The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 15 of 2017

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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 No bills were introduced during the previous sitting week.

Commentary on amendments and explanatory materials

No comments

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

- Marriage Amendments (Definition and Religious Freedoms) Bill 2017;[1] and
- National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017.[2]

1 On 28 November 2017 the Senate agreed to eight amendments moved by Senator Brandis and the bill was read a third time.

2 On 29 November 2017 the Senate agreed to 11 Government amendments, the Assistant Minister for Social Services and Multicultural Affairs (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

Bankruptcy Amendment (Enterprise Incentives) Bill 2017

Purpose	This bill seeks to amend the *Bankruptcy Act 1966* to: • 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
Bill status	Before the Senate
Scrutiny principle	Standing order 24(1)(a)(i)

2.2 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Attorney-General responded to the committee's comments in a letter dated 4 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]

Strict liability offences[2]

Initial scrutiny – extract

2.3 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

1 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

2 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.

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'.

2.4 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.

2.5 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, 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.*[3]

2.6 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.[4] 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.

2.7 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.

2.8 The committee therefore requests the Attorney-General's advice as to the appropriateness of making an offence (for a bankrupt failing to notify of a change in

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

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

contact details) subject to up to six months imprisonment where strict liability applies to the offence.

Attorney-General's response

2.9 The Attorney-General advised:

> The Committee has requested my 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.
>
> Subsection 80(1) of the *Bankruptcy Act 1966* currently requires bankrupts to immediately notify the trustee of a change to their name or principal place of residence. Item 4 of Schedule 1 of the Bill repeals subsection 80(1) and replaces it with the requirement for the bankrupt to notify the trustee within 10 business days of changes to their name, address and phone number during the 'prescribed period'. Both the existing subsection and proposed new subsection are strict liability offences which are subject to up to 6 months imprisonment.
>
> I acknowledge that the drafting of the current and proposed subsection 80(1) does not comply with the *Guide to Framing Commonwealth Offences* (the Guide). I thank the Committee for bringing this matter to my attention.
>
> I will seek to amend item 4 Schedule 1 of the Bill to ensure compliance with the Guide.

Committee comment

2.10 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's acknowledgement that the drafting of both the current and proposed subsection 80(1) does not comply with the *Guide to Framing Commonwealth Offences*[5] (the Guide) in that it applies strict liability to an offence punishable by a term of imprisonment. The committee welcomes the Attorney-General's undertaking to seek to amend the provision so as to ensure compliance with the Guide.

2.11 In light of the Attorney-General's undertaking to seek to amend item 4 of Schedule 1 relating to the penalty applicable to a strict liability offence, the committee makes no further comment on this matter.

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

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
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (ii), (iii), (iv) and (v)

2.12 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Minister responded to the committee's comments in a letter dated 30 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.[6]

Significant matters in delegated legislation[7]

Initial scrutiny – extract

2.13 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.

2.14 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

6 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

7 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.

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.[8] 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.

2.15 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 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.[9] 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.

2.16 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.[10] 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.

2.17 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

8 Explanatory memorandum, p. 13.

9 Explanatory memorandum, pp 16-17.

10 Explanatory memorandum, pp 17-18.

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.[11] 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 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.

2.18 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*.[12] 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.[13]

2.19 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*

11 Explanatory memorandum, p. 26.

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

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

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.[14]

2.20 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:

- 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).

Minister's response

2.21 The Minister advised:

> *Overview*
>
> The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) *Redress and Civil Litigation* Report recommended the establishment of a national redress scheme for survivors. The Royal Commission has highlighted that many victims of child sexual abuse have not had the opportunity to seek compensation for the abuse they suffered. There is a clear need to provide avenues for survivors to obtain effective redress for this past abuse however, for many it is no longer feasible to seek common law damages. Additionally, the Commonwealth does not have comprehensive constitutional power to legislate for a national scheme. A referral from all starts to the Commonwealth under section 5I(xxxvii) of the Constitution is the most legally sound way to implement a nationally consistent scheme and maximise participation. It will enable redress to be provided to survivors of institutional child sexual

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

abuse in non-government institutions that occurred in a state or where a state government is deemed responsible.

For this reason, the Commonwealth Bill, which I introduced to Parliament on 26 October 2017, does not facilitate states, or non-government institutions in states, to opt-in to the Scheme. The Commonwealth Bill is a significant first step to encourage jurisdictions to opt-in to the Scheme, and will ensure survivors who were sexually abused as children in Commonwealth institutions will receive redress.

If a state agrees to provide a referral and participate in the Scheme from its commencement, the Government will ensure a national redress scheme can be established via legislation from 1 July 2018.

The Royal Commission has shed light on the issue of institutional child sexual abuse on a national level, however the scale of this Scheme is quite different to other state-based schemes or overseas experiences (for example, the Irish Redress Scheme only included one institution). This is the reason the Scheme will need to be flexible to account for any unforeseen numbers of survivors, institutional contexts and other circumstances. Further, my experience of the Western Australian Redress Scheme has shown it will be necessary to adjust policy settings to mitigate against unintended outcomes for survivors.

Detailed advice

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) *Redress and Civil Litigation Report* has formed the basis for the development of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Commonwealth Bill). Further, an Independent Advisory Council on Redress, appointed by the Prime Minister, the Hon Malcolm Turnbull MP, provided expert advice and insight into the policy and implementation considerations for the Commonwealth Bill. The Independent Advisory Council includes survivors of institutional child sexual abuse and representatives from support organisations, as well as legal and psychological experts, Indigenous and disability experts, institutional interest groups and those with a background in government. The Council is chaired by the Hon Cheryl Edwardes AM, a former solicitor and Western Australian Attorney-General.

The Commonwealth Bill acknowledges that child sexual abuse suffered by children in institutional settings was wrong and should not have happened. The Royal Commission highlighted the complex needs and different life outcomes of survivors of institutional child sexual abuse. The Commonwealth Bill is designed to recognise the suffering survivors have experienced, accept these events occurred and ensure that each institution that is responsible for the abuse pays redress to survivors.

The Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse (the Scheme), which implements all aspects of the Commonwealth Bill, is designed to be responsive to survivors' and

participating institutions' needs. This is why it is necessary for elements of the Scheme to be in delegated legislation.

The Royal Commission recommended the establishment of a national redress scheme for survivors. In circumstances where the Commonwealth does not have comprehensive constitutional power to legislate for a national Scheme, a referral to the Commonwealth from the states under section 51(xxxvii) of the Constitution is the most legally sound way to implement a nationally consistent Scheme and maximise participation. It will enable redress to be provided to survivors of institutional child sexual abuse in non-government institutions that occurred in a state or where a state government is deemed responsible.

The Commonwealth Bill is a significant first step to encourage jurisdictions to opt-in to the Scheme, and has been designed in anticipation of their participation should a referral of powers be received.

Scheme participation will be established with jurisdictions and non-government institutions from commencement of the Scheme, as they choose to opt-in. Flexibility is needed to allow adjustments for the differing needs of survivors, participating institutions, and to enable the Scheme to quickly implement changes required to ensure positive outcomes for survivors.

Responsive changes, such as a declaration for subclause 27(1) to provide that a non-government institution is a *participating non-government institution of a Territory* for the purposes of the Scheme, allows that institution to provide redress to a survivor as soon as the institution is included in the declaration. Where a non-government institution decides to opt in to the Scheme, this may also require responsive changes to the rules to provide that a *participating non-government institution* is not a *participating non-government institution* for a specified period as the institution was not established in a Territory during that period (see: subclauses 26(3) and (4)).

Using rules rather than regulations or incorporating all elements of the Scheme in the Commonwealth Bill, provides appropriate flexibility and enables the Scheme to respond to factual matters as they arise. It is uncertain how many applications for redress the Scheme will receive at the commencement of the Scheme, and whether there will be unforeseen issues requiring prompt responses. It is therefore appropriate that aspects of the Scheme be covered by rules that can be adapted and modified in a timely manner. The need to respond quickly to survivor needs is also a key feature of the Scheme as many survivors have waited decades for recognition and justice.

In relation to the eligibility requirements in clause 16, the Explanatory Memorandum explains that the citizenship requirement:

> *…is included to mitigate the risk of fraudulent claims and to maintain the integrity of the Scheme. It would be very difficult to verify the*

> *identity of those who are not citizens, permanent residents or within the other classes who may be specified in the Rules. Removing citizenship requirements would likely result in a large volume of fraudulent claims which would impact application timeliness for survivors.*

As the committee has noted, the Explanatory Memorandum details three initial classes of people that will be eligible for redress, despite the citizenship requirements above. Further investigation and consultation is continuing across Government and with states and territories to determine if there are other classes of survivors that do not fit the above citizenship requirements that should be deemed eligible for the Scheme. There may also be classes of survivors that will apply for redress that the Scheme has not, or could not, envisage to include in the legislation. The Scheme may not have accounted for categories of survivors that it needs to deal with promptly, to ensure the timely processing of applications and the best outcomes for survivors so subclause 16(2) is necessary to allow the Scheme to respond to situations as they arise. Subclause 16(3) will be used to respond to exceptional cases, such as to specify people ineligible where they have a criminal conviction and their eligibility would affect the integrity and public confidence in the Scheme.

I note the committee's concerns and I am considering the inclusion of predetermined cases in any future legislation to reflect a national redress scheme.

Subclause 21(7) is intended to operate to ensure that institutions are not found responsible for abuse that occurred in circumstances where it would be unreasonable to hold the institution responsible, despite subclauses 21(2) and (3). For example, from the commencement of the Scheme, it is intended the rules will specify an institution is not responsible for child sexual abuse perpetrated by another child unless there is a reasonable likelihood that the institution mismanaged or encouraged the situation. The power in subclause 21(7) will also be used to clarify circumstances where a participating government institution should not be considered responsible. Such circumstances may include:

- where the government only had a regulatory role over a non-government institution;
- where the government only provided funding to a non-government institution; and
- where the only connection is that the non-government institution was established under law enacted by the government.

Until institutions opt in to the Scheme, it is not possible to envisage every possible circumstance to include in the legislation.

In relation to your query about institutions that may be prescribed as not constituting a Commonwealth or territory institution, paragraphs 23(2)(c)

and 25(2)(b), and subclause 26(3) allow for flexibility to accommodate opt-in arrangements for different types of institutions.

These rule-making powers are not intended to reduce the scope of the application of the Scheme. Institutions have been established differently in different jurisdictions, which means some institutions may technically be considered a Commonwealth or Territory institution, rather than a non-government institution. For example, the Anglican Church provided comment on a draft of the National Bill that:

> *Read strictly some Anglican bodies (e.g. those established under the* Anglican Church of Australia (Bodies Corporate) Act 1938 *in NSW) may meet the definition of a State institution.*

Paragraphs 23(2)(c) and 25(2)(b) will allow for institutions that have been established under Commonwealth or Territory laws, but would be considered as separate from these jurisdictions for the purposes of the Scheme, to be determined in the rules to be a non-government institution.

Subclause 26(3) may cover situations where an institution was established in a Territory but only for a limited time. Subclause 26(4) is a safeguard should the Scheme want to prescribe situations where a non-government institution established in a Territory is not within scope of the Scheme but only for a specified period of time. It will not be possible to clarify the circumstances of non-government institutions of territories until the scheme commences and non-government institutions take steps to opt-in to the Scheme. For example, where an institution is operation from 2000 to 2018, but only established in a Territory from 2015, subsections 26(3) and 26(4) may be used to clarify that the institution is not a non-government institution of a territory from 2000 to 2015. These provisions are not intended to reduce the scope of the application of the Scheme, but rather to correctly identify institutions that are responsible for the abuse and which are within the scope of the Scheme.

As noted by the committee, the Explanatory Memorandum explains that assessment guidelines would normally be of an administrative character and would not be contained in a legislative instrument. The committee queries whether the guidelines could instead be included in the primary legislation. It is necessary not to publish the detailed assessment guidelines in the primary legislation in order to mitigate the risk of fraudulent applications. Placing the assessment guidelines in the primary legislation would enable people to understand how payments are attributed and calculated, and possibly submit a fraudulent or enhanced application designed to receive the maximum redress payment under the Scheme. The Scheme has a low evidentiary threshold and is based on a reasonable likelihood test. These aspects of the Scheme are important and provides recognition and redress to survivors who may not be able or want to access damages through civil litigation. However, there needs to be some mechanisms to prevent fraudulent claims. To balance the risk of fraudulent applications with ensuring a transparent and certain process, it

was considered necessary to make these declarations legislative instruments.

It is appropriate for matters to be included in rules rather than regulations as the Scheme needs to be responsive to survivors, participating territory institutions, and participating non-government institutions given that the Scheme will operate for a fixed period of time and needs to ensure the timely processing of survivors' applications. The use of rules allows the Scheme to act on and implement changes quickly and as the need arises. As the committee would know, regulations would need to go through the Executive Council process, which may result in the Scheme being less responsive to the needs of survivors and participating institutions.

All aspects of the Scheme have been subject to ongoing consultation with State and Territory Ministers responsible for redress, state and territory departmental officials, the Independent Advisory Council, survivors of institutional child sexual abuse and non-government institutions. The drafting of the legislation, including the rules, have been a part of this consultation with stakeholders.

A Board of Governance will be established to serve in an advisory capacity to provide advice to the Minister, Scheme Operator, the Department of Social Services and the Department of Human Services. The structure of the board is still under development; however, membership will include Ministerial representatives from each participating State and Territory. Consultation and agreement from the Board will be undertaken prior to any legislative changes, including creating or amending legislative instruments.

Committee comment

2.22 The committee thanks the Minister for this response. The committee notes the Minister's advice that the Commonwealth does not have comprehensive constitutional power to legislate for a national scheme and a referral from all states would be the most legally sound way to implement a nationally consistent scheme. The committee notes the Minister's advice that this bill is a significant first step to encourage jurisdictions to opt-in to the scheme and, as such, flexibility is needed to allow adjustments for the differing needs of survivors and participating institutions and to enable the scheme to quickly implement changes.

2.23 The committee notes the Minister's advice that further investigation and consultation is continuing to determine if there are classes of survivors that should be deemed to be eligible for redress that do not fit within the requirements set out in the bill, and subclause 16(2) (which enables rules to be made prescribing who is eligible for redress) is necessary to allow the Scheme to respond to situations as they arise. The committee further notes the Minister's advice that subclause 16(3) (which enables rules to be made prescribing who is *not* eligible for redress) will be used to respond to exceptional cases, 'such as to specify people ineligible where they have a criminal conviction and their eligibility would affect the integrity and public

confidence in the Scheme'. The committee notes the Minister's advice that he is considering including predetermined cases 'in any future legislation', but notes that no undertaking has been made to amend this bill.

