

The Senate

Standing
Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

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

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Commentary on Bills

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

Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

| | |
|-------------------|--|
| Purpose | This bill seeks to amend the <i>Crimes Act 1914</i> and the <i>Criminal Code Act 1995</i> to: <ul style="list-style-type: none"> • introduce new restrictions on the existing arrangements for bail and parole; and • amend the operation of the continuing detention order scheme |
| Portfolio | Attorney-General |
| Introduced | Senate on 1 August 2019 |

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

Right to liberty – presumption against bail and parole¹

Presumption against bail

1.3 Section 15AA of the *Crimes Act 1914* (Crimes Act) currently provides for a presumption against bail for persons charged with, or convicted of, certain Commonwealth terrorism offences unless exceptional circumstances exist.

1.4 Schedule 1 to the bill proposes to significantly expand the presumption against bail in section 15AA in relation to several categories of people:

- items 1 and 3 seek to extend the presumption against bail to any person charged under any Commonwealth law, who has previously been charged with, or convicted of, a terrorism offence listed in subsection 15AA(2). In practice this appears to mean that a person may be charged or convicted under any Commonwealth law (including non-terrorist related offences) and will have a presumption against bail as long as they have at some point

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

(including in the past) been charged with, or convicted of, terrorism related offences;

- item 4 seeks to extend the presumption against bail to persons charged with, or convicted of, an offence of associating with a terrorist organisation;² and
- item 7 seeks to insert proposed subsection 15AA(2A) into the Crimes Act to expand the presumption against bail to people who are subject to a control order and to people who have made statements or carried out activities supporting, or advocating support for, terrorist acts.³

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

1.6 In relation to the expansion of the presumption against bail to persons for any offences against a law of the Commonwealth where a person has previously been charged with, or convicted of, terrorist offences, the statement of compatibility notes that a person 'who is convicted of a terrorism offence has been proven, to the satisfaction of the law, to be a danger to the Australian community'.⁴ However, the explanatory materials do not address why or how a person who has been previously *charged* with a terrorism offence, but not necessarily convicted of that offence, is a risk to the community.

1.7 The committee notes that a person may have been previously charged with a terrorism offence but the charges were later dropped or they may have been acquitted of that offence, yet a presumption against bail would exist in relation to them if later charged with *any* Commonwealth offence. The committee notes that this places the onus of proof onto the accused to prove that exceptional circumstances exist. It is not clear to the committee that providing evidence that a past charge for terrorism was dropped will be sufficient in all circumstances to satisfy the high bar of proving exceptional circumstances exist to override a presumption.

1.8 The committee also notes that no justification has been provided for expanding the presumption against bail to apply to the offence of associating with terrorist organisations. The committee notes that when the offence of associating

2 An offence under section 102.8 of the *Criminal Code Act 1995*.

3 Within the meaning of Part 5.3 of the *Criminal Code Act 1995*.

4 Statement of compatibility, p. 11.

with a terrorist organisation was introduced,⁵ the Senate Legal and Constitutional Affairs Committee raised concerns about the breadth of the offence and recommended that provisions relating to the presumption against bail not apply to this offence.⁶ Government amendments were introduced in 2004 in line with this recommendation. It is of concern that the presumption against bail is proposed to be extended to an offence of association with a terrorist organisation in circumstances where the Senate has previously rejected this extension and where no justification is provided in the explanatory memorandum as to why it is necessary to do so.

1.9 In relation to expanding the presumption against bail to persons subject to control orders, the explanatory memorandum states:

A person who is subject to a control order has been identified by law enforcement as posing a risk to society. It is therefore appropriate for the court to be able to take this into account in deciding whether a person, accused of a separate offence, should be released on bail – a decision that focuses on the risk posed by that person to the community.⁷

1.10 In relation to expanding the presumption against bail to persons who have made statements or carried out activities supporting, or advocating support for, terrorist acts, the explanatory memorandum states:

A person who supports or advocates support for terrorist acts poses a risk to society and it is appropriate that a bail authority can take this factor into account when considering bail, regardless of the current offence that the person is charged with or convicted of.⁸

1.11 While the committee notes the above explanations, no evidence has been provided in the explanatory materials to address whether courts are currently not taking these matters into account when exercising their discretion to grant bail. Rather, the only evidence that the explanatory memorandum points to is that the amendments are in response to one incident in 2017 committed by a person on parole (not bail) for Victorian offences in circumstances where he had previously been acquitted of a terrorism offence.⁹

1.12 The committee has previously raised serious scrutiny concerns about the impact of control orders on an individual's personal liberty, as a control order may be issued by a court without any criminal conviction (or without even a charge being

5 In the Anti-Terrorism (No. 2) Bill 2004.

6 See Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-terrorism Bill (No. 2) 2004*, August 2004, recommendation 4, p. 34.

