance. The committee also requests advice as to the type of conditions it is envisaged may be specified under this provision.

Minister's response

2.212 The Minister advised:

The Committee has sought further information about why the authorisation of the EDR scheme is not disallowable. The Ministerial power to authorise an EDR scheme does not involve the exercise of a power that is legislative in character because it does not determine or alter the content of a law (rather, the authorisation will merely determine the circumstances in which the relevant law will apply). Accordingly, the exercise of that power should not be disallowable.

We note that the authorisation is a notifiable instrument which will be listed on the Federal Register of Legislation and provide members of the public with appropriate access to a copy of the instrument.

The Committee also seeks further information about the types of conditions that it is envisaged may be specified under the authorisation. The ability to set conditions will allow the Government to ensure that AFCA is accountable to both consumers and member firms, for example by specifying the frequency of independent reviews of the scheme's operations and procedures, or by requiring AFCA to report to the Government about changes AFCA makes to its membership fees.

Committee comment

2.213 The committee thanks the Minister for this response. The committee notes the Minister's advice that the ministerial power to authorise the external dispute resolution (EDR) scheme should not be disallowable because it does not involve the exercise of a power that is legislative in character—that is, it determines the circumstances in which the relevant law will apply but does not determine or alter the content of the law. The committee also notes the Minister's advice that the

97 See *Legislation Act 2003*.

power to specify conditions in relation to the authorisation of an EDR may be used to set the frequency of independent reviews of the scheme or require AFCA to report on changes to its membership fees.

2.214 The committee notes that the distinction between legislative and administrative decisions is not always clear and can be difficult to draw. However, the committee notes that the authorisation decision, in combination with the decision to specify conditions, appears to have consequences for how the scheme, which has legislative backing, will work in practice. To the extent that conditions will establish accountability requirements for a scheme for external dispute resolution, which is part of a broader framework of public regulation, such conditions appear to be accountability requirements which may be considered to have a legislative character. The committee therefore remains concerned that the Parliament will have insufficient oversight of important policy considerations relating to the operation of the EDR scheme, given that its authorisation and the specification of conditions will not be subject to disallowance.

2.215 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the authorisation of, and specification of conditions relating to, the external dispute resolution scheme to occur by notifiable instrument (which is not subject to disallowance).

Strict liability⁹⁸

Initial scrutiny – extract

2.216 Proposed section 1054A provides the Australian Financial Complaints Authority (AFCA) with the ability to obtain certain information and documents that are relevant to a superannuation complaint. Proposed subsection 1054A(4) makes it an offence of strict liability if a person fails to comply with a requirement in the written notice given by AFCA. The offence is subject to a penalty of 30 penalty units.

2.217 As it is proposed that AFCA will have a number of statutory powers that can be used to compulsorily obtain information in the case of a superannuation complaint, secrecy provisions in proposed section 1058 make it an offence to disclose or make records of information, or produce or permit access to documents, acquired by an AFCA staff member under AFCA's statutory powers in connection with a superannuation complaint. Proposed subsection 1058(2) makes it an offence of strict liability if an AFCA staff member fails to comply with the secrecy provisions and is subject to a penalty of 30 penalty units.

98 Schedule 1, item 2, proposed subsections 1054A(4) and 1058(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

2.218 In both instances, the explanatory memorandum provides no justification as to why the offences are subject to strict liability.

2.219 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*.⁹⁹

2.220 The committee requests a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.¹⁰⁰

Minister's response

2.221 The Minister advised:

The Committee has sought further information about the strict liability offences contained in the Bill.

General comments

The Bill has two strict liability offences. Under proposed section 1054A, AFCA may give written notice to a person which requires that person to give information or documents to AFCA. A person who fails to comply with AFCA's direction will commit a strict liability offence. In addition, under proposed section 1058, AFCA staff members will be required to comply with secrecy obligations. An AFCA staff member who fails to comply with these obligations will commit a strict liability offence. Both offences attract a maximum penalty of up to 30 penalty units for an individual and up to 150 penalty units for a body corporate.