2.24 In relation to the power to make rules to specify when institutions are *not* to be held responsible for abuse, the committee notes the Minister's advice that until institutions opt in to the scheme 'it is not possible to envisage every possible circumstance to include in the legislation'. The committee notes that in relation to clauses 23, 25 and 26, the Minister's similarly advised that it is not possible to clarify which institutions should not be included as part of the scheme until the scheme commences and non-government institutions take steps to opt-in to the scheme.

2.25 The committee has had long-standing scrutiny concerns[15] about 'framework bills' which are introduced into Parliament but which contain only the broad principles of the legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. Such legislation undermines effective parliamentary scrutiny as it avoids detailed parliamentary debate on the content of important provisions. The committee considers that, from a scrutiny perspective, it would be better for the introduction of a bill to be delayed until all policy details have been appropriately considered than to allow significant policy content to be determined by way of delegated legislation. In this instance, the committee considers this is of particular concern where the rules can be used to determine who would *not* be eligible for redress and which institutions would be considered *not* to be responsible for the abuse of a person.

2.26 The committee is particularly concerned that clause 34(3) provides that any declaration by the Minister setting out the method, or matters to be taken into account, for working out the amount of redress payment is exempt from the usual parliamentary disallowance processes. The committee notes it has consistently taken the view that removing or limiting parliamentary oversight is a significant matter and any exemption of delegated legislation from the usual disallowance process should be fully justified. The committee notes that the Senate Standing Committee on Regulations and Ordinances does not examine non-disallowable instruments and the nature of non-disallowance means that the Senate would have no power to set aside any ministerial declaration that it considers to be inappropriate. The committee notes the Minister's advice that placing these assessment guidelines in the primary legislation 'would enable people to understand how payments are attributed and calculated' which could mean that a person could submit a fraudulent or 'enhanced' application to seek to receive the maximum redress payment under the scheme. The committee notes that the creation of a legislative scheme generally requires that people are able to understand and access details of how the legislative scheme

15 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Final Report: Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee*, Chapter 5.

operates. In relation to the accessibility of such information, it is not clear to the committee why including such detail in a legislative instrument, which must be registered on the Federal Register of Legislation[16] (and therefore would be available on a public website), would differ from the accessibility of primary legislation. The committee also notes that the Minister's advice does not address its question as to why it is appropriate to exempt such a legislative instrument from disallowance.

2.27 Further the committee notes the Minister's advice that the use of rules, rather than regulations, allows the scheme to act on and implement changes quickly and as the need arises, whereas regulations would need to go through the Executive Council process which may result in the scheme being less responsive to the needs of survivors and participating institutions. The committee notes that the use of delegated legislation itself is designed to allow the executive to swiftly make changes to the law, and the committee reiterates its view that if significant matters are to be provided for in delegated legislation there should at least be some executive scrutiny over the process, by including such matters in regulations as opposed to rules.

2.28 Finally, the committee notes the Minister's advice that the rules will be developed as part of consultation with stakeholders, but notes that there is nothing in the bill requiring such consultation be undertaken. The committee takes this opportunity to reiterate its general view that where the Parliament delegates its legislative power in relation to significant regulatory schemes 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 those obligations is a condition of the validity of the legislative instrument.

2.29 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*).

2.30 The committee considers it may be appropriate for the bill to be amended to provide, at a minimum, that:

- **any Ministerial declaration made under clause 34, regarding the method or matters to be taken into account for working out the amount of redress payments, should be subject to the usual parliamentary disallowance procedures;**
- **the significant delegation of powers in clauses 16, 21, 23, 25, 26 and 34 be included in regulations rather than rules; and**

16 See subsection 15A(2) of the *Legislation Act 2003*.

- **specific consultation obligations be included in the bill, with compliance with these obligations a condition of the validity of the legislative instrument.**

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

2.32 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving significant elements of this new scheme to delegated legislation.

Standing appropriation[17]

2.33 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.

2.34 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.

2.35 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.

2.36 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 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).[18]

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

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17 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.

18 Clause 129.

Minister's response

2.38 The Minister advised:

> I note the Committee's comments regarding the standing appropriation and that some matters are not addressed in the Explanatory Memorandum. An Addendum to the Explanatory Memorandum will clarify this.

Committee comment

2.39 The committee thanks the Minister for this response. The committee welcomes the Minister's advice that an addendum to the explanatory memorandum will be made to address the standing appropriation.

2.40 In light of this undertaking, the committee makes no further comment on this matter.

Civil penalty[19]

Initial scrutiny – extract

2.41 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.[20] 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.

2.42 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.

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

20 Explanatory memorandum, p. 41.

Minister's response

2.43 The Minister advised:

> It is intended that a refusal or failure to comply with a requirement to provide information or documents to the Scheme Operator under clause 70 be subject to a civil penalty carrying a penalty of 100 penalty units (subclause 71(1)). Subclause 71(2) correctly states that subclause 71(1) will not apply if the institution or person has a reasonable excuse.
>
> The note at the end of subclause 71(2) was included in error. This error will be corrected.

Committee comment

2.44 The committee thanks the Minister for this response. The committee notes the Minister's advice that the note at the end of subclause 71(2) was included in error and welcomes his undertaking to correct this error.

2.45 In light of this undertaking, the committee makes no further comment on this matter.

Broad discretionary power[21]

Initial scrutiny – extract

2.46 Clause 77 provides that the Commonwealth Redress Scheme Operator (the Operator)[22] 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 records of the relevant government departments.[23] 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

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21 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.

22 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.

23 See subclause 75(2).

person'.[24] 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.

2.47 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.[25] 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.

2.48 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
- 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).

Minister's response

2.49 The Minister advised:

> The provisions have been drafted to reflect similar provisions in other legislation within the Social Services portfolio, which routinely deals with a

24 Explanatory memorandum, p. 43.

25 See clause 78(3).

person's sensitive information and provides a consistent approach to the way in which the Department deals with protected information. It was considered more appropriate to provide a power to enable rules to be made by the Minister if it was considered necessary to assist with the exercise of the Scheme Operator's disclosure of protected information. This provides flexibility to address any circumstances that arise which are of sufficient public interest to warrant the exercise of that power. Incorporating high-level rules in the Commonwealth Bill would restrict the Scheme Operator's power to make a public interest disclosure to those circumstances set out in the Commonwealth Bill.

Careful consideration will be given to ensure that any personal information held by the Scheme Operator is given due and proper protection. It is envisaged the power to make public interest disclosures will only be used, for instance, where it is necessary to prevent, or lessen, a threat to life, health or welfare, for the purpose of briefing the Minister or if the information is necessary to assist a court, coronial inquiry, Royal Commission, etc., for specific purposes such as a reported missing person or a homeless person.

Despite there not being a positive requirement in the Commonwealth Bill, the intention is to make rules to regulate the Scheme Operator's disclosure power. However, the Committee's concerns are noted and I will consider including a positive requirement for rules in the National Bill.

Committee comment

2.50 The committee thanks the Minister for this response. The committee notes the Minister's advice that the provision has been drafted to reflect similar provisions in other legislation within the social security portfolio, and that giving the Minister the discretion to make rules will provide flexibility to address any circumstances that warrant the exercise of the power. The committee also notes the Minister's advice that personal information held by the Operator will be given due and proper protection, and that it is envisaged public interest disclosures will only be made in certain limited circumstances. Finally, the committee notes the Minister's advice that it is intended to make rules to regulate the Operator's disclosure power and consideration will be given to including a positive requirement to this effect in the bill.

2.51 The committee does not consider that the existence of similar disclosure provisions in other legislation provides a sound justification for including such a provision in this bill. The committee reiterates that the bill, as it stands, would allow the Operator to disclose extremely sensitive information, including information relating to allegations regarding child sexual abuse, to *any* person and for *any* reason so long as it is considered necessary in the public interest to do so. Although the Minister's response outlines a number of circumstances in which it is envisaged this disclosure power might be used, it remains the case that the bill itself does not restrict disclosure to these circumstances, nor does the bill require the making of

rules to regulate the use of the disclosure power. The committee reiterates 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.[26] 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. It remains unclear to the committee why it is necessary to grant such a broad disclosure power to the Operator and why guidance as to its use cannot be set out in primary legislation.

2.52 From a scrutiny perspective, the committee therefore considers it would be appropriate for the bill to be amended so as to provide at least high-level guidance about the exercise of the Operator's disclosure powers, including that affected persons must be consulted before personal information is disclosed (except in specified urgent circumstances).

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

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

2.55 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of granting the Operator broad discretionary power to disclose personal information.

Reversal of evidential burden of proof

Strict liability offence[27]

Initial scrutiny – extract

2.56 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

26 See clause 78(3).

27 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.

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.

2.57 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.

2.58 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.

2.59 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.

2.60 The committee notes that the *Guide to Framing Commonwealth Offences*[28] 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.[29]

2.61 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).

2.62 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

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

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

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.*[30] The explanatory memorandum provides no justification as to why the offence is subject to strict liability.

2.63 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 principles as set out in the *Guide to Framing Commonwealth Offences*; [31] 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*.[32]

Minister's response

2.64 The Minister advised:

> Subclauses 84(1) and 84(2) make it an offence to offer to supply protected information about another person, or for a person to hold himself or herself out as being able to supply such information. Subclause 84(3) provides a defence where an officer is acting in the performance or exercise of his or her powers, duties or functions under the Act. Subclause 100(6) provides that a nominee commits an offence if they refuse or fail to comply with a relevant notice. Subclause 100(7) provides a defence where the nominee has a reasonable excuse.
>
> In relation to the offence specific defence in subclause 84(3), whether the person was acting in the performance or exercise of his or her powers,

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

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

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

duties or functions under the Act would be peculiarly within the knowledge of the defendant. It is therefore appropriate that the defendant bears the evidential burden of proof in relation to the matter.

In relation to the offence-specific defence in subclause 100(7), evidence pertaining to the defendant's excuse for failing to comply with a relevant notice is a matter peculiarly within the knowledge of the defendant. It is therefore appropriate that the defendant bears the evidential burden of proof in relation to the matter.

Consistent with the *Guide to Framing Commonwealth Offences*, subclauses 84(3) and 100(7) specify that the evidential burden of proof in relation to the defence rests with the defence.

Subclause 100(8) provides that an offence under subclause 100(6) is an offence of strict liability. The offence in subclause 100(6) is not punishable by imprisonment and the penalty in subclause 100(6) is 30 penalty units. The offence in subclause 100(6) is necessary to ensure that the Scheme Operator is able to monitor the disposal of redress payments by payment nominees. A payment nominee may be appointed where, for example, a survivor is a minor or does not have capacity to manage their financial affairs. The payments may be up to $150,000 and it is essential to the integrity of the Scheme that payment nominees who receive money on behalf of survivors are accountable to the Scheme Operator for their use of survivors redress payments.

The Committee's comment that these matters are not addressed in the Explanatory Memorandum are noted. An Addendum to the Explanatory Memorandum will clarify this.

Committee comment

2.65 The committee thanks the Minister for this response. The committee notes the Minister's advice that, in relation to the offence-specific defence set out in subclause 84(3), whether the person was acting in the performance or exercise of his or her powers, duties or functions under the Act would be peculiarly within the knowledge of the defendant and it is therefore appropriate that the defendant bear the evidential burden of proof.

2.66 The committee also notes the Minister's advice that it is appropriate that the defendant bear the evidential burden of proof in relation to the offence-specific defence set out in subclause 100(7) as evidence pertaining to the defendant's excuse for failing to comply with a relevant notice is a matter peculiarly within the defendant's knowledge. The committee further notes the Minister's advice that the application of strict liability to the offence in subclause 100(6) is necessary to ensure the Operator is able to monitor the disposal of redress payments by payment nominees, and that the offence is not punishable by imprisonment and attracts a penalty of 30 penalty units.

2.67 The committee considers that the Minister's response has adequately addressed its scrutiny concerns in relation to the application of strict liability and the reversal of the evidential burden of proof in clause 100. However, in relation to the reversal of the evidential burden of proof in clause 84, the committee does not consider that the Minister's response has established 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. Whether an officer is acting in accordance with their legislative duties should be known to the Commonwealth. The committee does not consider that it is appropriate that the burden of proof 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. The committee considers these matters appear to be matters more appropriate to be included as an element of the offence.

2.68 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*).

2.69 In light of the information provided, the committee makes no further comment in relation to the application of strict liability and the reversal of the evidential burden of proof in clause 100.

2.70 However, the committee draws its scrutiny concerns in relation to clause 84 to the attention of Senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in this clause.

Limitation on merits review[33]

2.71 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.

2.72 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

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

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.[34]

2.73 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*.[35] The explanatory memorandum 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.[36]

2.74 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 [2.95] to [2.96] below.

2.75 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.

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34 Clause 30.

35 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 pages 20-21 of *Scrutiny Digest 13 of 2017*.

36 Explanatory memorandum, p. 7.

Minister's response

2.76 The Minister advised:

> The decision to limit the internal reviewer to only have regard to information and documents that were available to the person who made the original determination was to balance the need for an expedited application process for survivors with the burden of administration required when reopening many applications for review. Allowing the internal reviewer to request further information from survivors will create a high level of administrative burden to the individual and the Scheme, add to the potential re-traumatisation of survivors having to seek additional material and increase the operational costs for institutions to participate in the Scheme. To ensure national participation of Territory and non-government institutions in the Scheme, and to allow maximum coverage for survivors, administration costs have to be kept to a minimum. If administration costs are too high, institutions will not participate in the Scheme and many survivors will therefore not have the opportunity to receive redress. The Scheme will provide extensive communication and support to survivors to ensure they provide all information available to them when they lodge an application.
>
> The decision to exclude external merits review for applicants was made on the advice of the Independent Advisory Council on redress following the Royal Commission's recommendation. The Council recommended the Scheme provide survivors with access to an internal review process, but no rights to external merits or judicial review as they considered that providing survivors with external review would be overly legalistic, time consuming, expensive and would risk further harm to survivors.
>
> Survivors of institutional child sexual abuse often have experienced significant and continuing power imbalance between themselves, even as an adult, and institutions. The long-term impacts of child sexual abuse leave many survivors much less able to confront institutions and they remain at great risk of re-traumatisation.
>
> For these reasons, the Scheme is not intended to be legalistic in nature and is intended as an alternative to civil litigation with a low evidentiary burden and a high level of beneficial discretion. The Scheme aims to have the needs of survivors at the core and to take lengths to avoid further harm or re-traumatisation of survivors. The Scheme has taken many steps to ensure that all aspects are developed in accordance with a trauma-informed approach and the judicial review process has not been developed for these reasons. If judicial review avenues were available, many survivors may have unrealistic expectations of what could be achieved and the judicial review process is likely to re-traumatise a survivor.
>
> My Department will recruit appropriately qualified, independent assessors, known as Independent Decision Makers, who will make all

> decisions on applications made to the Scheme. Independent Decision Makers will not report or be answerable to Government. The Scheme will allow internal merits review of decisions and the Independent Decision Maker undertaking the review must not have been involved in the making of the original decision. The recruitment process, including the criteria for appropriate skills and attributes of the Independent Decision Makers to ensure objectivity, are under development.