7 Explanatory memorandum, p. 29.

8 Explanatory memorandum, p. 29.

9 Explanatory memorandum, p. 5.

laid).¹⁰ The committee also notes that what could constitute someone 'who supports or advocates support for terrorist acts' may be very broad and may, for example, include statements on social media made a number of years ago. As a result, a person may be subject to a permanent presumption against bail for any offence against a Commonwealth law, regardless of whether they have continued to support or advocate support for terrorist acts. The committee also notes that the explanatory materials do not indicate whether there are any other comparable instances in other Commonwealth or state legislation where such a broad presumption against bail exists.

Presumption against parole

1.13 In addition, the committee notes that proposed section 19ALB seeks to introduce a presumption against parole for persons who have been convicted of a terrorism offence, persons subject to control orders and persons who have made statements, or carried out activities supporting, or advocating support for, terrorist acts. The explanatory memorandum states that:

The presumption against parole gives primacy to the first purpose of parole stated in section 19AKA of the Crimes Act – the protection of the community – by placing the onus on the terrorism-related offender to demonstrate exceptional circumstances exist to justify their release on parole.¹¹

1.14 The committee considers that this provision similarly limits a person's right to liberty as outlined above in relation to the presumption against bail. The committee notes that the expansion of the presumption against parole includes persons who may not have been convicted for terrorism related offences. In the committee's view, the explanatory materials do not adequately justify why the presumption against parole should apply to persons who have not (or may never have been) convicted of a terrorism offence. In addition, the committee notes that while the presumption against parole will not technically be of retrospective effect, in practice there may be people who have been convicted of offences prior to the commencement of this bill who will now be subject to a presumption against parole that did not exist when they were initially sentenced.

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

11 Explanatory memorandum, p 27.

1.15 In light of the comments above, the committee requests the Attorney-General's more detailed justification as to the necessity and appropriateness of expanding the presumption against bail and parole, noting that it may apply in circumstances where a person has not been charged with, or ever previously convicted of, a terrorism offence.

Trespass on rights and liberties – continuing detention orders¹²

1.16 Schedule 2 to this bill seeks to make amendments to the continuing detention order scheme (the scheme). The scheme allows for the continued detention of those judged to be high risk terrorist offenders who are serving custodial sentences, after those sentences have been served. Schedule 2 to the bill seeks to extend the scheme to persons serving concurrent or cumulative sentences for an eligible terrorism offence and another offence.

1.17 Currently the Australian Federal Police (AFP) Minister can apply for a continuing detention order not more than 12 months before the end of a person's sentence for an eligible terrorism offence, at the end of which a person would be required to be released into the community. The AFP Minister is currently unable to apply for such an order where an eligible offender has also been sentenced for a further non-terrorist related offence that expires after the eligible sentence.

1.18 The committee commented on the introduction of the scheme by the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 in *Alert Digest 10 of 2016*.¹³ The committee raised significant scrutiny concerns in relation to the scheme. The committee noted that while proceedings for a continuing detention order are characterised by the usual procedures and rules for civil proceedings, the scheme nevertheless fundamentally inverts basic assumptions of the criminal justice system. The committee noted that 'offenders' in our system of law may only be punished on the basis of offences which have been proved beyond reasonable doubt, whereas the scheme proposed to detain persons, who have committed offences and have completed their sentences for those offences, on the basis that there is a high degree of probability they will commit similar offences in the future.