We note that the penalties comply with the requirements of the Guide because:

- the offences are not punishable by imprisonment;

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

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

- the maximum penalties are below the maximum allowable for strict liability offences (the Guide provides that a strict liability offence should be punishable by a maximum of 60 penalty units for individuals and 300 penalty units for body corporates); and
- the offences are likely to significantly enhance the effectiveness of the enforcement regime by supporting AFCA's ability to effectively obtain information required to resolve a superannuation complaint, as well as deter conduct involving the inappropriate disclosure of confidential or personal information.

Further comment - section 1054A (offence relating to AFCA's information gathering power)

A strict liability offence removes the requirement for a fault element to be proven before a person can be found guilty of an offence. This is considered appropriate in this instance as failure to comply with AFCA's requests for information would undermine the integrity of the regulatory regime by impacting AFCA's ability to effectively obtain information required to resolve a superannuation complaint.

We note that the offence supports the efficacy of AFCA's powers. Professor Ian Ramsay considered these powers in his 'Review of the Financial System External Dispute Resolution Framework' and determined that the powers were critical to support the investigation and resolution of superannuation complaints. We also note that the Superannuation (Resolution of Complaints) Act 1993 (which will be repealed by this Bill) contains a comparable strict liability offence in relation to non-compliance with the Superannuation Complaint Tribunal's information gathering powers.

In addition to having access to the defence of honest and reasonable mistake, the offence will not apply to a person who has a reasonable excuse (see subsection 1054A(5)).

Further comment - section 1058 (offence relating to secrecy obligations of AFCA staff members)

A strict liability offence removes the requirement for a fault element to be proved before a person can be found guilty of an offence. This is considered appropriate in this instance as an AFCA staff member's failure to comply with secrecy obligations would undermine the integrity of the regulatory regime. People who are asked to provide information to resolve a superannuation complaint need to have confidence that confidential or personal information that they provide will be adequately protected by AFCA. If this kind of assurance cannot be provided, it would undermine AFCA's ability to effectively investigate and resolve superannuation complaints.

It is expected that AFCA will have appropriate safeguards in place to ensure that its staff members are aware of their secrecy obligations.

In addition to having access to the defence of honest and reasonable mistake, the offence will not apply in various circumstances where disclosures are appropriate (for example, see subsections 1058(3) to (5)).

Committee comment

2.222 The committee thanks the Minister for this response. The committee notes the Minister's advice that strict liability is appropriate in both instances, as the offences are likely to significantly enhance the effectiveness of the enforcement regime by supporting AFCA's ability to effectively obtain information and to deter conduct involving the inappropriate disclosure of confidential or personal information. In relation to proposed section 1054A the committee notes the Minister's advice that the imposition of strict liability is considered appropriate as a failure to comply with AFCA's requests for information will impact on its ability to effectively obtain information required to resolve a superannuation complaint. In relation to proposed section 1058 the committee notes the Minister's advice that failure to comply with secrecy obligations by AFCA staff members would undermine the confidence needed to effectively investigate and resolve superannuation complaints, and that it is expected that AFCA will have appropriate safeguards in place to ensure that its staff members are aware of their secrecy obligations.

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

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

Exclusion of judicial review¹⁰¹

Initial scrutiny – extract

2.225 Item 11 of the bill seeks to ensure that the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) does not apply to decisions or determinations made by AFCA in relation to superannuation disputes.

2.226 The committee notes that the explanatory memorandum only provides a brief justification for the exclusion of the ADJR Act review and therefore a number of scrutiny issues arise in relation to this provision.