Committee comment

2.77 The committee thanks the Minister for this response. The committee notes the Minister's advice that allowing the internal reviewer to request further information from survivors beyond that available to the original decision maker would create a high level of administrative burden to the individual and the scheme, add to potential re-traumatisation of survivors, and increase operational costs for participating institutions. The committee also notes the Minister's advice that institutions may not participate in the scheme if administration costs are too high, and that survivors will be provided with support to ensure they include all information available to them then when lodging an application.

2.78 The committee further notes the Minister's advice that the decision to exclude external merits review before the Administrative Appeals Tribunal (AAT) was made on the advice of the Independent Advisory Council on redress, which considered that providing survivors with external review would be overly legalistic, time consuming and expensive and would risk further harm to survivors.

2.79 Finally, the committee notes the Minister's advice that the Department intends to recruit appropriately qualified independent assessors as independent decision makers and that criteria detailing appropriate skills and attributes for these positions are being developed.

2.80 The committee remains concerned that not allowing the consideration of additional information during the internal review process could prevent applicants from relying on evidence that becomes available between the time of the original application and the internal review, or material that 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. It is not clear to the committee that allowing internal reviewers to have regard to such additional information would increase the administrative burden to individuals or add to potential re-traumatisation as it would be the individuals themselves who would seek to have the additional information considered, rather than the internal reviewer requiring its production. It is also not clear to the committee that this would significantly add to the cost of the internal review process.

2.81 With respect to the decision not to allow external merits review, the committee reiterates its view that AAT review is itself designed to not be legalistic and, as it would only apply if a survivor of abuse sought to make an application for review, it remains unclear to the committee why providing AAT review would be

inconsistent with the intention of placing the needs of survivors at the core of the scheme. The committee notes that, while the intention may be to appoint appropriately qualified persons as independent decision makers, there is nothing in the bill to require this.

2.82 The committee considers it would be appropriate for the bill to be amended so as to remove subclause 88(3), which seeks to exclude the use of new information or documents in the internal review process.

2.83 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding external merits review of decisions on applications for redress.

Reversal of legal burden of proof[37]

Initial scrutiny – extract

2.84 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.

2.85 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.

2.86 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.

2.87 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

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

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*. [38]

Minister's response

2.88 The Minister advised:

> Subclause 109(3) makes it an offence for a financial institution not to comply with a notice given to it by the Scheme Operator requiring repayment to the Commonwealth of an amount that the Scheme Operator considers was wrongly paid to the credit of an account kept with that institution. The financial institution must repay the lessor of the amount stated in the notice or the amount standing to the credit of the relevant account. For a financial institution, it is a defence to the offence of failing to comply with the notice if the financial institution proves that it was incapable of complying with the notice.
>
> The note to subclause 109(4) clarifies that a defendant (financial institution) bears the legal burden of proving that it was incapable of complying with the Scheme Operator's notice. It is appropriate for the financial institution to be required to prove that it was incapable of complying with the notice in order to be released from the usual requirement to repay an amount owing to the Commonwealth. The financial institution bears the legal burden of proof because whether it was incapable of complying with the notice is a matter that would be peculiarly within its knowledge. It would be unreasonable to require the prosecution to disprove, beyond reasonable doubt, that the financial institution was incapable of complying with the notice. For that reason is it appropriate for the defendant to discharge the legal burden of proof in relation to this matter.
>
> The committee's comment that this is not addressed in the Explanatory Memorandum is noted. An Addendum to the Explanatory Memorandum will clarify this.

Committee comment

2.89 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is considered appropriate to require a financial institution to prove, on the balance of probabilities, that it was incapable of complying with the notice because this would be a matter peculiarly within its knowledge and it would be unreasonable to require the prosecution to disprove the matter beyond reasonable doubt.

2.90 The committee notes that the *Guide to Framing Commonwealth Offences* states that, where a defendant is required to discharge a legal burden of proof, the

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

explanatory material should justify why a legal burden has been imposed instead of an evidential burden.[39] The committee accepts that whether or not a financial institution was incapable of complying with the notice appears to be peculiarly within the knowledge of that institution and that it would therefore be justifiable to reverse the *evidential* burden of proof. However, it is not clear from the Minister's response, or from the explanatory materials, why it is proposed to instead place a *legal* burden of proof on the defendant.

2.91 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*).

2.92 In light of the information provided and the fact that this offence applies to financial institutions rather than individuals, the committee makes no further comment on this matter.

Broad delegation of administrative powers[40]

Initial scrutiny – extract

2.93 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.[41] This would presumably apply to any APS employee within the relevant government department.

2.94 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

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

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

41 See clause 9.

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.

2.95 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.

2.96 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.

Minister's response

2.97 The Minister advised:

> A broad delegation of the Scheme Operator's powers is necessary to enable the Department of Human Services and the Department of Social Services to administer the Scheme in an efficient manner, which is responsive and flexible to address matters as they arise.
>
> Determinations to do with eligibility or assessment can only be delegated to an Independent Decision Maker. The Scheme Operator will delegate functions for the ordinary administration of the Scheme. The Scheme Operator, who is the Secretary of the Department of Social Services, will determine the appropriate level of delegation commensurate with the administrative function being undertaken.
>
> Subclause 121(2) states that before the Minister can engage a person to be an Independent Decision Maker, the Minister must consult the appropriate Ministers from the self-governing Territories in accordance with the Commonwealth Redress Scheme Agreement. The consultation process will include selection, vetting and training of prospective Independent Decision Makers. This consultative process provides appropriate legislative guidance to engage appropriate Independent Decision Makers, whilst retaining flexibility to respond to cohorts of survivors coming through the Scheme as they present.

Committee comment

2.98 The committee thanks the Minister for this response. The committee notes the Minister's advice that the broad delegation of the Operator's powers is necessary to enable the efficient, responsive and flexible administration of the scheme. The committee also notes the Minister's advice that the Scheme Operator—that is, the Secretary of the Department of Social Services—will determine the appropriate level of delegation with respect to the administrative function being undertaken.

2.99 The committee further notes the Minister's advice that, before engaging a person as an independent decision maker, the bill provides that the Minister must consult the appropriate Territory Ministers in accordance with the Commonwealth Redress Scheme Agreement and that this consultation will include selection, vetting and training of prospective independent decision makers.

2.100 The committee reiterates its preference that delegations of administrative power be confined to holders of nominated offices or members of the Senior Executive Service or, alternatively, that a limit be set on the scope and type of powers that may be delegated. The committee notes the Minister's advice as to how it is *intended* the Scheme Operator's administrative powers will be delegated. However, the committee notes there is nothing on the face of the bill that would *require* the delegation power to be exercised in this way.

2.101 The committee also reiterates its concern that the bill contains no guidance as to the skills, training or experience independent decision makers must possess in order to be appointed. The committee does not share the Minister's view that the consultation process between the Minister and the appropriate Territory Ministers, as set out in subclause 121(2), provides appropriate legislative guidance as to the appropriate qualifications of independent decision makers, as it relates only to the need for consultation. While the selection, vetting and training of independent decision makers may be addressed in this consultation process, this does not address the committee's concern that no legislative guidance on such matters is set out in the bill.

2.102 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing for a broad delegation of the Scheme Operator's administrative powers and of the power to appoint independent decision makers in the absence of any legislative guidance as to their skills, training or experience.

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

Purpose	This bill seeks to amend the *Fair Work (Registered Organisations) Act 2009* and the *Fair Work Act 2009* to: • 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
Portfolio	Employment
Introduced	House of Representatives on 19 October 2017
Bill status	Before Senate
Scrutiny principles	Standing order 24(1)(a)(i),(ii) and (iii)

2.103 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Minister responded to the committee's comments in a letter dated 3 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.[42]

Privacy[43]

Initial scrutiny – extract

2.104 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.[44] 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.

2.105 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.'[45] 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 organsiations.[46] 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.

2.106 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.

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42 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

43 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.

44 See Schedule 1, item 10.

45 Explanatory memorandum, p. 5.

46 Statement of compatibility, p. xiii.

Minister's response

2.107 The Minister advised:

Effect of proposed subsection 237(4)

Section 237 of the Fair Work (Registered Organisations) Act 2009 (RO Act) requires registered organisations to lodge particulars of specified loans, grants and donations with the Registered Organisations Commissioner (the Commissioner). These particulars can include the name and address of the person to whom the loan, grant or donation was made (s237(5) and s237(6)). Members of the organisation have the right to inspect statements given to the Commissioner (s237(4)), however, there is currently no capacity for the Commissioner to protect the privacy of individuals whose personal details are included in the statement.

Proposed subsection 237(4A) of the Bill creates a new protection for persons who give or receive loans, grants or donations by providing that, prior to a member inspecting a statement, the Commissioner must omit any residential address included in the statement. Subsection 237(4A) also provides the Commissioner with the discretion to omit other personal information from statements prior to member inspection.

Issue

The committee notes that whilst a discretion to omit personal information is included in the Bill, the Commissioner would not be obliged to omit such 'other personal information'. The committee requests 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.

Discussion

The Royal Commission noted that creating greater transparency about the financial transactions of registered organisations would ensure that members have the capacity to inquire into individual transactions.

The proposed amendments to section 237 of the RO Act do not add to the level of particularity that needs to be provided to the Commissioner in a statement about any loans, grants or donations made by an organisation that exceed $1,000. As detailed above, under current subsections 237(5) and (6), organisations must already disclose the name and address of the person to whom any loan, grant or donation over $1,000 is made and, in the case of loans, the arrangements made for the repayment of the loan. The principal alteration to section 237 is that organisations will now be required [to] provide the same details about loans, grants and donations made <u>to</u> the organisation, as per recommendation 39 of the Royal Commission.

In providing the discretion to the Commissioner to redact private information, the Bill ensures that members are provided with as much transparency as possible about the persons with whom their organisation

> arranges loans, grants and donations with, whilst also ensuring personal information is protected. Statements provided to the Commissioner in accordance with section 237 would become futile if, in addition to the omission of residential addresses, the Commissioner were required to remove the only other detail that organisations will be required to be provided about loans, grants and donations; the name of the other party involved in the transaction.
>
> The Office of the Australian Information Commissioner and the Attorney-General's Department were both consulted during the drafting of the Bill in order to ensure that appropriate attention was directed toward protecting privacy of personal information.

Committee comment

2.108 The committee thanks the Minister for this response. The committee notes the Minister's advice that the proposed amendments to section 237 of the *Fair Work (Registered Organisations) Act 2009* (the Act) would not add to the level of detail that must currently be provided to the Commissioner in a statement about any loans, grants or donations made *by* an organisation, but would add a new requirement that the same level of detail be provided about loans, grants and donations made *to* an organisation.

2.109 The committee also notes the Minister's advice that the effect of proposed subsection 237(4A) would be to require the Commissioner to redact residential addresses from statements prior to their inspection by members, and to give the Commissioner the discretion to redact other personal information from such statements prior to their inspection. The committee further notes the Minister's advice that these provisions would provide transparency for members while also protecting personal information, and that the provision of statements under section 237 of the Act would become futile if the Commissioner were required to redact further personal information.

2.110 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*).

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

Broad delegation of administrative powers[47]

Initial scrutiny – extract

2.112 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.[48] Proposed section 329MB seeks to make these obligations 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.[49] 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.

2.113 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.

2.114 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. [50]

2.115 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

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47 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.

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

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

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

organisations and their associated entities.'[51] However, there is nothing in the bill that would limit the delegation of powers to persons with such appropriate expertise.

2.116 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.

Minister's response

2.117 The Minister advised:

> *Effect of proposed subsection 329MB(3)*
>
> Proposed paragraph 329MB(2)(b) and subsection 329MB(3) authorise the Commissioner to delegate the authority to issue infringement notices to any member of staff working for the Registered Organisations Commission (the Commission) and any other person assisting the Commissioner.
>
> *Issue*
>
> 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. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.
>
> *Discussion*
>
> Upon the successful passage of this Bill, the Commission will have the additional function of managing the regulation and oversight of worker entitlement funds. Given that the Commission is a small agency with a limited number of SES officers, it is appropriate not to limit the Commissioner's power to delegate the ability to issue infringement notices to its SES officers.

Committee comment

2.118 The committee thanks the Minister for this response. The committee notes the Minister's advice that the passage of the bill would give the Commission the additional function of managing the regulation and oversight of worker entitlement funds and that, given the small size of the agency, it is considered inappropriate to limit the Commissioner's ability to delegate the power to issue infringement notices to SES officers.

2.119 The committee does not consider that the small size of the Commission provides a sound justification for allowing the delegation of the power to issue infringement notices to a broad class of people with little or no specificity as to their

51 Explanatory Memorandum, p. 27.

qualifications or attributes. The committee also does not consider that the small number of SES officers in an agency provides an adequate justification for a broad delegation of administrative powers as it is possible to limit the scope of the delegation by specifying particular attributes, qualifications or qualities delegates will be required to possess.

2.120 The committee reiterates that it considers it would 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.

2.121 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the broad delegation of a power to issue infringement notices.

Procedural fairness[52]

Initial scrutiny – extract

2.122 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.

2.123 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.

2.124 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

52 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.

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.

2.125 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.