1.19 The committee also acknowledged that in some circumstances detention may be justified on the basis of protecting the public from unacceptable risks without undermining the presumption of innocence, or the principle that persons should not be imprisoned for crimes they may commit. For example, detention on the basis of risks associated with the spread of communicable disease does not threaten these

12 Schedule 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

13 See Senate Standing Committee for the Scrutiny of Bills, *Report 10 of 2016*, pp. 631-643 and *Alert Digest No. 7 of 2016*.

basic assumptions of our criminal law. However, where the trigger for the assessment of whether or not a person poses an unacceptable risk to the community is prior conviction for an offence, the protective purpose cannot be clearly separated from the functioning of the criminal justice system. If the continuing detention is triggered by past offending, then it can plausibly be characterised as retrospectively imposing additional punishment for that offence. If the continuing detention is not conceptualised as imposing additional punishment, then the fact that it is triggered by past offending on the basis of predicted future offending necessarily compromises the principles identified above.

1.20 The committee reiterates these significant scrutiny concerns in relation to the proposed expansion of the continuing detention order scheme. The committee does not consider that the explanatory materials have adequately justified the need for this expansion. While the explanatory materials extensively discuss the operation of the scheme in general, the explanatory materials do not indicate why it is necessary to expand the scheme beyond stating that 'expanding the eligibility criteria for the [scheme] is consistent with the overall objective of the [scheme]'.¹⁴

1.21 The committee requests the Attorney-General's more detailed justification as to why it is considered appropriate to expand the continuing detention scheme for high risk terrorist offenders after their sentences for imprisonment have been served.

Procedural fairness¹⁵

1.22 Schedule 2 to the bill also seeks to make amendments to the basis upon which information regarding an application for a continuing detention order will be provided to an offender. Currently, section 105A.5 of the *Criminal Code Act 1995* provides that a terrorist offender who is the subject of a continuing detention order application must be given a 'complete copy' of that application. It provides that sensitive information can be withheld from the offender for a period of time but ultimately requires all information in the application to be given to the offender. Item 16 of the bill seeks to repeal the current requirement to provide a complete copy of the application with a requirement that the offender only receive a complete copy subject to any court orders or protective orders made relating to the protection of information in the application. These protective orders can limit the information provided to the offender, including by providing a summary or statement of facts instead of the complete information.

14 Explanatory memorandum, p. 3.

15 Schedule 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

1.23 Paragraph 105A.5(3)(aa) currently provides that an application for a continuing detention order must include materials and a statement of facts that would reasonably be regarded as supporting a finding that the order should not be made (exculpatory information). Item 14 of Schedule 2 would also allow the AFP Minister to redact or withhold information, material or facts, provided in relation to exculpatory material, which is likely to be protected by public interest immunity.

1.24 In *Alert Digest 7 of 2016*, the committee raised concerns that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 did not allow for the provision of sufficient information to offenders prior to the hearing of an application for a continuing detention order. In response to the committee's concerns, the Attorney-General advised that amendments would be made to ensure that an offender would be provided with a complete copy of the application within a reasonable period before the preliminary hearing.¹⁶

1.25 The explanatory memorandum states that the current requirement to provide a complete copy of an application to an offender 'places unique obligations on the AFP Minister that go beyond the ordinary information disclosure requirements that operate in other contexts, such as in criminal prosecutions'.¹⁷ This justification is also used in relation to the ability to remove information on the basis of public interest immunity.¹⁸ The committee has generally not accepted the existence of similar provisions in other Acts to be an adequate justification and notes that the proposed amendments may limit an offender's right to a fair hearing as the offender may not have access to all of the relevant information on which the application for the order is made. These concerns are heightened given the serious consequences for the right to liberty that may flow from the making of a continuing detention order.

1.26 The committee requests the Attorney-General's more detailed justification as to why it is considered necessary and appropriate to remove an offender's right to receive a complete copy of any application made against them.

16 Senate Standing Committee for the Scrutiny of Bills, *Report 10 of 2016*, p. 640.

17 Explanatory memorandum, p. 42.

18 Explanatory memorandum, p. 43.

Inspector-General of Live Animal Exports Bill 2019

| | |
|-------------------|--|
| Purpose | This bill seeks to establish the role of an independent Inspector-General of Live Animal Exports to oversee the regulator of live-stock exports: the Department of Agriculture |
| Portfolio | Agriculture |
| Introduced | Senate on 31 July 2019 |

Significant matters in delegated legislation¹⁹

1.27 The bill seeks to establish an Inspector-General of Live Animal Exports (Inspector-General) to oversee the regulator of live-stock exporters. Clause 10 of the bill provides that the Inspector-General may review the performance of functions or exercise of powers by live-stock export officials. Subclause 10(3) requires the Inspector-General to publish a report on each review conducted. Subclause 10(4) provides that the rules may make provision for the process to be followed in conducting a review and the content of reports of reviews.