101 Schedule 1, item 11, proposed paragraph (hba) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

2.227 First, the explanatory memorandum states that the approach to review rights for superannuation disputes is consistent with the existing practice for disputes handled by the Superannuation Complaints Tribunal (the SCT).¹⁰² However, the committee notes it appears that at least some decisions of the SCT are subject to ADJR Act review.¹⁰³

2.228 Secondly, the explanatory memorandum suggests that ADJR Act review for superannuation disputes may be inappropriate because a statutory right to appeal on questions of law to the Federal Court is provided for. The committee notes that although a statutory appeal on a question of law is sometimes a functional equivalent of an ADJR Act review, this is not necessarily so. This is because the type of errors that can constitute questions of law (and thus whether the court has jurisdiction to hear an appeal) is a question of statutory interpretation. The courts interpret the meaning of 'question of law' in the context of the particular statute in which it appears. It is therefore not clear that an appeal on a question of law would enable an aggrieved consumer to raise all of the errors that would give them a ground of review in a judicial review application brought under the ADJR Act.

2.229 Finally, while parties may appeal to the Federal Court on questions of law in relation to superannuation disputes, the AFCA also has jurisdiction over non-superannuation financial disputes. The explanatory memorandum states that the ADJR Act will not apply to determinations by AFCA in relation to non-superannuation financial disputes because those determinations would not be made under an enactment.¹⁰⁴ While the proposed AFCA will be a private industry body, it will play an important role in a mandatory scheme of public regulation which is set up in part through the exercise of statutory power. It is therefore unclear why it would not be appropriate for a court to have the jurisdiction to judicially review the legality of AFCA's non-superannuation decisions and determinations.

2.230 The committee therefore requests the Minister's advice:

- as to the decisions or conduct of the SCT that is currently reviewable under the ADJR Act and the rationale for proposing to exclude ADJR Act review of these types of decisions made by AFCA;
- in relation to superannuation disputes, whether the grounds for bringing an appeal on a 'question of law' will be narrower or more limited than those that would be available under the ADJR Act; and

102 Explanatory memorandum, p. 44.

103 See Superannuation Complaints Tribunal, *Submission in response to the Consultation Paper: Improving dispute resolution in the financial system*, p. 10, available at <https://static.treasury.gov.au/uploads/sites/1/2017/09/Superannuation-Complaints-Tribunal.pdf>.

104 Explanatory memorandum, p. 44.

- in relation to non-superannuation financial disputes:
 - whether, in the absence of ADJR Act review and a statutory right to appeal, any court would have jurisdiction to judicially review the legality of AFCA's non-superannuation decisions and determinations; and
 - the appropriateness of providing that a court of general jurisdiction have the jurisdiction, by way of appeal on a question of law or judicial review, to hear disputes about the legality of AFCA's non-superannuation decisions and determinations.

Minister's response

2.231 The Minister advised:

The exclusion of determinations made by AFCA from, judicial review under the ADJR Act

The Committee has sought further information about the exclusion of judicial review.

Specifically, the Committee sought further information about the type of decisions that are currently reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the rationale for proposing to exclude ADJR Act review of decisions made by AFCA.

Currently, decisions of the Superannuation Complaints Tribunal made under the *Superannuation (Resolution of Complaints) Act 1993* are subject to review under the ADJR Act. In practice, the most common examples of appeals under the ADJR Act are appeals of decisions by the Superannuation Complaints Tribunal to withdraw a complaint or that a complaint is outside the Superannuation Complaint Tribunal's jurisdiction.

This Bill inserts a new provision in the ADJR Act which excludes decisions relating to the making of a determination under the AFCA scheme.

Judicial review in the federal jurisdiction is generally available to administrative decisions made by officers of the Commonwealth (such as public servants), Ministers and their delegates. As the Superannuation Complaints Tribunal is a statutory authority established under the *Superannuation (Resolution of Complaints) Act 1993*, and as its decision-makers are considered 'officers of the Commonwealth', it is appropriate that these decisions are subject to judicial review.

By contrast, AFCA is a private review mechanism arising from private rights. Its decision-makers will not be 'officers of the Commonwealth', and as a result it is not appropriate for its decisions and conduct to be subject to judicial review. This is consistent with administrative law principles.