Minister's response

2.126 The Minister advised:

> *Effect of proposed section 329MG*
>
> Under proposed section 329MG, where the Commissioner proposes to deregister a registered worker entitlement fund, he or she must give written notice to the fund operator setting out the grounds for and proposed date of deregistration, and invite submissions from the operator. Proposed section 329MK states that proposed Subdivision B of Division 5 of Part 3C of Chapter 11 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule.
>
> *Issue*
>
> The committee considers that a consequence of proposed sections 329MG and 329MK could be that a registered worker entitlement fund may be deregistered in circumstances where it has not been afforded a fair opportunity to put its case. The committee seeks advice as to why it is necessary and appropriate to exclude aspects of the natural justice hearing rule in relation to the deregistration process.
>
> *Discussion*
>
> Proposed sections 329MG and 329MK are not intended to exclude the natural justice hearing rule. Provision is made in proposed paragraph 329MG(2) for a notice of proposed deregistration to a fund operator to specify the grounds for deregistration and for the operator to be invited to make submissions on the proposed deregistration. Under proposed paragraphs 329MH(1)(c) and 329MI(1)(c), the Commissioner must consider any submissions before deciding whether a condition of registration has not been, or is not being, complied with. These provisions ensure that a fund operator has a fair opportunity to put its case should the Commissioner propose that a fund be deregistered and ensure that due consideration is given to submissions before any decision is taken.
>
> In addition, proposed paragraph 329NI(b) provides for application for Administrative Appeals Tribunal (AAT) review of deregistration decisions. This reinforces natural justice requirements for an operator to be heard on decisions concerning deregistration of a worker entitlement fund and for due consideration to be given to the submissions of an operator. Under section 5 of the *Administrative Decisions (Judicial Review) Act 1977*, an application for AAT review may be made on grounds including improper exercise of power or failing to take a relevant consideration into account.

Committee comment

2.127 The committee thanks the Minister for this response. The committee notes the Minister's advice that proposed sections 329MG and 329MK are not intended to exclude the natural justice hearing rule. The committee also notes the Minister's advice that there is provision for a notice to be given to a fund operator before a decision is made, for the operator to be invited to make submissions and for the Commissioner to consider any submissions before making a decision, which ensures that a fund operator has a fair opportunity to put its case should the Commissioner propose that a fund be deregistered.

2.128 The committee notes that the Minister's response does not address why proposed section 329MK, which provides that the Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule, is necessary and appropriate. The committee reiterates that 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. Proposed section 329MK would mean that the only applicable procedural fairness requirements are those set out in the Subdivision. The committee reiterates that given what constitutes a fair hearing is necessarily dependent on the context of the inquiry, the consequence of proposed section 329MK may mean that a fund may be deregistered in circumstances where it has not been afforded a fair hearing. For example, procedural fairness may require, in the circumstances of a particular case, that a submission received after the specified deadline be considered as part of the inquiry, yet proposed paragraph 329MI(1)(c) would only require the Commissioner to consider a submission made by the specified deadline.

2.129 In the absence of a satisfactory response as to why it is necessary and appropriate to provide that proposed Subdivision B provides an exhaustive statement of the natural justice hearing rule, the committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding aspects of the natural justice hearing rule in relation to the deregistration process.

Exclusion of merits review[53]

Initial scrutiny – extract

2.130 Proposed section 329NI lists a number of decisions made by the Commissioner that are reviewable by the Administrative Appeals Tribunal (AAT).

53 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.

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.[54] 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.

2.131 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.

Minister's response

2.132 The Minister advised:

> *Effect of proposed section 329MA*
>
> Proposed section 329MA provides the Commissioner with the power to direct the operator of a registered worker entitlement fund to take, or stop taking, one or more actions relating to compliance with an ongoing condition for registration or to ensure that a report, notice, information or statement given in accordance with an ongoing condition for registration is not false or misleading. It is one of a suite of measures intended to ensure compliance with the conditions for registration and is an alternative to the provision in proposed section 329MG for the Commissioner to give notice of a proposed deregistration.
>
> *Issue*
>
> The committee seeks an explanation as to why decisions taken under proposed section 329MA are considered to be of a law enforcement nature and therefore appropriate for exclusion of merits review.
>
> *Discussion*
>
> Decisions under proposed section 329MA are directed towards ensuring compliance with the conditions for registration of a worker entitlement fund that are set out in the table of conditions in proposed section 329LA and are thus properly characterise[d] as law enforcement in nature.
>
> Decisions under proposed section 329MA are also subject to separate review processes not administered by the Commissioner. For example,

54 Explanatory memorandum, p. 31.

> non-compliance with a direction issued by the Commissioner under proposed subsection 329MA(1) is subject to a civil liability action under subsection 329MA(3). Review of a decision under proposed section 329MA is available in the Federal Court and the operator of a worker entitlement fund can explain its decision not to comply with a direction in relation to taking, or to stop taking, one or more actions. In addition, decisions of the Commissioner to direct an operator of a worker entitlement fund to take, or stop taking, one or more actions are subject to review by the Federal Court under section 39B of the *Judiciary Act 1903* or the High Court under section 75(v) of the Constitution.

Committee comment

2.133 The committee thanks the Minister for this response. The committee notes the Minister's advice that decisions taken under proposed section 329MA are directed towards ensuring compliance with the conditions for registration of a worker entitlement fund and are thus properly characterised as law enforcement in nature. The committee also notes the Minister's advice that non-compliance with a direction given under proposed section 329MA is subject to a civil liability action and judicial review of the Commissioner's direction under proposed section 329MA is available.

2.134 The committee notes that the decision under proposed section 329MA of the Commissioner to give a notice to an operator to take, or stop taking, a specified action may be taken to ensure a condition is being complied with or to ensure certain reports are not false or misleading. Before giving such a notice 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 unclear to the committee that these determinations are of a law enforcement nature, and it remains unclear why it would be inappropriate to allow merits review of the Commissioner's decision.

2.135 In the absence of a satisfactory response as to why decisions under proposed section 329MA are considered to be of a law enforcement nature, the committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding merits review for decisions made under this section.

Reversal of evidential burden of proof[55]

Initial scrutiny – extract

2.136 Proposed section 329NF seeks to provide the Commissioner with the power to require a person to produce documents or information relevant to determining

55 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.

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.

2.137 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.

2.138 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.

2.139 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.

2.140 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.

2.141 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.[56] 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.[57]

2.142 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*.[58] The committee also requests the

56 Explanatory memorandum, p. 30.

57 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.

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

Minister's clarification as to whether it is intended that this provision be subject to a civil or criminal penalty.

Minister's response

2.143 The Minister advised:

> *Effect of proposed subsection 329NF(5)*
>
> Proposed section 329NF provides the Commissioner with the power to give a notice requiring a person to produce specified documents or information relevant to determining whether an ongoing condition of worker entitlement fund registration has been or is being complied with or whether a deregistered fund has complied with the requirements of proposed section 329NC in relation to final reports after deregistration.
>
> Proposed subsection 329NF(4) provides that it is an offence for a person who has been provided with a notice to give information or produce documents, to not do so. Proposed subsection 329NF(5) provides an exception to this offence, where the person has a reasonable excuse.
>
> *Issue*
>
> The committee has requested advice as to why it is proposed to use an offence-specific defence in subsection 329NF(5). The Committee is concerned that this provision reverses the evidential burden of proof and asks for a response that explicitly addresses the relevant principles of the Guide to Framing Commonwealth Offences (the Guide). The Committee has also sought clarification as to whether it is intended that proposed subsection 329NF(4) be subject to a civil or criminal penalty.
>
> *Discussion*
>
> It is intended that proposed subsection 329NF(4) be subject to a criminal penalty.
>
> The offence-specific defence of reasonable excuse in proposed subsection 329NF(5) puts an onus on a defendant to give a reason or reasons why they did not do as they were required to do and requires a consideration of the excuse put forward. The existence of a reason to not give information or not produce documents would be a matter peculiarly within the knowledge of a defendant. It would also be significantly more difficult and costly for the prosecution to disprove that a defendant has a reasonable excuse than for a defendant to establish a reasonable excuse. These factors satisfy the principles in the Guide applicable to the inclusion of offence-specific defences.[59]

59 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2001, p. 50.

> The appropriate burden of proof applies to the offence-specific defence in proposed subsection 329NF(5). The principle in the Guide is that an evidential burden should generally apply to an offence-specific defence.[60]
>
> Proposed subsection 329NF(5) does not impose a legal burden of proof upon a defendant as it is not expressed to do so (section 13.4 of the *Criminal Code).* On this basis a defendant has the burden of adducing or pointing to some evidence that suggests a reasonable possibility that the matter exists or does not exist (subsection 13.3(6) of the *Criminal Code).* If the defendant meets this evidential burden, the prosecution then has to refute the defence beyond reasonable doubt (subsection 13.1(2) and section 13.2 of the *Criminal Code).*
>
> It is appropriate that the offence-specific defence of 'reasonable excuse' be applied to the offence in proposed subsection 329NF(4). The principle in the Guide is that such a defence should not be applied unless it is not possible to rely on the general defences in the *Criminal Code* (such as duress, mistake or ignorance of fact, intervening conduct or event, and lawful authority) or to design more specific defences.[61] It is not possible to rely on the general defences in the *Criminal Code* as these are too narrow to encompass all the circumstances of what may be a reasonable excuse. It is therefore preferable to defer the evaluation of the reasonableness of an excuse to the discretion of the Court.

Committee comment

2.144 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is intended that proposed subsection 329NF(4) be subject to a criminal penalty, and that whether a person has a reasonable excuse as to why they did not give information or produce documents is a matter peculiarly within the defendant's knowledge and it would be significantly more difficult and costly for the prosecution to disprove.

2.145 The committee requests that the key information provided by the Minister (including correcting the incorrect reference to the provisions as being subject to a civil penalty), 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*).

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

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60 Attorney-General's Department, *A Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers*, September 2001, p. 51.

61 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2001, p. 52.

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

Purpose	This bill seeks to amend various Acts relating to family assistance and child support Schedule 1 amends the child support scheme to: • 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 Schedule 2 replaces the current FTB Part A immunisation requirement arrangements with new compliance arrangements
Portfolio	Social Services
Introduced	House of Representatives on 14 September 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i) and (iii)

2.147 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. The committee sought further information and the Minister responded in a letter dated 30 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.[62]

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

Retrospective effect[63]

Initial scrutiny – extract

2.148 A number of provisions[64] 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.

2.149 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.

2.150 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.

2.151 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 first response

2.152 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

63 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.

64 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.[65]

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

65 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 (Alridge 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).[66] 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.

66 Commonwealth Ombudsman's Annual Report 2012-13.

Committee's first comment – extract

2.153 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.

2.154 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.

2.155 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.

2.156 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.

2.157 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 amendment 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.

2.158 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.

2.159 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*).

2.160 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.

2.161 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*.

Minister's response

2.162 The Minister advised:

> I note the request at paragraph 2.102 of Scrutiny Digest 13 of 2017 (15 November 2017) to update the explanatory memorandum to include the information provided in my earlier letter of 7 November 2017 to you, regarding the retrospectivity of provisions contained in the Bill. I intend to table an addendum to the explanatory memorandum that will include this information.
>
> I provide the following information in response to the Committee's comments at paragraph 2.104 of Scrutiny Digest 13 in relation to item 51 of Part 3, Schedule 1 of the Bill. The application provision at item 51 enables the amendments made by items 46 and 47 of the Bill to apply to

> terminating events that occur on or after commencement. The amendments will not have retrospective effect, however, they may apply to any agreement taken to be a consent order, regardless of whether the agreement was made before or after commencement of the amendments.
>
> In relation to whether the proposed changes would apply to any cases currently before the courts. Any decision made by the courts involving an interpretation of existing sections 35C and 95 of the *Child Support (Assessment) Act 1989* before the commencement of item 51 would be upheld, and decisions made after the commencement of item 51 would be made in line with the amended sections 35C and 95.

Committee comment

2.163 The committee thanks the Minister for this response and welcomes the Minister's undertaking to amend the explanatory memorandum to include the key information requested by the committee.

2.164 The committee notes the Minister's advice that the amendments will not have retrospective effect but may apply to an agreement taken to be a consent order that was made before commencement of the amendments, and that any decision of the courts involving an interpretation of the existing sections made after the commencement of item 51 would be made in line with the amended provisions.

2.165 The committee notes that it appears that this could mean that proceedings brought under the existing arrangements, but where the court's decision is handed down after item 51 commences, would need to apply the new law, which could retrospectively subject such cases to the new law, although it is not clear to the committee whether any person could suffer detriment as a result.

2.166 The committee requests that the further 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*).

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

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

Purpose	This bill seeks to amend various Acts in relation to the financial sector by amending: • 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 *Financial Sector (Business Transfer and Group Restructure) Act 1999*; • 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
Bill status	Before House of Representatives
Scrutiny principle	Standing order 24(1)(a)(i)

2.168 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Minister responded to the committee's comments in a letter dated 5 December 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Treasurer's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[67]

67 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

Reversal of evidential burden of proof[68]

Initial scrutiny – extract

2.169 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 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.

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

2.171 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.

2.172 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.

2.173 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.

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68 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.

2.174 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'.[69] However, the committee notes that the *Guide to Framing Commonwealth Offences*[70] 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.[71]

2.175 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.

2.176 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*.[72]

Treasurer's response

2.177 The Treasurer advised:

> Proposed sections 11CI of the *Banking Act 1959* (Banking Act), 109A of the *Insurance Act 1973* (Insurance Act) and 23IA of the *Life Insurance Act 1995* (Life Insurance Act) set out secrecy provisions which the Australian Prudential Regulation Authority (APRA) may apply to ensure that details of a direction given by APRA to an authorised deposit-taking institution (ADI) or insurer or related entities are not disclosed. While most directions will properly be publically available, there are limited circumstances where a period of confidentiality is necessary to ensure panic does not develop in

69 Explanatory memorandum, p. 85.

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

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

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

financial markets as a consequence of precipitously announced resolution actions.

There are a number of defences available to a person who has made a relevant disclosure. The defences are that the disclosure is:

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

The defendant bears an evidential burden in relation to these defences. This means that a defendant has the burden of adducing or pointing to evidence that suggests a reasonable possibility that the basis of the defence exists.