1.28 The committee's view is that significant matters, such as how a review is conducted and the content of reports of such reviews, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states that:

These matters, processes and circumstances may arise for a range of technical and administrative reasons, and the flexibility allows for matters, processes and circumstances to be prescribed quickly if required.²⁰

1.29 While the committee notes this justification, the committee does not accept administrative flexibility as a sufficient justification for including significant matters in delegated legislation. It is unclear to the committee why at least high level guidance cannot be included in the primary legislation. This could include how evidence or documents is collected, retained or disclosed, and the circumstances under which a review can be initiated. In relation to reports, the primary legislation could include the timeframe in which a report must be submitted after a review is completed, whether certain information is able to be redacted or omitted from the report, whether live-stock export officials will have a right of reply to any criticisms contained in the report, and whether live-stock export officials will have a right to be heard prior to the publication of any criticisms contained in a report.

¹⁹ Clause 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

²⁰ Explanatory memorandum, p 24.

1.30 In addition, the committee notes that the explanatory memorandum states that the requirement that the Inspector-General publish reports will ensure transparency.²¹ However, by allowing the rules to make provision for the content of the reports, the minister would be able to limit or control what information would be included in the report. The committee is concerned that this could significantly reduce the transparency of the review process. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.31 The committee requests the minister's more detailed justification as to why it is considered necessary and appropriate to leave significant elements of the review process and the content of reports to delegated legislation.

Reversal of the evidential burden of proof²²

1.32 Clause 31 of the bill makes it an offence for a person to use or disclose information they obtain in the course of performing functions or duties under the bill in circumstances where the disclosure is not authorised. Subclause 31(2) contains an offence specific defence, which provides that the offence does not apply to the extent that the person uses or discloses the information in good faith and in purported compliance with the bill or rules.

1.33 Under this offence-specific defence the defendant will bear the evidential burden of proof.²³ At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.34 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 nevertheless expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in subclause 31(2) has not been addressed in the explanatory materials.

21 Explanatory memorandum, p 10.

22 Clauses 31, 34 and 35. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

1.35 In addition, subclause 34(1) provides that a person will be liable for a civil penalty if the person gives false or misleading information when required to provide information to a review conducted by the Inspector-General. Subclauses 34(2), (3) and (4) each provide that subclause 34(1) will not apply if:

- the information is not false or misleading in a material particular;
- the information did not omit any matter or thing without which the information is misleading in a material particular; or
- the official receiving the information did not take reasonable steps to inform the person that they may be liable to a civil penalty.

1.36 Subclause 35(1) provides that a person will be liable for a civil penalty if the person produces a document they know is false or misleading to a review conducted by the Inspector-General. Subclauses 35(2) and (3) each provide that subclause 35(1) will not apply if:

- the document is not false or misleading in a material particular; or
- the person provides a written statement stating that the document is false or misleading in a material particular.

1.37 Subsection 96 of the *Regulatory Powers (Standard Provisions) Act 2014* provides that a person who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating a civil penalty provision bears an evidential burden in relation to that matter. This mirrors the provisions in subsection 13.3(3) of the *Criminal Code Act 1995* relating to criminal offences.

1.38 In this instance, the committee notes that the explanatory materials do not provide any justification for the reversals of the evidential burden of proof, merely stating the effect of the relevant provisions.

1.39 The committee also notes that the reversal of the burden of proof in clauses 34(2), (3) and (4) and 35(2) and (3) relate to a civil penalty, rather than to a criminal offence. However, the committee recognises that, in certain cases, there may be a blurring of distinctions between criminal and civil penalties, with civil penalties applied in circumstances that are akin to criminal offences. The committee considers that reversals of the burden of proof in such cases merit careful scrutiny,²⁴ as there could be a risk that reversing the burden of proof in such cases may unduly trespass on personal rights and liberties.