AFCA will have internal review mechanisms and an independent assessor to manage disputes relating to the processes and operations of AFCA.

Further, a determination of AFCA in relation to superannuation complaint can be appealed to the Federal Court on a question of law.

Appeals on questions of law

The Committee sought further information about whether the grounds for bringing an appeal on a 'question of law' will be narrower than those that would currently be available in relation to a superannuation dispute under the ADJR Act.

Appeals on questions of law are generally limited to questions going to the legal correctness of a decision, whereas judicial review generally provides an opportunity to test the lawfulness of an administrative decision.

The types of questions of law that may be appealed in any particular situation would depend on the particular legal context in which the decision is made, which may be broader than reviews provided by the ADJR Act as the grounds of review under the ADJR Act are expressly prescribed. Further, not all grounds of ADJR Act review would necessarily apply in the context of a particular AFCA determination which could be appealed on a question of law.

The exclusion of review under the ADJR Act is appropriate because AFCA is a private industry body, rather than a government body, and it would not be usual to allow judicial review under the ADJR Act in relation to an industry body.

The Bill recognises the importance of the judicial oversight of decision-making bodies by allowing the Federal Court to hear appeals on questions of law from determinations of AFCA in relation to superannuation complaints. This will ensure that an appropriate review process by the Federal Court will be available to parties to a superannuation complaint.

Non-superannuation financial disputes

The Committee sought further information about the appropriateness of providing a court of general jurisdiction with the jurisdiction to hear appeals in relation to non-superannuation complaints.

Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

The Bill does not provide a mechanism for appeals in relation to non-superannuation complaints to be heard by a court. Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

However, a member of the AFCA scheme (a financial services provider) may challenge a determination made by AFCA in court through a civil action for breach of contract if the determination is inconsistent with AFCA's terms of reference.

A consumer can challenge a decision of a financial services provider in a court through a civil action for breach of contract. Consumers are not required to comply with a determination of AFCA and may commence a civil action independent of any determination that is made by AFCA.

Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

Committee comment

2.232 The committee thanks the Minister for this response. The committee notes the Minister's advice that decisions of the Superannuation Complaints Tribunal are currently subject to review under the ADJR Act because its decision-makers are officers of the Commonwealth, but that it is not appropriate to subject the decisions and conduct of the AFCA to judicial review because it will be a private review mechanism arising from private rights and its decision-makers will not be officers of the Commonwealth.

2.233 The committee also notes the Minister's advice that a determination of AFCA in relation to a superannuation complaint can be appealed to the Federal Court on a question of law, and the grounds for bringing such an appeal would depend on the particular legal context. The committee notes the Minister's advice that not all of the grounds of review specified under the ADJR Act would necessarily apply in the context of a particular AFCA determination which could be appealed on a question of law. The committee notes the Minister's view that the exclusion of review under the ADJR Act is appropriate because AFCA is a private industry body, rather than a government body.

2.234 The committee also notes the Minister's advice that currently decisions in relation to non-superannuation financial disputes cannot be appealed to a court, and that this situation would not change under the AFCA scheme.

2.235 With respect to the exclusion of decisions made by AFCA from judicial review under the ADJR Act, the committee remains concerned as to whether the right to appeal on a question of law will provide an adequate substitute to judicial review under the ADJR Act. The committee notes the Minister's advice that not all grounds of ADJR Act review would necessarily apply in the context of a particular AFCA determination which could be appealed on a question of law. As such, it is not clear to the committee whether errors relating, for example, to a denial of a fair hearing (i.e those which give rise to the procedural fairness ground of review) would give rise to a question of law.