The matters listed as defences would normally be expected to be peculiarly within the knowledge of the defendant For example:

- If the disclosure was allowed by a determination made by APRA (e.g. under proposed section 11CK of the Banking Act) and complied with any conditions imposed by APRA in the determination, the defendant, having made the disclosure, and having been privy to all the relevant surrounding circumstances of the disclosure, will be in the best position to raise initial evidence of the possibility that the disclosure aligned with APRA's determination.
  - It should be noted that APRA must provide a copy of the determination permitting the disclosure to the entity and any person covered by the determination, or else the determination will be a legislative instrument and therefore publicly available.
  - Therefore the defendant will generally have:
    - knowledge of the content of the determination; and
    - peculiar knowledge of the precise circumstances of the disclosure in question, and whether they align with the terms of the determination.
  - They will therefore be in the best position to raise evidence supporting the possibility that the defence can be made out, which will return the onus to the prosecution to prove the contrary.

- If the disclosure was made to a legal representative for the purpose of seeking legal advice or a legal service (e.g. under proposed section 11CL of the Banking Act), the defendant will be in the best position to adduce evidence of both elements. Specifically, the defendant will have peculiar knowledge of the relationship between the defendant and the recipient of the information (that the recipient was in fact the defendant's legal representative) and of the purpose for which the disclosure was made (i.e. so that the recipient of the information could provide the advice or service, rather than for some other reason).
- If the disclosure is authorised by an exception to the secrecy provision in section 56 of the APRA Act - which it should be noted will only be relevant if the defendant is a APRA member, APRA staff member or other Commonwealth officer - evidence of that fact will generally be peculiarly within the knowledge of the defendant. For example, where the disclosure was made to a financial sector supervisory agency, the defendant will be in the best position to raise evidence that when they made the disclosure they were "satisfied that the disclosure ... [would] assist [that] financial sector supervisory agency...to perform its functions or exercise its powers"(see paragraph 56(4)(a) of the APRA Act). It should be noted that section 56 of the APRA Act itself casts an evidential burden on the defendant to adduce prima facie evidence of the existence of each defence, and therefore the approach taken in the new secrecy provisions in the Bill is consistent.
- If the disclosure was made in circumstances prescribed by the regulations it will generally be the case that the defendant will be in the best position to adduce evidence of that possibility because the defendant will again be the person with peculiar knowledge of the facts and circumstances of the disclosure and whether they align with the terms of the determination.
- If the disclosure was in response to an order or direction of a court or tribunal, the defendant will generally be in possession of a copy of the order (e.g. subpoena), and will have the peculiar knowledge to adduce evidence of this.
- The above considerations also apply to secondary disclosures (e.g. where an initial permissible disclosure is made to a solicitor, who then seeks advice from a barrister who is a legal representative of the solicitor's client).

Further, the defendant is merely required to adduce or point to evidence that suggests a reasonable possibility that the relevant fact or facts exist.

It would be onerous, costly and (often) redundant for the prosecution to have to prove beyond reasonable doubt, in every prosecution, that every single one of the above circumstances does <u>not</u> exist. It is inherently difficult to prove a negative, and in most cases there will usually be no

> reason to suggest that the factual circumstances described in the defence provisions exist.
>
> It is highly unlikely that a prosecution would be brought where the information about the direction had already been lawfully made available to the public and it submitted that it would be onerous for the prosecution to be required to prove, beyond reasonable doubt, the negative proposition that the information had not been lawfully made available to the public. Again, should there be some prospect that the information was lawfully made available to the public, the defence would only be obliged to adduce evidence of this possibility, rather than prove it to a legal standard. It is submitted that the Bill strikes an appropriate balance in this regard.
>
> Finally, the approach taken is broadly consistent with other secrecy provisions in Commonwealth legislation (including, as noted, section 56 of the APRA Act).

Committee comment

2.178 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the listed defences would normally be expected to be peculiarly within the knowledge of the defendant. In particular, the committee notes the Minister's advice in relation to the following defences:

(a) *disclosure of information that has already been lawfully made available to the public*; that it would be onerous for the prosecution to be required to prove, beyond reasonable doubt, the negative proposition that the information had not been lawfully made available to the public;

(b) *disclosure allowed by a determination made by APRA*; that the defendant would be in the best position to raise initial evidence, and the defendant would generally have knowledge of the content of the determination and peculiar knowledge of the precise circumstances of the disclosure in question;

(c) *disclosure to a legal representative for the purposes of seeking legal advice*; that the defendant will be in the best position to adduce evidence and will have peculiar knowledge of the relationship between the defendant and the recipient of the information and the purpose for which the disclosure was made;

(d) *disclosure which is authorised by the APRA Act*; that this would generally only be relevant if the defendant is an APRA member, staff member or other Commonwealth officer and evidence of whether the disclosure was authorised by the Act would generally be peculiarly within the knowledge of the defendant and the defendant would be in the best position to raise evidence;

(e) *disclosure made in circumstances specified in the regulations*; that generally the defendant will be in the best position to adduce evidence as they will have peculiar knowledge of the facts and circumstances of disclosure and whether they align with the terms of the determination;

(f) *disclosure in response to an order or direction of a court or tribunal*; that the defendant will generally be in possession of a copy of the order and will have the peculiar knowledge to adduce evidence of this;

(g) *secondary disclosures*; the same considerations as above apply.

2.179 The committee also notes the Treasurer's advice that it would be onerous and costly and often redundant for the prosecution to have to prove beyond reasonable doubt that every one of the above circumstances does not exist and in most cases there will usually be no reason to suggest that the factual circumstances in the defence do exist.

2.180 The committee reiterates that 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 raise evidence to disprove one or more elements of an offence interferes with this common law right. The committee notes that the *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[73]

2.181 The committee notes that this requires more than just the defendant knowing that a certain fact exists or being 'best placed' to adduce evidence, it must be a matter that is *peculiarly* within their knowledge. It is also not sufficient that it would be onerous or costly for the prosecution to disprove a matter (given the role of the prosecution is to prove a person's guilt beyond reasonable doubt, including proving that certain circumstances do not exist). As such, the committee does not consider that the matters listed above in paragraph [2.178] (other than that at paragraph (c), in relation to disclosure to a legal representative) are matters that are *peculiarly* within the defendant's knowledge, but are matters that would be known to the prosecution and the defendant. The committee notes, in particular, that it is not possible to say if a disclosure made in accordance with circumstances set out in the regulations would be peculiarly within the defendant's knowledge, given those regulations have not yet been made.

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

2.182 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*).

2.183 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in the above circumstances.

Removal of cause of action[74]

Initial scrutiny – extract

2.184 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.

2.185 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 constraints of creditor or other third party actions that could otherwise impede the orderly nature of a resolution'.[75]

2.186 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

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74 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.

75 Explanatory memorandum, p. 43.

passed while the body corporate's business was under the control of a statutory manager.

2.187 The committee therefore seeks the Treasurer'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.

Treasurer's response

2.188 The Treasurer advised:

> The proposed sections 15B of the Banking Act, 62ZOR of the Insurance Act and 179AR of the Life Insurance Act are necessary to allow breathing space for the stabilisation of an insolvent entity in order to prepare it for resolution and to allow the statutory or judicial manager to focus on the interests of depositors or policyholders and properly discharge their statutory mandate.
>
> It should be noted that they are moratorium provisions only. They temporarily suspend or stay the right to bring or continue proceedings rather than remove the cause of action as such.
>
> Without these provisions, orderly resolution could be constrained by creditor or other third party actions. A disorderly resolution would result in poorer outcomes for depositors and policyholders, as well as creditors and other third parties. Depending on the entity involved a disorderly resolution may also have an adverse impact on the stability of financial markets or the wider industry.
>
> There are sufficient checks and balances to mitigate against the risk of these provisions applying in a harsh or unjust way (indeed in certain respects they improve on the current provisions). To elaborate:
>
> - Proposed sections 15B of the Banking Act, 62ZOR of the Insurance Act and 179AR of the Life Insurance Act apply where a statutory manager has been appointed to a regulated entity or related body. They provide that a person cannot begin or continue a proceeding in a court or tribunal in respect of the body corporate if a statutory manager is in control of the body corporate's business.
> - However, the court or tribunal may grant leave for the proceeding to be begun or continued with on the ground that the person would be caused hardship if leave were not granted. This serves as a safeguard where, for example, the plaintiff would be prejudiced by the expiry of a limitation period if they were unable to commence the relevant proceeding. It should also be noted that APRA, or the statutory manager (after considering APRA's views) may consent to the proceeding beginning or continuing.
>
>   – It should also be noted that APRA, or the statutory manager (after considering APRA's views) may consent to the proceeding

beginning or continuing (proposed subsection 15B(5) in the Banking Act, proposed subsection 62ZOR(5) in the Insurance Act and proposed subsection 179AR(5) in the Life Insurance Act). At the point in time that the statutory manager is no longer in control of the body corporate's business, there is no longer a bar on beginning or continuing proceedings.

- Existing section 15B of the Banking Act is in similar terms (although it does not refer to the statutory manager being able to consent).
- Proposed sections 62P of the Insurance Act and 161 of the Life Insurance Act apply where a judicial manager has been appointed to an insurer. They allow the court or tribunal, or the judicial manager (after considering APRA's views) to consent to the beginning or continuing of the proceedings. Again, this will allow the court, tribunal or judicial manager to allow proceedings to be filed where there would otherwise be hardship for the plaintiff (for example, proceedings need to be filed promptly as a limitation period is about to expire).
- Existing sections 62P of the Insurance Act and 161 of the Life Insurance Act are in similar terms except that, rather than allowing the court or tribunal in which the proceedings have been (or are to be) brought to allow them to be commenced or continue, they refer to the Federal Court giving leave.
- Similar moratorium provisions exist in other legislation, for example section 440D of the *Corporations Act 2001* (Corporations Act) (in the case of voluntary administration, under Part 5.3A of the Corporations Act).

Committee comment

2.189 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that these provisions are moratorium provisions only and temporarily suspend or stay the right to bring or continue proceedings rather than remove the cause of action. The committee also notes the Treasurer's advice that there are checks and balances that mitigate against the risk of these provisions applying in a harsh or unjust way, including that the court or tribunal may grant leave for the proceeding to be begun or continued, which would serve as a safeguard where, for example, the plaintiff would be prejudiced by the expiry of a limitation period if they were unable to commence the relevant proceeding.

2.190 The committee requests that the key information provided by the Treasurer 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 In light of the information provided, the committee makes no further comment on this matter.

Privilege against self-incrimination[76]

Initial scrutiny – extract

2.192 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.[77]

2.193 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.

2.194 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.

2.195 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.[78] It also does not explain why a derivative use immunity is not included.

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76 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.

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

78 Statement of compatibility, pp 224-225.

2.196 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*.[79]

Treasurer's response

2.197 The Treasurer advised:

> These provisions are based on existing section 14A of the Banking Act. It is critical that a statutory manager, having taken over what will often be an insolvent or near insolvent financial institution or related entity, be in a position to obtain all relevant information about the institution from officers (and former officers) in order for the statutory manager to control, stabilise, investigate and (to the extent possible) resolve the institution or resolve a related entity.
>
> Overriding the privilege against self-incrimination is justified in this context because only the key personnel of a relevant entity will have access to information and documents relating to that entity's financial condition. It is essential for a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of a relevant entity that is financially distressed. By compelling relevant officers or ex-officers to provide the required information and documents, statutory managers will be able to maximise their ability to rehabilitate a distressed entity. This will benefit the entity's customers, creditors and other suppliers. In the event of a significant crisis, APRA would also be able to use the information gathered to support decision making and prevent contagion in the system.
>
> These powers only apply in relation to an 'officer' as defined in section 9 of the Corporations Act (e.g. a director or other senior person with significant strategic responsibilities in relation to the failed entity), and a person who has been such an officer. Circumstances may exist where the failure of the institution can be attributed to a failure by the one or more officers to comply with their statutory responsibilities, including where there has been a breach of Corporations Act provisions carrying an offence. This raises the real possibility of the statutory manager's ability to fulfil his or her duties being hampered by a refusal to provide information on self-incrimination grounds, making the override of the privilege against self-incrimination necessary in this instance.
>
> As the committee has noted, direct use immunity is conferred by these provisions, but not derivative use immunity. The reason for this is that if derivative use immunity applied, it would often be very difficult for the prosecution to show that the evidence they rely on to prove a criminal

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

> case against an officer relating to the failure of the financial institution was uncovered through an absolutely independent and separate investigation process. This may in turn lead to hesitation on the part of a statutory manager to exercise the information-obtaining power, undermining the purpose for which the power was conferred. Another difficulty with derivative use immunity is that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.
>
> These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and *Private Health Insurance (Prudential Supervision) Act 2015.*

Committee comment

2.198 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that overriding the privilege against self-incrimination is justified because it is critical that a statutory manager be in a position to obtain all relevant information about the institution from officers in order to be able to control, stabilise, investigate and resolve the institution or related entity, only the key personnel of a relevant entity will have access to this information and documents, and compelling them to provide the required information or documents will allow statutory managers to maximise their ability to rehabilitate a distressed entity.

2.199 The committee also notes the Treasurer's advice that only a use immunity is conferred by these provisions but not a derivative use immunity (which would have prevented information or evidence indirectly obtained from being used in criminal proceedings against the person). The committee notes the Treasurer's advice that if a derivative use immunity applied, it would be very difficult for the prosecution to show that the evidence they relied on against an officer was uncovered through an absolutely independent and separate investigation process, which may lead to hesitation on the part of a statutory manager to exercise the information-obtaining powers.

2.200 The committee reiterates that it considers that the privilege against self-incrimination is an important right under the common law and any abrogation of that right represents a significant loss to personal liberty. As such, the committee considers, from a scrutiny perspective, it would be more appropriate if a derivative use immunity were included to ensure information or evidence indirectly obtained

from an officer compelled to provide information or documents could not be used in evidence against them.

2.201 The committee requests that the key information provided by the Treasurer 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*).

2.202 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of overriding the privilege against self-incrimination with no accompanying derivative use immunity.

Migration Amendment (Skilling Australians Fund) Bill 2017

Purpose	This bill seeks to amend the *Migration Act 1958* to: • 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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.203 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Minister responded to the committee's comments in a letter dated 4 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.[80]

Penalty in delegated legislation[81]

Initial scrutiny – extract

2.204 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.

80 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

81 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.

2.205 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.[82] However, there is nothing in the legislation that would limit the amount of the penalty prescribed in this way.

2.206 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.