1.40 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

24 See also Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129), December 2015, p. 284.

burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.²⁵

No requirement to table or publish reports²⁶

Clause 10 of the bill provides that the Inspector-General may review the performance of functions or exercise of powers by live-stock export officials. Subclause 10(3) requires the Inspector-General to publish a report on each review conducted. Clause 40 of the bill also provides that the Inspector-General must prepare an annual report each year, which is to be provided to the Minister. However the bill does not require the review reports or annual reports to be tabled in Parliament. In addition, there is no requirement that an annual report be made publicly available.

1.41 Tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of the documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Making documents associated with review processes available online promotes transparency and accountability. Consequently, where a bill does not require reports to be tabled or made available online, the committee would expect an appropriate justification to be included in the explanatory memorandum. The explanatory memorandum does not explain why there is no requirement for review reports and annual reports to be tabled in Parliament. In relation to publication of reports, the explanatory memorandum states that 'all reports by the Inspector-General must be given to the Minister for Agriculture and made public.'²⁷ However, there is no requirement on the face of the bill that the annual report be made publicly available.

1.42 The committee requests the minister's advice as to why there is no requirement for either review reports or annual reports to be tabled in Parliament and why there is no requirement for an annual report to be made publicly available, noting the potential detrimental impact on parliamentary scrutiny.

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

26 Clauses 10 and 40. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

27 Explanatory memorandum, p. 2.

National Integrity Commission Bill 2018 [No. 2]

| | |
|-------------------|---|
| Purpose | These bills seek to establish the Australian National Integrity Commission as an independent, broad-based public sector anti-corruption commission for the Commonwealth |
| Sponsors | Senator Larissa Waters |
| Introduced | Restored to <i>Notice Paper</i> on 1 August 2019 |

Fair hearing²⁸

1.43 The bill provides that a National Integrity Commissioner (Commissioner) may conduct an investigation into whether a public official has engaged or may engage in corrupt conduct. Clause 64 provides that after completing an investigation the Commissioner must prepare a report of the investigation. The report must set out the Commissioner's findings, the evidence and other material on which those findings are based, any action that the Commissioner has taken or proposes to take, and any recommendations that the Commissioner sees fit to make.²⁹ Clause 62 provides that the Commissioner must not include in the report an opinion or finding that is critical of a Commonwealth agency or a person unless the Commissioner has first given the head of the agency or the person an opportunity to be heard.

1.44 However, subclause 62(2) provides that a hearing is not required if the Commissioner is satisfied that:

- a person may have committed a criminal offence, contravened a civil penalty provision, or engaged in conduct that could be subject to disciplinary proceedings or provide grounds for the termination of employment; and
- affording the person or the head of the agency the opportunity to be heard may compromise the effectiveness of either the investigation of a corruption issue or an action taken as a result of such an investigation.

1.45 In effect, subclause 62(2) attempts to exclude an obligation to give a person the right to be heard prior to the completion of a report. This is despite the fact that subclause 64(3) expressly provides that a report may recommend terminating a person's employment, taking action against a person with a view to having the person charged with an offence, and initiating disciplinary proceedings. This raises questions as to whether subclause 64(2) unduly trespasses on the right to a fair hearing. The committee notes that the explanatory memorandum provides no

28 Subclause 62(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

29 Subclause 64(2).

justification for limiting the right to a fair hearing. It merely sets out the operation and effect of the relevant provisions.³⁰

1.46 The committee also notes that while clause 64 would allow the Commissioner to exclude 'sensitive information' from a report, it would not require the Commissioner to do so. Additionally, while sensitive information excluded from a report must be included in a supplementary report, it is only the primary report that must be tabled in Parliament.³¹

1.47 Given the capacity of findings and opinions mentioned in subclause 62(2) to adversely affect a person's reputation,³² and the characterisation of the right to be heard as a fundamental common law right, the bill may, without further clarification, give rise to considerable interpretive difficulties in the courts. For example, it may be that a court could imply a right to be heard prior to the Prime Minister tabling a report in Parliament in relation to any critical findings or opinions that had not been disclosed pursuant to subclause 62(2) and which was not excluded from the report as 'sensitive' information.