2.236 The committee also remains concerned that the bill does not provide any mechanism for appeals on a question of law (or ADJR Act judicial review) in relation to non-superannuation complaints. The committee notes the Minister's justification for this exclusion rests on the fact that AFCA will be a private body. However, the committee emphasises that AFCA, despite being a private body, will nevertheless

form an important part of a broader scheme of public regulation of financial disputes and complaints as set up by legislation. In circumstances where a dispute resolution scheme is part of a broader legislative design to serve the public interest (noting the inadequacies of contractual remedies) the committee does not view the private status of AFCA as a sufficient ground for not making available appeals on questions of law. Indeed, the committee notes that in its view the private status of ACFA has, rightly, not prevented the availability of an appeal of questions of law in relation to superannuation disputes. The committee also does not view the fact that such appeals are currently not available for non-superannuation complaints as sufficient justification for not allowing them under the provisions of this bill. In the committee's view the lack of either judicial review, or a means to appeal on questions of law, means there is a risk that any legal errors made by AFCA cannot be corrected.

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

2.238 The committee seeks the Minister's further advice as to whether it is intended that errors related to a denial of a fair hearing (that is, errors which give rise to a procedural fairness ground of review) would give rise to a question of law (and so be subject to appeal).

2.239 The committee draws its remaining scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of not providing a mechanism for appeals and excluding judicial review under the ADJR Act in relation to non-superannuation financial disputes.

Privacy¹⁰⁵

Initial scrutiny – extract

2.240 The proposed amendments in items 13, 14 and 29 of the bill would allow officers and other staff members of APRA, ASIC and the ATO to disclose protected information to AFCA to assist it to perform its functions. The explanatory memorandum does not provide any information in relation to the type of information that may be disclosed to AFCA and whether this information is likely to include personal or confidential information. There are also no details about the

105 Items 13, 14 and 29 of Schedule 1. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

safeguards that will be in place to ensure that AFCA will protect the confidentiality of any information disclosed to it under these provisions.

2.241 In the absence of this explanatory information, the committee considers that enabling protected information to be disclosed to a non-government body such as AFCA raises privacy scrutiny concerns.

2.242 The committee therefore requests the Minister's advice as to the type of information that it is envisaged may be disclosed to AFCA under these provisions, whether this information is likely to include personal or confidential information, and details as to the safeguards that will be in place to ensure that AFCA will protect the confidentiality of any information disclosed to it.

Minister's response

2.243 The Minister advised:

The protected information envisaged to be shared with AFCA and the safeguards put in place

The Committee has sought further information about the type of information that it is envisaged may be disclosed to AFCA.

The Bill allows officers and other staff members of APRA, the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO) to disclose confidential and protected information to AFCA to assist it to perform its functions.

The type of information that may be disclosed by the ATO to AFCA is limited to information that was obtained under or in relation to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*. This is consistent with the type of information that the ATO is permitted to disclose to the Superannuation Complaints Tribunal under the current law, which may include personal or confidential information.

The legislation enables ASIC to share information, at ASIC's discretion, that will assist AFCA to perform its functions or powers. This may potentially include information that relates to an individual complaint, a systemic issue or membership of AFCA. The information may be personal or confidential information. Under the current law, ASIC is permitted to disclose this type of information to the Superannuation Complaints Tribunal.

It is intended that AFCA's terms of reference will include an obligation for AFCA to keep confidential all information pertaining to a dispute that is provided to AFCA except to the extent reasonably necessary to carry out AFCA's responsibilities. This is a matter that will be considered as part of the EDR authorisation decision.

In addition, each of the relevant legislative frameworks authorising the disclosure of protected information contains mechanisms for safeguarding the confidentiality of information once disclosed by ASIC, APRA and the ATO. For example, subsection 127(4A) of the *Australian Securities and*

Investments Commission Act 2001 allows ASIC to impose conditions that AFCA must comply with in relation to information disclosed. Subsection 56(9) of the *Australian Prudential Regulation Authority Act 1998* provides a similar rule in relation to disclosures made by APRA. Section 355-155 of Schedule 1 of the *Tax Administration Act 1953* provides that it is an offence (punishable by up to two years' imprisonment) for an entity to on-disclose or record protected information acquired by the entity from taxation officers, except in certain limited circumstances.