Minister's response

2.207 The Minister advised:

> I note the Committee's concern that the Bill does not set an upper limit on the level of the penalty that may be prescribed in the regulations. I will consider moving an amendment to the Bill to address this concern.

Committee comment

2.208 The committee thanks the Minister for this response. The committee notes the Minister's advice that he will consider moving an amendment to the bill to set an upper limit on the level of the penalty that may be prescribed in the regulations.

2.209 The committee reiterates its scrutiny concerns regarding the proposed section as it is currently drafted. The committee will examine the terms of any amendments that may be made to the proposed section.

2.210 In light of the Minister's advice that he will consider moving an amendment to set an upper limit on the level of the penalty that may be set in the regulations, the committee makes no further comment on this matter at this time.

82 Explanatory memorandum p. 7.

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

Purpose	This bill seeks to amend the *National Health Act 1953* to: • 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
Bill status	Before House of Representatives
Scrutiny principles	Standing order 24(1)(a)(iv) and (v)

2.211 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Minister responded to the committee's comments in a letter dated 5 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.[83]

83 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

Broad instrument making power

Instruments not subject to disallowance[84]

Initial scrutiny – extract

2.212 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.[85] 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.[86]

2.213 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.[87] 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.

2.214 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.

2.215 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

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84 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.

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

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

87 Explanatory memorandum, p. 3.

notifiable instruments, as such instruments, which are not disallowable, would be subject to no parliamentary oversight.

2.216 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).

Minister's response

2.217 The Minister advised:

> *Agreement between the Government and Medicines Australia*
>
> The pricing amendments in the Bill are required to implement measures in agreements made between the Commonwealth and Medicines Australia, representing the originator medicines sector, and the Generic and Biosimilar Medicines Association, representing generic and biosimilar medicine suppliers. The agreements involved extensive consultation with industry and were announced by the Government in the 2017 Budget as part of the PBS Medicines Package. The pricing measures are expected to deliver savings of $1.3 billion over four years (around $1.8 billion over the five years of the agreements).
>
> Details of the pricing measures are set out in the Strategic Agreement (the Agreement) entered into by the Commonwealth and Medicines Australia on 27 April 2017. This Agreement is publicly available on the Department of Health's website.
>
> In return for savings, the Agreement provides greater certainty for the medicines industry regarding pricing policy, where funding for new listings is supported through price reductions that are predictable and applied primarily to medicines reaching the end of their patent life or becoming subject to competition. Savings from the pricing measures will help to support investment in new and extended PBS listings, and maintain the Government's commitment to list all drugs recommended by the Pharmaceutical Benefits Advisory Committee (PBAC).
>
> The Agreement includes specific provisions that reduce statutory price reductions in direct response to previous price reductions. It also provides that the Minister will have the discretion not to apply, or to reduce, a statutory price reduction. Under the Agreement, the Minister's discretion is not limited or subject to additional criteria.
>
> However, Section 11 of the Agreement provides for oversight of implementation of the Agreement via the establishment by the Commonwealth (represented by the Department of Health) and Medicines Australia of a new Joint Oversight Committee. One of the main functions of the Joint Oversight Committee is to oversee the extent of reductions to statutory price reductions.

An exposure draft of the pricing components of the Bill was provided for review to Medicines Australia, the Generic and Biosimilar Medicines Association, several innovator and generic pharmaceutical companies, the Pharmacy Guild of Australia, the Pharmaceutical Society of Australia, the National Pharmaceutical Services Association, the Consumers' Health Forum, and the Medical Software Industry Association.

As a result of that consultation, some provisions were revised to ensure consistency with the Agreement. However, there was no expectation that the Bill would contain set criteria for exercising the Minister's discretionary power to apply statutory price reductions and no requests have been received from stakeholders for additional detail in the explanatory memorandum.

The pricing changes in the Bill are extensions to, or adjustments of, existing processes. PBS pricing reforms and various PBS policies that can affect pricing have been in place for more than ten years. This means that many PBS medicines will have been subject to previous price reductions. The Agreement recognises that the increased frequency and magnitude of the new price reductions need to be balanced by allowing at least some previous price reductions to be taken into account and by allowing ministerial discretion to reduce the amount of a price reduction in some circumstances. To do otherwise may have meant that it would not have been possible to achieve the price reduction percentages set in the Agreement and that it would be unreasonable or unworkable to apply the maximum reduction in some cases.

Current requirements for statutory price reductions and price disclosure reductions mean that price reductions are required regardless of the nature of a medicine, the supply history, or supply volume for a product. If mandatory reductions (especially flow-on reductions) make products unviable to supply, it can be difficult for companies to maintain supply which threatens continuity of therapy for patients. In some cases, it has been necessary for companies to apply for price increases immediately following a statutory price reduction in order to continue to supports the supply of affected products in Australia. The Agreement acknowledges that it would be preferable for relevant information to be considered before applying the new statutory price reductions.

First new brand price reductions

Schedule 1 of the Bill provides for the price reduction that applies on listing the first additional new brand to be increased from 16 per cent to 25 per cent. However, this is subject to item 8 of Schedule 1 which provides that no reduction applies where the price of the brand has already been reduced by 40 per cent or more since 1 January 2016, and item 12 of Schedule 1 which provides that the reduction is capped at 40 per cent of the price of the brand on 1 January 2016 if there have been reductions since then of more than 15 per cent. This means that the full 25

per cent reduction applies only when price reductions since 1 January 2016 have been 15 per cent or less.

Item 14 of Schedule 1 provides for ministerial discretion to determine by written instrument to apply a lesser or no first new brand price reduction. The Bill includes, and the explanatory memorandum explains, that the Minister must take into account what the price of the new brand would otherwise be if the statutory reduction were applied. This makes it clear that previous reductions for the listed brand must be identified and the statutory price reduction calculated in the usual way before ministerial discretion can be applied. In exercising the discretional power, there is provision for the Minister to take any other relevant matter into account.

The provisions protect brands already subject to price reductions of more than 40 per cent and other reductions are capped so that the total reduction, including previous reductions since 1 January 2016, ranges between 25 and 40 per cent.

Anniversary price reductions

Schedule 2 provides for new anniversary price reductions to apply for brands of pharmaceutical items on F1 on the 5, 10, and 15 year anniversary of the drug being listed on the PBS.

Item 11 of Schedule 2 provides for ministerial discretion to determine by written instrument to apply a lesser or no anniversary price reduction. The Bill includes, and the explanatory memorandum explains, that the Minister must take into account what the price of the new brand would otherwise be if the statutory reduction were applied. This makes it clear that previous reductions for the listed brand must be identified and the statutory price reduction calculated in the usual way before ministerial discretion can be applied. In exercising the discretional power, there is provision for the Minister to take any other relevant matter into account.

The Agreement requires that in applying ministerial discretion for anniversary price reductions the total of previous reductions since 1 January 2016 must be considered. Because the current five year anniversary price reduction has applied since April 2016, most F1 drugs to which the new anniversary reductions apply would have had a five year anniversary five per cent reduction.

Ministerial discretion in relation to first new brand and anniversary price reductions

The provisions in the Bill and the Agreement provide some criteria that should be taken into account in considering whether a statutory price reduction should be reduced or not applied. The Bill specifies that the Minister must take into account what the price would otherwise be, and may take into account any other matter the Minister considers relevant.

It would be counterproductive for a detailed list of criteria for ministerial discretion to be included in the Bill. Ministerial discretion is intended to be

exercised only where genuinely justified based on pricing or other history. Including further criteria may result in applications prioritising those criteria when others could be more important for a particular medicine, and create the perception or expectation that applications would be judged according to the response to the criteria. Setting criteria may also inadvertently fetter the Minister from considering unusual circumstances which would warrant adjustment of a price reduction. Either way, including criteria in the legislation is unlikely to be of assistance.

In practice, the Department of Health will be able to source the necessary information and provide advice to the Minister in most cases where ministerial discretion is required for statutory price reductions. The Department of Health has access to information regarding the listing, pricing and use of PBS medicines, including the timing and quantum of previous price changes, recommendations from the PBAC regarding pricing, and other matters that may be relevant for a particular medicine. The Bill does not contain specific provisions regarding applications from companies as no application is required for ministerial discretion to be applied and a price reduction adjusted. However, a pharmaceutical company (referred to in the *National Health Act 1953* as a 'responsible person') could submit an application for ministerial discretion using any justification considered relevant or provide additional information for consideration by the Minister. In addition, information regarding price reductions is made available to companies prior to the reduction taking place. In situations where there were particular considerations for a medicine, consultation would occur between the Department of Health and the company.

Determination of new brands as new presentations

Schedule 4 provides for a new brand which is a variation of an existing brand to be listed as a 'new presentation' without a first new brand price reduction. If the applications for the new presentation and the listed brand have been made by the same responsible person and the new presentation is listed on or before the fifth anniversary of the drug being listed on the PBS, it is automatic that the price reduction does not apply. Items 4 and 7 of Schedule 4 provide that the Minister may determine by notifiable instrument that a new brand is a new presentation of a listed brand if satisfied that the new brand will be listed on the PBS after the fifth, but before the tenth, anniversary of the drug being listed on the PBS.

In making the determination, the Minister may take into account any advice given by the PBAC, any information provided by the responsible person for the new brand, and any other matter the Minister considers relevant.

Ministerial discretion in relation to determining new presentations

There would be no merit in setting specific criteria for determining whether a new brand is a new presentation at this stage, as the Minister

would not want to limit the PBAC's consideration or advice nor limit the other matters that could be considered relevant in a particular case.

The Bill already provides that the responsible person can submit information and that the Minister may take that information into account. It is intended that the information be submitted by the applicant (in the case of determinations it does not need to be the same responsible person), as part of the usual listing and pricing process. There would be no merit in requiring that the information submitted by an applicant responds to set criteria as this could unnecessarily limit the information provided.

In addition, information on determinations for new presentations involving ministerial discretion will be subject to monitoring by the Joint Oversight Committee (as referred to above).

Use of written instruments for price reduction determinations made by the Minister

The Bill provides that the Minister may determine by written instrument that a first new brand or anniversary statutory price reduction should be reduced or not applied.

Information about determinations made for this purpose will be made available publicly on the PBS website (www.pbs.gov.au) along with other pricing determinations and information on price reductions for PBS medicines. The PBS website is the primary source of information for pharmaceutical companies and other PBS users regarding pricing and price reductions. Notification of updates to pricing information is sent to stakeholders via the PBS Subscription distribution list.

It is unlikely that price reductions included in the instrument would need to be revisited as any company affected by a decision would have been consulted or received information regarding the outcome prior to the instrument being finalised.

The highly technical nature of the subject matter, as evidenced by the role of the PBAC in advising the Minister on matters relating to PBS medicines, means that if expert advice is required the matter should be referred before the decision is made. The Joint Oversight Committee, which will include members with particular expertise regarding the PBS, will monitor the manner in which ministerial discretion is exercised.

In view of these factors, it was not considered necessary for a determination which serves to reduce or not apply a price reduction to be subject to Parliamentary scrutiny.

In response to the concern raised by the Committee, the Department of Health will investigate voluntary inclusion of the written instrument on the Federal Register of Legislation and will seek the advice of the Office of Parliamentary Counsel for this to occur. If agreed, the explanatory memorandum will be updated to this effect.

Use of notifiable instruments for new presentation determinations made by the Minister

A determination by the Minister that a new brand is a new presentation will be made by notifiable instrument for registration on the Federal Register of Legislation. It was not considered necessary for a determination of this kind to be subject to Parliamentary scrutiny as the Minister would be able to access expert advice from the PBAC in making the decision.

Oversight of implementation of the Agreement and ministerial discretion

The terms of reference for the Joint Oversight Committee, as outlined in the Agreement, include that it will consider the effectiveness of measures relating to the application of statutory price reductions; consider and agree details intended to guide companies in making applications regarding statutory price reductions; and identify unintended consequences arising from the measures in the Agreement, including in relation to the extent of exemptions from statutory price reductions agreed by the Commonwealth.

It would be premature to include in the Bill criteria for applying for ministerial discretion regarding price reductions as considering the effectiveness of the provisions and providing advice on applications is part of the role of the Joint Oversight Committee.

Limited duration of pricing amendments

The Agreement and the pricing amendments in the Bill are effective until 30 June 2022, after which time the current pricing arrangements are reinstated. Limiting the duration of the changes means that experience from the implementation of the Agreement and advice from the Joint Oversight Committee will be able to inform any future pricing arrangements.

Committee comment

2.218 The committee thanks the Minister for this response. The committee notes the Minister's advice that the pricing amendments in the bill are required to implement measures in agreements made between the Commonwealth and Medicines Australia and the Strategic Agreement provides that the Minister should have the discretion not to apply, or to reduce, a statutory price reduction. The committee also notes the detailed advice as to the circumstances in which the Minister is likely to exercise this power, the importance of adjusting mandatory price reductions in certain circumstances and the advice that it would be counterproductive for a detailed list of criteria for ministerial discretion to be included in the bill.

2.219 In relation to the use of written instruments for price reductions (rather than notifiable or legislative instruments), the committee notes the Minister's advice that information will be made publicly available on the PBS website, that this involves

highly technical subject matter and a Joint Oversight Committee, with relevant expertise, will monitor the manner in which ministerial discretion is exercised, and as such it was not considered necessary for a determination which serves to reduce or not apply a price reduction to be subject to parliamentary scrutiny. The committee also similarly notes the Minister's advice in relation to the use of notifiable instruments (rather than legislative instruments) that it was not considered necessary for a determination of this kind to be subject to parliamentary scrutiny as the Minister would be able to access expert advice from the Pharmaceutical Benefits Advisory Committee in making the decision.

2.220 The committee notes that a written instrument is not subject to any of the requirements of the *Legislation Act 2003* (including that it be registered on the Federal Register of Legislation and subject to disallowance) and a notifiable instrument is not subject to disallowance. As such, any determination by the Minister to reduce or not apply a price reduction on certain medicines (which presumably would have the effect of ensuring the price of such medicines for consumers remains higher) would not be subject to any form of parliamentary scrutiny.

2.221 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*).

2.222 In light of the detailed information provided as to why it is necessary to give the Minister a broad discretionary power in relation to statutory price reductions, the committee makes no further comment on this matter.

2.223 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of providing that the Minister's determinations relating to statutory price reductions are to be made by written or notifiable instruments, which are not subject to the usual parliamentary disallowance processes.