1.48 The committee also notes that, under paragraph 62(7)(b), a person appearing before the Commissioner to make submissions in relation to an adverse finding or opinion may be represented by another person, but only with the Commissioner's permission. This would appear to give the Commissioner the power to refuse to allow a person to be represented—including by their lawyer. Given the nature of the rights and interests at stake and the potential complexity of the issues that may be raised, the committee considers that there may be circumstances in which a person's right to a fair hearing may be compromised if the Commissioner refuses to allow that person to be represented.

1.49 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of:

- **effectively excluding the right to a fair hearing for persons who, in the view of the National Integrity Commissioner, may have engaged in unlawful conduct, or conduct that could give rise to disciplinary proceedings or provide grounds for the termination of employment; and**
- **giving the National Integrity Commissioner the power to approve whether a person appearing before the Commissioner to make a submission in relation to an adverse finding or opinion may be represented (rather than giving the person a right to be represented).**

30 Explanatory memorandum, pp. 18-19.

31 See clause 233.

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

Coercive powers³³

1.50 Clause 72 of the bill seeks to provide that, for the purposes of investigating a corruption issue, the Commissioner may, by notice in writing, require a person to give information, or produce documents or things, if the Commissioner has reasonable grounds to suspect that the information, documents or things will be relevant to the investigation of a corruption issue. Clause 77 seeks to make it an offence to fail to comply with a notice, punishable by imprisonment for two years.

1.51 Clause 82 also seeks to provide that the Commissioner may summon a person to attend a hearing at a time and place specified in the summons, and to give evidence and produce documents or things, if the Commissioner has reasonable grounds to suspect that the evidence, documents or things will be relevant to the investigation of a corruption issue or the conduct of a public inquiry. Clause 92 seeks to make it an offence to fail to attend a hearing, to answer a question or to produce a document or thing. These offences would be punishable by imprisonment for between 12 months and two years.

1.52 As set out below at [1.69] to [1.77], the bill also provides that a person is not excused from answering a question or producing a document when served with a notice or summoned to attend on the ground it may incriminate the person or expose them to a penalty. This thereby abrogates the common law privilege against self-incrimination.

1.53 The bill further proposes to allow the Commissioner to take action in circumstances where the Commissioner considers that a person is in contempt of the Commission in relation to a hearing. Clause 93 provides that a person is in contempt of the Commission if (among other matters) the person fails to attend a hearing as required by a summons, refuses or fails to answer a question, or knowingly gives evidence that is false or misleading in a material particular. Clause 94 provides that, if the Commissioner is satisfied that a person is in contempt of the Commission in relation to a hearing, the Commissioner may apply either to the Federal Court the Supreme Court of the State or Territory in which the hearing is held for the person to be dealt with in relation to the contempt.

1.54 Clause 96 provides that, if the Commissioner proposes to make an application under clause 94 in respect of a person, the Commissioner may direct a constable or an authorised officer to detain the person for the purposes of bringing the person before the relevant court. Where a person is detained, the Commissioner must make an application under clause 94 as soon as practicable, and the person must be brought before the relevant court as soon as practicable.

33 Clauses 72, 82, 84 and 96. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i)

1.55 Where a bill seeks to confer coercive powers on persons or bodies, the committee would expect the explanatory materials to provide a sound justification for the conferral of such powers, by reference to principles set out in the *Guide to Framing Commonwealth Offences*.³⁴ In this instance, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.³⁵

1.56 The committee also notes that, under clause 84, a person appearing at a hearing, but not giving evidence, may be represented by a legal practitioner only if special circumstances exist, and the Commissioner consents to the person being represented. Given the nature of the rights and interests at stake and the potential complexity of the issues that may be raised, the committee considers that there may be circumstances in which a person's right to a fair hearing may be compromised if the Commissioner refuses to allow that person to be represented. The committee notes that the explanatory memorandum does not explain why this provision is considered necessary and appropriate, nor does it provide examples of the 'special circumstances' which might justify legal representation.

1.57 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of conferring on the National Integrity Commissioner broad coercive powers to require persons to give information, answer questions, and produce documents and things.

Arrest and search warrants³⁶

1.58 Clause 105 of the bill seeks to provide that an authorised officer may apply to a judge for a warrant to arrest a person, if the authorised officer believes on reasonable grounds that:

- the person has been ordered to deliver their passport to the Commissioner, and is likely to leave Australia for the purposes of avoiding giving evidence at a hearing before the Commissioner;
- the person has been served with a summons under clause 82, and has absconded, is likely to abscond, or is otherwise attempting, or is likely to attempt, to evade service of the summons; or

34 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Chapters 7-10.