Committee comment

2.244 The committee thanks the Minister for this response. The committee notes the Minister's advice that the information that may be shared with the AFCA will include confidential and personal information to assist it to perform its functions, which may include personal information, of the type currently permitted to be disclosed to the Superannuation Complaints Tribunal. The committee notes the Minister's advice that it is intended that AFCA's terms of reference will include an obligation to keep confidential all information pertaining to a dispute, except to the extent reasonably necessary to carry out its responsibilities, and that this obligation will be considered as part of the EDR authorisation decision. The committee further notes the Minister's advice that legislative frameworks relevant to ASIC, APRA and the ATO contain mechanisms for safeguarding the confidentiality of such information once disclosed.

2.245 The committee notes the Minister's earlier advice that AFCA is to be a private review mechanism arising from private rights and its decision-makers will not be Commonwealth officers.¹⁰⁶ The committee therefore remains concerned about enabling protected information to be disclosed to a non-government body such as AFCA, particularly in circumstances where this information may include personal and confidential information. It is not clear to the committee that the *Privacy Act 1988* would apply to such a private body and while the committee notes the Minister's advice that the Acts under which ASIC, APRA and the ATO are each authorised to disclose protected information also contain provisions to safeguard confidentiality, those Acts merely impose the ability for ASIC and APRA to impose conditions regarding confidentiality, and not an obligation requiring confidentiality. The committee notes that including obligations in AFCA's terms of reference is not equivalent to making it a legislative requirement that AFCA have an obligation to maintain confidentiality. The committee notes the advice that including these matters in AFCA's terms of reference is intended to be considered as part of the EDR authorisation decision. However, the committee notes that, as discussed above, the EDR authorisation decision and the specification of any conditions on such authorisation, is to occur by notifiable instrument, and will therefore not be disallowable by Parliament.

106 See Minister's response in paragraph [2.243] above.

2.246 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of enabling protected personal and confidential information to be disclosed to AFCA, a non-government body, without any specific safeguards in the bill to ensure that AFCA will protect the confidentiality of any information disclosed to it.

Significant matters in delegated legislation¹⁰⁷

Initial scrutiny – extract

2.247 Under current section 101 of the *Superannuation Industry (Supervision) Act 1993* trustees of regulated superannuation funds and approved deposit funds are required to have an internal dispute resolution (IDR) system and to provide written reasons for decisions about complaints made by beneficiaries, former beneficiaries or other interested parties. Current section 47 of the *Retirement Savings Accounts Act 1997* specifies similar requirements for an IDR system for complaints relating to the operation or management of a Retirement Savings Account (RSA). A person who intentionally or recklessly contravenes these requirements commits an offence punishable by a fine of up to 100 penalty units.¹⁰⁸

2.248 Items 7 and 9 of Schedule 2 seek to repeal the current requirements in the primary legislation and allow ASIC to set requirements about providing written reasons for IDR decisions in a legislative instrument.¹⁰⁹ Contravening these requirements will remain an offence, subject to up to 100 penalty units (or \$21,000). The committee's view is that significant matters, such as requirements the breach of which will constitute an offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case, the explanatory memorandum states that the amendments will 'provide ASIC with the flexibility to align the requirements around giving reasons for IDR decisions made by these trustees to those that apply for other IDR firms'.¹¹⁰ While the committee notes this brief explanation, the committee does not consider that this adequately explains why the use of delegated legislation is appropriate in this instance.

107 Schedule 2, items 7 and 9, proposed subsection 47(2A) of the *Retirement Savings Accounts Act 1997* and proposed subsection 101(1B) of the *Superannuation Industry (Supervision) Act 1993*. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

108 *Superannuation Industry (Supervision) Act 1993* s 101(2); *Retirement Savings Accounts Act 1997* s 47(3).