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

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

2.224 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Minister responded to the committee's comments in a letter dated 5 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.[88]

Reversal of evidential burden of proof[89]

Initial scrutiny – extract

2.225 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.[90] The offence carries a maximum penalty of imprisonment for two years.

2.226 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:

88 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

89 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.

90 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).

- 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);[91]
- is disclosed to an individual, contains only personal information about that individual, and is information contained in the register of accountable persons;[92] 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.[93]

2.227 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.[94]

2.228 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.

2.229 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.

2.230 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.

2.231 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*.[95]

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

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

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

94 Explanatory memorandum, p. 38.

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

Treasurer's response

2.232 The Treasurer advised:

> Item 5 of Schedule 1, which introduces proposed offence-specific defences to section 56 of the APRA Act, reflects the current structure of section 56: the section currently consists of definitions (subsection 56(1)), an offence provision (subsection 56(2)) and numerous offence specific defences in the subsections that follow. Section 56 follows a similar structure to section 79A of the *Reserve Bank of Australia Act 1959.*
>
> The current structure of section 56 reflects that APRA needs to receive significant amounts of confidential information and documents from its regulated entities, which should not be disclosed except in specific circumstances.
>
> Section 56 concerns the confidentiality of 'protected information' and 'protected documents'. Broadly, documents and information become 'protected' by virtue of both having been received by APRA and relating to the affairs of entities that APRA regulates, or customers of those entities, or entities that APRA registers or collects data from under the *Financial Sector (Collection of Data) Act 2001* (FSCODA). The offence can only be committed by an 'officer', defined in subsection 56(1) of the APRA Act as an APRA member or staff member, or any other person who, because of his or her employment, or in the course of that employment, has acquired protected information or has had access to protected documents.
>
> While section 56 does address the possibility of protected information or protected documents being disclosed by persons who are not part of APRA, the overwhelming majority of instances in which disclosure might conceivably occur are from APRA staff, dealing with information held by APRA.
>
> Item 5 of Schedule 1 seeks to introduce three exceptions to the offence that would otherwise be committed if a person who is, or has been an officer, discloses protected information or a protected document to any person or to a court: subsection 56(2) APRA Act. The three subsections proposed to be added to section 56 of the APRA Act relate to matters which would normally be expected to be peculiarly within the knowledge of the defendant. For example:
>
> - This Bill will amend the Banking Act such that authorised deposit-taking institutions (ADIs) will be required register their 'accountable persons' (certain of their senior executives and directors that meet the description in proposed section 37BA of the Banking Act). APRA will be required to maintain a register of accountable persons: proposed section 37H of the Banking Act (the Register). As paragraph 1.139 of the Explanatory Memorandum to this Bill points out:

> *'The register is not a public document nor is it a legislative instrument. Information provided to APRA under the BEAR is subject to the confidentiality provisions in the APRA Act. This means that APRA can disclose the information to an ADI, to the accountable person to whom the information relates and APRA may make any other disclosures permitted by the APRA Act, including where it has disqualified a person under BEAR.'*

- Proposed subsection 56(7D) of the APRA Act has been introduced to permit officers of APRA to provide information contained on the Register to an ADI so that an ADI might consider that information in seeking to comply with its obligations under this Bill. In particular, an ADI is required make a declaration that the ADI is satisfied a person is suitable to be an accountable person (subsection 37(HA)) upon registration.
- Proposed subsection 56(7E) of the APRA Act has been introduced to permit officers of APRA to provide information contained on the Register to an individual, where that information is personal information about the individual.
- In both instances, the APRA officer disclosing the information will be in the best position to point to evidence that the information was contained on the Register as they will have access to the Register and in the case of proposed subsection 56(7E) will be best-placed to point to evidence as to whether the information was personal information relating to the person to who it was disclosed.
- Proposed subsection 56(7F) of the APRA Act has been introduced to permit officers of APRA to disclose information as to whether a person is disqualified under proposed section 37J of the Banking Act or whether APRA has made a decision under proposed Subdivision C of Division 6 of Part IIAA of that Act and the reasons for the decision. Decisions made under Subdivision C include a decision to disqualify an accountable person, and to vary or revoke such a decision. The APRA officer, who will have access to protected information relating to the decisions made under Subdivision C, will also be in the best position to point to evidence that the information met the criteria in subsection 56(7F) of the APRA Act.

It should also be emphasised that the defendant is merely required to adduce or point to evidence that suggests a reasonable possibility that the relevant fact or facts exist. It would be onerous, costly and (often) redundant for the prosecution to have to prove beyond reasonable doubt, in every prosecution, that the above circumstances do not exist. It is inherently difficult to prove a negative.

Committee comment

2.233 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the listed defences relate to matters which would

normally be expected to be peculiarly within the knowledge of the defendant. In relation to the disclosure to certain organisations or individuals of protected information held on the APRA register of accountable persons, the committee notes the advice that in both instances the APRA officer disclosing such information would be 'in the best position' to point to evidence as they will have access to the Register and be best placed to point to whether certain evidence was personal information. In relation to disclosure of information as to whether a person is disqualified from acting as an accountable person, the committee notes the advice that the APRA officer who will have access to protected information will be in the best position to point to evidence that the information met the legislative criteria. The committee also notes the Treasurer's advice that it would be onerous and costly and often redundant for the prosecution to have to prove beyond reasonable doubt that the above circumstances do not exist and in most cases there will usually be no reason to suggest that the factual circumstances in the defence do exist.

2.234 The committee reiterates that 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 raise evidence to disprove one or more elements of an offence interferes with this common law right. The committee notes that the *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[96]

2.235 The committee notes that this requires more than just the defendant knowing that a certain fact exists or being 'best placed' to adduce evidence, it must be a matter that is *peculiarly* within their knowledge. It is also not sufficient that it would be onerous or costly for the prosecution to disprove a matter (given the role of the prosecution is to prove a person's guilt beyond reasonable doubt, including proving that certain circumstances do not exist). As such, the committee does not consider that the matters listed above in paragraph [2.233] are matters that are *peculiarly* within the defendant's knowledge, but are matters that would be known to the prosecution and the defendant. The committee also notes that whether an officer is acting in accordance with their legislative duties should be known to the Commonwealth. The committee does not consider that it is appropriate that the burden of proof 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. The committee

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

considers these matters appear to be matters more appropriate to be included as an element of the offence.

2.236 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*).

2.237 **The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in the above circumstances.**

Privilege against self-incrimination[97]

Initial scrutiny – extract

2.238 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 incriminate himself or herself.[98] 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.

2.239 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).

2.240 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

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97 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.

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

committee will also consider the extent to which the use of self-incriminating evidence is limited by use or derivative use immunity provisions.[99] 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.

2.241 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.'[100] 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 doing so would 'significantly limit APRA's ability to regulate the Banking Act and address matters related to prudential risk.'[101]

2.242 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.

2.243 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'.[102] 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.

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99 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.

100 Explanatory memorandum, p. 79.

101 Explanatory memorandum, p. 39.

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

2.244 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.

2.245 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.

Treasurer's response

2.246 The Treasurer advised:

> In order to protect the integrity of the prudential regulatory regime, and protect the interests of bank depositors and promote financial system stability, it is necessary to override the privilege against self-incrimination. This is to allow APRA to acquire all relevant information to administer the laws for which it is responsible.
>
> **(a) Derivative use immunity**
>
> The committee has noted that subsection 52F(2) of the Banking Act provides for 'use immunity', in that any information given to APRA in compliance with a requirement to give information under the Banking Act or the FSCODA is not admissible in evidence against the individual in criminal or civil penalty proceedings, other than in respect of the falsity of the information, but does not provide for derivative use immunity (meaning that any information obtained as a consequence of the production of the information or documents may in fact be admissible).
>
> The omission of any provision for derivative use immunity is consistent with the general position under the SIS Act, the Insurance Act and the Life Insurance Act.
>
> The provision of derivative use immunity with respect to self-incriminating information would impair APRA's ability to effectively perform its regulatory functions.
>
> It is relatively straightforward to prove compliance with use immunity in that all of the evidence obtained under compulsion from the person concerned is easily identifiable and can be excluded from any subsequent criminal or civil penalty proceedings against that person.
>
> In most cases, establishing compliance with derivative use immunity would be substantially more difficult. It would require persuading the court to the required standard that no part of the original information was taken into account, directly or indirectly, when obtaining the information upon which the prosecution is based. This may require the introduction of Chinese walls in the agency who received the original information in order to avoid

contagion of other employees of that agency who may be involved in obtaining the information upon which the prosecution is based. The effectiveness of these Chinese walls would also have to be proven.

The task would be made more difficult given that the required proof is a negative one (i.e., to disprove use). Disproving use would require the agency to prove that no person who had knowledge of the original information was in any way involved in the obtaining of the evidence on which the proceedings would be based. Even though the test is whether the further evidence was obtained as a direct or indirect consequence of the original information (as opposed to obtained by a person who is apprised of the original information), it would be practically impossible to prove that any information which was known to an employee of the agency was not causative in obtaining (directly or indirectly) any evidence to be relied upon in the proceedings by that agency. This would create significant resourcing constraints and financial burdens on an agency because it could not use any employees who have received the original information to obtain further evidence to be relied upon in the proceedings.

Both the Australian Securities and Investments Commission (ASIC) and APRA have similar views on the matter of derivative use immunity. APRA has advised that it agrees with the view expressed in ASIC's submissions to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Issues Paper 46 (March 2015) at page 25: 'Any grant of derivative use immunity has the potential to render a person conviction-proof for an unforeseeable range of offences'.

Further, derivative use immunity has the potential to significantly impede the usefulness of information sharing about a person of common interest with another agency. This is because the other agency would also be bound by any derivative use immunity. In the event that the other agency wished to commence criminal or civil penalty proceedings against that person, it would not be able to make use of any evidence derived as a result of the originally received information. It would also face the additional evidentiary hurdle of establishing that no use was made of the shared information in obtaining the evidence to be relied upon in the prosecution. Please see above comments in relation to the difficulties in proving a negative assertion.

(b) Limitation of immunity

The application of use immunity to individuals who claim self-incrimination is an approach consistent with provisions in the SIS Act, the Life Insurance Act and the Insurance Act.

The process by which a person can make a claim for privilege against self-incrimination in the course of an examination is clearly explained to the examinee prior to the examination being conducted by APRA. It is then up to the examinee to assert that right.

Committee comment

2.247 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that no derivative use immunity is included in these provisions (which would have prevented information or evidence indirectly obtained from being used in criminal proceedings against the person) as it would impair APRA's ability to effectively perform its regulatory functions. The committee notes the Treasurer's advice that establishing compliance with derivative use immunity would require persuading the court that no part of the original information was taken into account when obtaining the information on which the prosecution is based, which may require the introduction of Chinese walls in the agency. The committee also notes the advice that disproving use would require the agency to prove that no person who had knowledge of the original information was in any way involved in obtaining the evidence on which the proceeding would be based, which would create significant resourcing constraints and financial burdens on an agency and impede the usefulness of information sharing about a person of common interest with another agency.

2.248 The committee also notes the Treasurer's advice that the application of use immunity to only those who claim self-incrimination prior to the examination is consistent with other legislative provisions and the process is clearly explained to an examinee prior to the examination being conducted so it is up to the examinee to assert that right.

2.249 The committee reiterates that it considers that the privilege against self-incrimination is an important right under the common law and any abrogation of that right represents a significant loss to personal liberty. As such, the committee considers, from a scrutiny perspective, it would be more appropriate if a derivative use immunity were included to ensure information or evidence indirectly obtained from an officer compelled to provide information or documents could not be used in evidence against them. The committee also reiterates that restricting the use immunity only to those who claim, before giving the information, that it might incriminate them, may mean the immunity could become unavailable simply because a person has not had adequate legal advice prior to an examination and did not fully understand the need to make the claim. The committee considers this could significantly undermine the existence of the use immunity.

2.250 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*).

2.251 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of overriding the privilege against self-incrimination in the circumstances set out above.

Procedural fairness[103]

Initial scrutiny – extract

2.252 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 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.[104] 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.[105]

2.253 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.

2.254 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.[106]

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103 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.

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

105 Explanatory memorandum, p. 39.

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

2.255 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.

2.256 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.[107] 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.[108]

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

2.258 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.[109]

2.259 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 it 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.

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

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

109 Explanatory memorandum, p. 40.

Treasurer's response

2.260 The Treasurer advised:

(a) Limiting the involvement of the examinee's lawyer

An equivalent power to limit the involvement of the examinee's lawyer under proposed section 6 IE of the Banking Act is already provided in respect of examinations conducted under subsection 279(2) of the SIS Act and subsection 62E(2) of the Insurance Act.

An examination is part of the information gathering process to be used in the course of an investigation. APRA's internal documented examination procedures recognise the importance of fairness when conducting examinations and provide, in part, that:

- questions must be fair and relevant;
- questions must be clear and unambiguous;
- the examination must always be conducted in a professional and courteous manner;
- the examinee must be given an adequate opportunity to answer questions and to address
- the inspector (i.e. investigator); and
- the examinee's lawyer should be allowed to examine the examinee.

In order to ensure that an examination is conducted fairly, the investigator permits the rights of the examinee's lawyer to be exercised at appropriate times during the course of the examination. In a practical sense, the power to limit the involvement of the examinee's lawyer provides the investigator with the opportunity to impose a structure around the exercise of these rights. By imposing limits on the times during the examination when these rights can be exercised, the investigator is able to control the course of examination in order to increase the likelihood that the examination will be conducted in an efficient and effective manner, while also reducing the likelihood that these rights will be used to obstruct the examination.

The exercise of the power to limit the role of the examinee's lawyer in the course of an examination would only be used in exceptional circumstances and not to deprive the examinee's lawyers of the rights provided under the proposed section 61E(4). It is anticipated that the requirement for an examinee's lawyer to stop addressing the investigator or examining the examinee would only be made in those rare instances where the investigator formed the opinion that the examinee's lawyer was deliberately attempting to obstruct the examination.

(b) Objections to the accuracy of the record of an examination

An examinee would be able to include in a record of examination corrections of typographical or transcription errors. To elaborate:

- It is APRA practice to make a sound recording of all examinations conducted pursuant to its compulsory powers. APRA then engages the services of a transcription company to prepare a transcript of the examination and provides the examinee with a copy of the transcript as well as a copy of the sound recording.
- The examinee is requested to review the transcript to ensure that it is an accurate record of the statements made at the examination and invited to make any corrections to the transcript. The only corrections made should be typographical errors or transcriptions error as the transcript should be an accurate reflection of the actual words said during the examination.
- If an examinee advises APRA of any areas where their evidence is different to that given during the examination, they will be requested to do so in writing, as per APRA's documented internal examination procedures.