35 Explanatory memorandum, pp. 19, 23 and 32.

36 Clauses 105 and 106; and proposed Division 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

- the person has committed an offence under subclause 92(1) (which relates to failures to attend hearings, produce evidence or answer questions), or is likely to commit such an offence.

1.59 Clause 106 seeks to provide that, for the purposes of executing an arrest warrant, the authorised officer may (among other matters) break into and enter relevant premises. This power is subject to a number of limitations, including a prohibition on entering premises during night hours, a requirement to inform the person of the reasons for the arrest, and a prohibition on subjecting the arrestee to greater indignity than is reasonable and necessary in the circumstances.

1.60 Proposed Division 3 of Part 6 further provides for that an authorised officer may apply for a number of different kinds of search warrant. These include warrants to search premises and to conduct an 'ordinary search and frisk or frisk search' of a person.³⁷ Under such warrants, an authorised officer would be permitted to (among other matters) search premises, vehicles and vessels for evidential material, seize such things as are considered relevant to the investigation, and conduct search and frisk procedures.³⁸ These powers are subject to the limitation that a search warrant may not authorise a strip search or a search of a person's body cavities.³⁹

1.61 Clause 145 provides for the appointment of authorised officers. Under that clause, the Commissioner would be able to appoint as an authorised officer a member of the Australian Federal Police (AFP) or a staff member of the Commission that the Commissioner considers to have suitable qualifications or experience. However, the clause does not specify the qualifications or experience necessary for appointment.

1.62 Although it may be possible to identify circumstances in which it would be appropriate for a person exercising powers under a warrant *not* to be an AFP officer (for example, if they were a former officer or a member of a State or Territory police force), the committee is concerned that the bill would permit a range of persons who are not police officer to exercise 'police powers'—such as powers to arrest and to conduct personal searches. The explanatory memorandum notes that it is essential that authorised officers are 'experienced, diligent and trustworthy' because they will be exercising power of search and arrest.⁴⁰ However, it does not explain why it is necessary or appropriate to allow these powers to be exercised by persons who are not police officers, nor does it explain why it is not possible to specify what constitutes 'suitable qualifications or experience' in the bill, rather than leaving these matters to the discretion of the Commissioner.

37 Clause 113.

38 Clauses 117 and 118.

39 Clause 119.

40 Explanatory memorandum, p. 47.

1.63 The committee further notes that the *Guide to Framing Commonwealth Offences* indicates that any new powers to search persons require a strong justification.⁴¹ While noting that there may be some circumstances in which the granting of new powers to search persons can be justified, the committee would expect an explanation as to why these powers are considered necessary and appropriate to be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no such explanation, merely restating the operation and effect of the relevant provisions.⁴²

1.64 Clause 122 further provides that, in executing a search warrant, an authorised officer may obtain such assistance, and use such force against persons and things, that is necessary and reasonable in the circumstances. Where a person assisting an authorised officer is also an authorised officer or a police constable, that person would be permitted to use such force against persons and things as is reasonable and necessary in the circumstances. Otherwise, the person assisting would be permitted only to use such force against things (not persons).

1.65 The committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion in a bill of any use of force power for the execution of warrants should only be allowed where a need for such powers can be identified. In this regard, it states that a use of force power should be accompanied by an explanation and justification in the explanatory materials, as well as a discussion of proposed accompanying safeguards that the agency intends to implement.⁴³ In this instance, the explanatory memorandum states that:

The Authorised Officer is given the discretion to use the necessary force needed which allows for the Authorised Officer to protect him or herself and others assisting in the execution of a warrant. The requirement of having only Authorised Officers or a constable taking part in searches and arrests is to ensure that these procedures are carried out by persons who have been provided with training and fulfilled the requirements to ensure that care, professionalism and diligence is present.⁴⁴

1.66 However, the explanatory memorandum does not appear to explain the circumstances in which it may be necessary to use force (for example, by providing relevant examples). Moreover, it does not appear to discuss any specific safeguards with respect to the use of force.

41 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 102-103.