109 Proposed subsection 47(2A) of the *Retirement Savings Accounts Act 1997* and proposed subsection 101(1B) of the *Superannuation Industry (Supervision) Act 1993*.

110 Explanatory memorandum, p. 54.

2.249 The committee requests the Minister's more detailed justification as to the appropriateness of setting out requirements in delegated legislation where breach of those requirements will constitute an offence.

Minister's response

2.250 The Minister advised:

The appropriateness of putting requirements in delegated legislation that, if breached, constitutes an offence

The Committee has sought further information about the appropriateness of setting out requirements in delegated legislation where breach of those requirements will constitute an offence.

This Bill includes a requirement for Retirement Savings Account providers and trustees of regulated superannuation funds and approved deposit funds to ensure that written reasons are given for decisions relating to complaints. Contravening this requirement will be an offence, subject to a penalty of up to 100 penalty units.

This Bill allows ASIC to set out the detail of this requirement by legislative instrument. The details that ASIC may specify are clearly circumscribed in the Act and the details will be readily obtainable, being available on the Federal Register of Legislation. ASIC will be required to consult, as appropriate, on the content of the legislative instrument.

This approach provides ASIC with the flexibility to develop and consult on the content of its legislative instrument so as to provide for greater consistency between the requirements around giving reasons for internal dispute resolution decisions made by these trustees and the requirements that will apply for other internal dispute resolution firms.

The requirements that apply for other internal dispute resolution firms will be set out under requirements approved by ASIC as mentioned in subparagraph 912A(2)(a)(i) of the *Corporations Act 2001*. This approach allows ASIC to ensure the new requirements begin for all internal dispute resolution firms from the same start date and that the enhanced internal dispute resolution framework achieves a consistent approach for consumers of financial services and products, including superannuation products. It would also be expected that in the long term, harmonising the rules will result in reduced complexity for internal dispute resolution procedures for financial service providers.

Committee comment

2.251 The committee thanks the Minister for this response. The committee notes the Minister's advice that the bill allows ASIC to set out the details of reasons given for decisions relating to complaints by Retirement Savings Account providers and trustees of regulated superannuation funds and approved deposit funds by legislative instrument. The committee notes the Minister's advice that details that ASIC may specify are clearly circumscribed in the Act and will be readily obtainable

on the Federal Register of Legislation, and this approach provides ASIC with the flexibility to develop and consult on the legislative instrument and provide greater consistency between requirements on these trustees and those that will apply for other internal dispute resolution firms.

2.252 The committee's view is that significant matters, such as requirements the breach of which will constitute an offence, should generally be included in primary legislation. The committee does not consider that providing flexibility for ASIC is a sufficient justification for setting out requirements in delegated legislation where breach of those requirements will constitute an offence.

2.253 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of setting out requirements in delegated legislation where breach of those requirements will constitute an offence.

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

Chapter 3

Scrutiny of standing appropriations

3.1 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 draws the following bill to the attention of Senators:

- **Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017** — Part 3-1, Division 2, section 54.

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](#).

Chapter 4

Proposed amendment to standing order 24

Background

4.1 Standing order 24 provides for the establishment and operation of the Standing Committee for the Scrutiny of Bills. On 29 November 2016, the Senate agreed to temporarily amend standing order 24(1) so as to include the following paragraph from the first sitting day of 2017 to the last sitting day of March 2018:

- (d) If the committee has not finally reported on a bill due to the failure of a minister to respond to its concerns then, immediately prior to the consideration of government business on any day or immediately prior to the consideration of the bill:
 - (i) any senator may ask the minister for an explanation as to why the minister has not provided a response to the committee, and
 - (ii) the senator may, at the conclusion of the explanation, move without notice either a motion relating to the consideration of the bill or—That the Senate take note of the explanation; or
 - (iii) in the event that the minister does not provide an explanation, the senator may, without notice, move a motion with regard to the minister's failure to provide an explanation.¹

4.2 By way of background, the motion proposing the temporary order explained that 'where the Scrutiny of Bills Committee writes to a minister it expects a response to be received in time to be considered by the committee and reported on while the bill is still before the Parliament', and that 'if the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, senators should have the right to ask the responsible minister why the Scrutiny of Bills Committee has not received a response'.²

4.3 Since the commencement of this temporary order, the committee has adopted the practice of publishing on its website a list of bills on which it has sought advice from the responsible minister but either has not yet received a response or has received a response but not yet finally reported.³ Where it may assist timely

1 *Journals of the Senate*, No. 21, 29 November 2016, pp 656–7. Referred to here as the 'temporary order'.