(c) Legal professional privilege

Proposed section 62AA of the Banking Act is consistent with section 288 of the SIS Act. The section recognises that legal professional privilege belongs to the client and not the legal representative. Furthermore, the person who asserts legal professional privilege has the obligation of establishing that the claim is valid. In order for an investigator to make an informed decision about the validity of the claim, it is necessary for the examinee to provide the investigator with sufficient information: *National Crime Authority v S (1991) 29 FCR 203* at 211.

Proposed section 62AA is intended to provide the investigator with the opportunity to obtain the minimum information necessary in order to make an informed assessment of the validity of a legal professional privilege claim made by a lawyer.

Committee comment

2.261 The committee thanks the Treasurer for this response. In relation to the power of an investigator to limit the involvement of the examinee's lawyer, the committee notes the Treasurer's advice that an investigator is given the power to permit the rights of an examinee's lawyer to be exercised at appropriate times during the course of the examination in order to ensure an examination is conducted fairly. The committee also notes the Treasurer's advice that this gives the investigator the opportunity to impose a structure around the exercise of these rights and efficiently control the course of the examination. The committee also notes the Treasurer's advice that the exercise of the power to limit the role of a lawyer would only be used 'in exceptional circumstances' and the power to stop a lawyer addressing the investigator or examining the examinee would only be made in those rare instances where the investigator formed the opinion that the lawyer was deliberately attempting to obstruct the examination.

2.262 The committee notes that while there is nothing in the bill limiting the exercise of the power in proposed subsection 61E(4) to the exceptional circumstances set out in the response, the committee considers that procedural fairness obligations would require an investigator to exercise these powers consistent with the right to a fair hearing.

2.263 In relation to whether an examinee would be able to include any objections as to accuracy in a record of examination prior to signing it, the committee notes the Treasurer's advice that it is APRA's practice to make a sound recording and have a transcript prepared of an examination, to which the only corrections should be typographical errors or transcription errors, and APRA's internal examination procedures require an examinee to advise APRA in writing if there are any areas where their evidence in the recording is different to that given during the examination.

2.264 However, the committee notes that proposed section 61F(2) provides that an investigator may require an examinee to read the written record (or have it read to them) and may require him or her to sign it. Failure to comply with this requirement constitutes an offence.[110] There is nothing in the legislation that would ensure that, if a person is required by an investigator to sign a record, they will have an opportunity to make any corrections to any transcription or other record before signing it. As such it remains unclear to the committee how any dispute as to the accuracy of the transcript would be resolved, particularly in light of the fact that failure to sign the record constitutes an offence

2.265 Finally, in relation to legal professional privilege, the committee notes the Treasurer's advice that the privilege belongs to the client and not the legal representative and in order for an investigator to make an informed decision about the validity of a claim to privilege, it is necessary for the investigator to be provided with sufficient information.

2.266 The committee requests that the key information provided by the Treasurer 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*).

2.267 In light of the detailed information provided, the committee makes no further comment on these matters.

110 See proposed section 61G.

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

Purpose	This bill seeks to amend various Acts relating to banking, insurance, credit, registrable corporations and financial system regulation Schedule 1 amends the application of the provisions relating to non-Authorised Deposit-taking Institution (ADI) lenders Schedule 2 provides for consequential amendments to the *Banking Act 1959* (Banking Act) in relation to non-ADI lenders 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 Schedule 4 inserts an objects provision in the Banking Act Schedule 5 amends the *National Consumer Credit Protection Act 2009* in relation to credit card contracts
Portfolio	Treasury
Introduced	House of Representatives on 19 October 2917
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv) and (v)

2.268 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Minister responded to the committee's comments in a letter dated 5 December 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Treasurer's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[111]

Incorporation of material as in force from time to time[112]

Initial scrutiny – extract

2.269 Proposed subsection 38C(7) provides that a rule may provide for a matter by applying, adopting or incorporating, with or without modification, any matter

111 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

112 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.

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.

2.270 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 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).

2.271 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.

2.272 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.[113] 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.

2.273 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.

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

Treasurer's response

2.274 The Treasurer advised:

> The ability for APRA to incorporate extrinsic material into a non-ADI lender rule as permitted under proposed section 38C(7) of the Banking Act is essential to ensuring the effectiveness of the rules and minimising their associated compliance burden.
>
> If APRA determines to make a non-ADI lender rule, it is possible that the rule will need to refer to complex concepts that are already defined in existing commercial standards. In these circumstances, it is clearer to incorporate the source material detailing these concepts rather than seeking to duplicate the concepts in the rule. Referring to extrinsic materials in rules – rather than attempting to replicate the terms in rules – would avoid APRA's rules becoming out of step with commercial practice.
>
> Examples of extrinsic material that might be used are Prudential Practice Guides published by APRA or documents published by the Australian Bureau of Statistics (ABS), such as the Household Expenditure Measure (HEM) devised by the ABS to calculate living expenses of borrowers.
>
> Examples of extrinsic material that might be used are Prudential Practice Guides published by APRA or documents published by the Australian Bureau of Statistics (ABS), such as the 'HEM' (Household Expenditure Measure) devised by the ABS to calculate living expenses of borrowers.
>
> Persons likely to be interested in the non-ADI lender rules would be familiar with the publishers or entities responsible for such extrinsic material (e.g. APRA or the ABS) and, as these documents are freely available on the internet to all, should be able to locate such material. This said, when incorporating such extrinsic material into a rule, APRA would also take efforts to provide information as to where that material could be found (for example, the URL of the appropriate document) to assist readers and remove doubt.
>
> It is necessary to apply these documents as in force or existing from time to time due to the fact that the financial markets can alter relatively quickly; reference to static documents would not provide responsiveness in the same manner and could also necessitate frequent changes being made to non-ADI lender rules.
>
> Rules made under proposed paragraphs 38C(2)(a) and (b) (the most likely form of rules to be issued) are legislative instruments and the process for making and commencing takes time. Given that non-ADI lender rules are likely to be most needed in times of financial instability, rules that are slow in responding to market changes are unlikely to be as effective as rules that are responsive.

Committee comment

2.275 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that allowing the incorporation of extrinsic material under proposed subsection 38C(7) is essential to ensuring the effectiveness of rules and minimising their associated compliance burden, and that it is clearer in some cases to incorporate source material rather than attempting to duplicate complex concepts in the rules. The committee also notes the Treasurer's advice that APRA's Prudential Practice Guides or the Australian Bureau of Statistics' Household Expenditure Measure are examples of material that may be incorporated, and that these documents are freely available on the internet.

2.276 The committee finally notes the Treasurer's advice that it is necessary to apply these documents as in force from time to time as financial markets can change relatively quickly and reference to static documents would necessitate frequent changes to the rules.

2.277 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*).

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

Consultation prior to making delegated legislation[114]

Initial scrutiny – extract

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

2.280 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

114 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.

to appropriately consult prior to making a non-ADI lender rule will not invalidate the rule.

Treasurer's response

2.281 The Treasurer advised:

> It is expected that APRA will, in all but extreme or time-critical circumstances, make efforts to consult not only ASIC under proposed subsection 38F(4) of the Banking Act, but also the non-ADI lenders subject to be subject to the rule (via a regulation impact statement-like process). This is consistent with the Government's position as put forward in the explanatory memorandum, and statements made in the regulation impact statement.
>
> Nevertheless, there are three rationales that underpin the no-invalidity clause in proposed subsection 38F(5), which provides that failure to comply with the consultation obligation in proposed subsection 38F(4) does not invalidate the making, varying, or revoking of a non-ADI lender rule.
>
> Firstly, the no-invalidity clause reflects Parliament's intention to vest the jurisdiction to make, vary, or revoke non-ADI lender rules exclusively with APRA.
>
> Secondly, the no-invalidity clause acknowledges the safeguards against the arbitrary use of non-ADI lender rules. The availability of avenues of review and potential for Parliamentary scrutiny will ensure public confidence in decisions made by APRA relating to non-ADI lender rules. For example:
>
> - Proposed section 38H provides for merits review of decisions relating to non-ADI lender rules. There is also the usual recourse to judicial review afforded under the *Administrative Decisions (Judicial Review) Act 1977* and the Constitution.
> - Additionally, should a rule be made by APRA to be complied by non-ADI lenders, or a class of non-ADI lenders, these rules will be legislative instruments under proposed section 38G.
>   - As a legislative instrument, the rule will therefore be subject to the scrutiny of, and potential disallowance by, the Parliament.
>
> Thirdly, the no-invalidity clause recognises that the desirability of consultation with ASIC is outweighed by the public inconvenience that would arise if a failure to consult deprived the making, varying, or revoking of a non-ADI lender rule of legal validity.
>
> - Members of the public, particularly those affected by non-ADI lender rules (such as non-ADI lenders), should be able to organise their affairs on the basis of apparently valid decisions.
> - To invalidate a decision relating to non-ADI lender rules as a result of a failure by APRA to consult with ASIC would invariably cause undue expense, inconvenience and loss of public confidence.

- This is particularly the case where, in these circumstances, such non-compliance would be extremely difficult for members of the public to detect, given the confidentiality and secrecy protections that attach to consultation between APRA and ASIC.
- Such an outcome would also be directly at odds with the rationale of enabling APRA to make non-ADI lender rules which, as outlined at proposed subsection 38C(1), is to empower APRA with the ability to address material risks of financial instability in the Australian financial system.

Committee comment

2.282 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that, prior to making a rule, APRA will seek to consult both ASIC and affected non-ADI lenders in all but extreme or time-critical circumstances. The committee also notes the Treasurer's advice that it is nevertheless appropriate to include a no-invalidity clause in proposed subsection 38F(5) because this clause:

- reflects Parliament's intention to vest the jurisdiction to make, vary or revoke non-ADI lender rules exclusively with APRA;
- acknowledges that decisions to make or vary certain rules are subject to both merits review and judicial review and will be subject to disallowance by Parliament; and
- recognises that the desirability of consultation with ASIC is outweighed by the public inconvenience that would arise if a non-ADI lender rule were deprived of validity due to a lack of consultation.

2.283 The committee finally notes the Treasurer's advice that members of the public should be able to organise their affairs on the basis of apparently valid decisions and that any invalidation due to a lack of consultation would cause undue expense, inconvenience and loss of public confidence.

2.284 The committee takes this opportunity to reiterate its general view that where the Parliament delegates its legislative power in relation to significant regulatory schemes 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. Providing that the instrument remains valid and enforceable even if ASIC fails to comply with the consultation requirements undermines including such requirements in the legislation.

2.285 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*).

2.286 In light of the information provided and the fact that a decision to make or vary the rules is subject to merits review, the committee makes no further comment on this matter.

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

Purpose	This bill seeks to amend the *Federal Financial Relations Act 2009* 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
Bill status	Before House of Representatives
Scrutiny principle	Standing order 24(1)(a)(v)

2.287 The committee dealt with this bill in *Scrutiny Digest No. 13 of 2017*. The Minister responded to the committee's comments in a letter dated 5 December 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Treasurer's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[115]

Parliamentary scrutiny—section 96 grants to the States[116]

Initial scrutiny – extract

2.288 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.[117]

2.289 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

115 See correspondence relating to *Scrutiny Digest No. 15 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

116 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.

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

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.

2.290 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.

2.291 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.[118] 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 committee has previously noted that effective parliamentary scrutiny is difficult because the information is only available in disparate sources.

2.292 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.

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

Treasurer's response

2.294 The Treasurer advised:

> *Guidance on Designated Housing Agreements*
>
> As noted by the Committee in its Digest, proposed section 15D of the Federal Financial Relations Act 2009 provides for designated housing agreements between the Commonwealth and States or Territories

118 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'.

(States). These could be either a multi-party or bilateral agreement. I note that, consistent with the proposed amendment to section 4, a designated housing agreement (DHA) must relate to any or all of: housing, homelessness and housing affordability matters.

This provides the flexibility for the Commonwealth and States to enter into other housing and homelessness agreements as may be needed from time to time. Funding is only payable if it is spent by the State in accordance with the DHA. Including additional guidance on terms and conditions that States would be required to comply with may unduly limit the Commonwealth's ability to provide financial assistance in the future and the States' ability to respond flexibly to jurisdiction-specific circumstances.

Tabling and publication of Agreements

I note the suggestion by the committee in its Digest, to include a requirement to table Agreements in Parliament and publish them on the internet. All agreements under the Federal Financial Relations framework are available publicly on the Council on Federal Financial Relations website.

Committee comment

2.295 The committee thanks the Treasurer for this response. The Committee notes the Treasurer's advice that designated housing agreements could be either multi-party or bilateral agreements and that they must relate to housing, homelessness or housing affordability matters. The committee also notes the Treasurer's advice that these agreements provide flexibility for the Commonwealth and the States to enter into other housing and homelessness agreements from time to time, and that including additional guidance as to the terms and conditions that States would be required to comply with may unduly limit the Commonwealth's ability to provide financial assistance and the ability of the States to respond to jurisdiction-specific circumstances. The committee finally notes the Treasurer's advice that all agreements made under the Federal Financial Relations Framework are publicly available on the Council of Federal Financial Relations website.

2.296 The committee reiterates 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.[119] 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.

119 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.'

2.297 It remains unclear to the committee why the inclusion of *high-level* guidance as to the terms and conditions that States will be required to comply with in order to receive funding under a designated housing agreement would inappropriately hamper the freedom of the Commonwealth and the States to enter into such agreements.

2.298 In addition, while the committee welcomes the fact that agreements made under the Federal Financial Relations Framework will be publicly available, the committee notes that there is no legislative requirement that the agreements be published and emphasises that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. As such, it remains unclear to the committee why it is not appropriate to include a legislative requirement that housing and homelessness agreements be tabled in Parliament within 15 sitting days of being made and published on the internet within 30 days of being made.

2.299 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of delegating to the executive government the Parliament's power under section 96 of the Constitution to make grants to the States, and to determine terms and conditions attaching to them, without any statutory guidance as to the types of terms and conditions that States and Territories will be required to comply with or a statutory requirement that the relevant agreements be tabled in the Parliament and published on the internet.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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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*.