2 *Journals of the Senate*, No. 21, 29 November 2016, pp 656–7.

3 Senate Standing Committee for the Scrutiny of Bills, *Ministerial Responses*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Ministerial_Responses (accessed 25 October 2017).

scrutiny of legislation currently before the Senate, the committee has also chosen to publish on its website ministerial responses, together with its preliminary comments on the responses, prior to the tabling of its regular Scrutiny Digest.

4.4 To date, no senator has yet exercised their ability to ask a minister for an explanation as to why a response has not been provided to the committee, as provided for by the temporary order. However, since the commencement of the temporary order, there has been a significant improvement in the responsiveness of ministers to the committee's requests for information. For example, the proportion of ministerial responses that were late (that is, not provided within the timeframe set by the committee) was 36 per cent in 2015 and 44 per cent in 2016. However, as at 8 November 2017, this figure had fallen to 22 per cent.

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

4.6 The committee notes that timeliness in providing ministerial responses to the committee is essential to an effective scrutiny process. The committee considers that the recent improvement in the timeliness of responses demonstrates the effectiveness of the temporary amendment to the standing orders.

Proposed ongoing amendment to standing order 24

4.7 In light of the improvement in ministerial responsiveness that has occurred since the commencement of the temporary order, the committee considers that the temporary order has significantly assisted it, and therefore the Senate, in its scrutiny work and that standing order 24 should be amended to establish this process on an ongoing basis.

4.8 The committee also considers that the practice it has currently adopted of publishing a list of bills in relation to which it has sought advice from the responsible minister but not yet finally reported, has itself contributed to improved ministerial responsiveness and should also become part of the requirements of standing order 24.

4.9 The following recommendation, if adopted by the Senate, would include the measures provided for by the current temporary order in standing order 24(1) on an ongoing basis. Minor stylistic changes have been made to the drafting of the amendment which do not alter the substance of the provisions. In addition, the recommendation would also add the following new provisions:

- proposed paragraph (d) would require the committee to maintain on its website a list of bills in relation to which it has sought advice from the responsible minister but not yet received a response;
- proposed paragraph (h) would limit the use of proposed paragraphs (e) to (g) to once per sitting day in respect of any bill or bills taken together.

Recommendation 1

4.10 Standing order 24 be amended as follows with immediate effect:

At the end of paragraph (1), add:

- (d) The committee shall maintain on its website a list of bills in relation to which the committee has sought advice from the responsible minister and not yet received a response.**
- (e) Where the committee has not finally reported on a bill because a ministerial response has not been received, then:**
 - (i) immediately prior to the consideration of government business on any day; or**
 - (ii) immediately prior to the consideration of the bill,**
any senator may ask the minister for an explanation of why the minister has not provided a response to the committee.
- (f) Where an explanation is sought under paragraph (e) and a minister provides an explanation, then at the conclusion of the explanation the senator may move, without notice, a motion:**
 - (i) relating to the consideration of the bill; or**
 - (ii) that the Senate take note of the explanation.**
- (g) Where an explanation is sought under paragraph (e) and the minister does not provide an explanation, then the senator may, without notice, move a motion relating to:**
 - (i) the consideration of the bill; or**
 - (ii) the minister's failure to provide an explanation.**
- (h) The procedures in paragraphs (e) to (g) may only be used once on any sitting day in respect of any bill or bills taken together.**