42 Explanatory memorandum, pp. 41-42.

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

44 Explanatory memorandum, p. 42.

1.67 The committee further notes that the explanatory memorandum does not explain why it is considered necessary and appropriate for an authorised officer to obtain assistance, nor does it provide any examples of the persons who may be called on to assist or the circumstances in which assistance may be necessary. The committee also notes that the bill does not appear to place any limits on the persons who may assist authorised officers in executing powers under a warrant, or impose any requirements as to those persons' qualifications or expertise.

1.68 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of:

- **allowing persons other than police officers to execute search warrants, which include powers to use force and to conduct personal searches, with no specific requirements as to those persons' qualifications or expertise; and**
- **allowing authorised officers to obtain assistance in the execution of search warrants, with no requirements that persons assisting have appropriate qualifications, experience or expertise.**

Privilege against self-incrimination⁴⁵

1.69 As outlined above, clause 72 seeks to allow the Commissioner to give a written notice to any person, requiring that person to give the Commissioner such information, documents or things as are specified in the notice. Clause 82 seeks to allow the Commissioner to summon a person to attend a hearing, to give evidence, and to produce such documents or things as are specified in the summons. Subclauses 79(1) and 102(1) provide that a person is not excused from complying with a notice or summons on the grounds that to do so would tend to incriminate that person or expose them to a penalty.

1.70 Subclauses 79(1) and 102(1) would therefore override 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 them.⁴⁶

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

45 Subclauses 79(1) and 102(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

outweighs the loss of personal liberty, in light of any relevant information in the explanatory materials.

1.72 In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will also consider the extent to which the abrogation is limited by a 'use' or 'derivative use' immunity. A 'use' immunity generally provides that information or documents produced in response to a statutory requirement will not be admissible in evidence against the person that produced it. 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 that person.

1.73 In this respect, the committee notes that 'use' immunities are provided in subclauses 79(3) and 102(4). Those subclauses provide that, where a person gives information, answers questions, or provides a document or a thing, pursuant to a notice under clause 72 or a summons under clause 82, the information, answers, documents and things are not admissible as evidence against that person. However, 'derivative use' immunities (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person) have not been included.

1.74 In addition, the committee notes that subclauses 79(3) and 102(4) set out a number of proceedings in which the 'use' immunity would not be available. These include proceedings for the confiscation of property, certain criminal proceedings and, where the person is a Commonwealth employee, disciplinary proceedings. The committee further notes that, for the 'use' immunity in subclause 102(4) to apply, the person would have to claim that giving the relevant answer, or producing the document or thing, might tend to incriminate the person or expose them to a penalty before doing so. This has the potential to mean that the 'use' immunity may become unavailable merely because the person has not had adequate legal advice prior to answering a question, or producing a document or thing, and was therefore unaware of the need to make a claim of self-incrimination.

1.75 The committee is also concerned that subclauses 79(2) and 102(3) provide that the relevant 'use' immunities would not apply to the production of a document that is, or forms part of, a record of existing or past business.

1.76 The explanatory memorandum provides no explanation as to why derivative use immunities have not been provided, nor does explain why it is considered necessary or appropriate to abrogate the privilege against self-incrimination. It merely restates the operation and effect of the relevant provisions.⁴⁷

47 Explanatory memorandum, pp. 21 and 34.

1.77 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination.

Legal professional privilege⁴⁸

1.78 Clause 99 seeks to provide that a person must not refuse or fail to answer a question at a hearing on the ground that the answer would disclose a communication that is subject to legal professional privilege, unless a claim for privilege has been accepted by the Commissioner. Clause 100 similarly seeks to provide that a person must not refuse or fail to produce a document or thing at a hearing on the ground that the document or thing is subject to legal professional privilege, unless a court has found that the document or thing is subject to privilege, or a claim for privilege over the document or thing is accepted by the Commissioner. A person would commit an offence of strict liability if they refuse or fail to answer a question, or to produce a document or thing, in relation to which the Commissioner has rejected a claim for privilege.⁴⁹

1.79 The provisions identified above would appear to abrogate legal professional privilege. As recognised by the High Court,⁵⁰ legal professional privilege is not merely a rule of substantive law but an important common law right which is fundamental to the administration of justice. The committee therefore considers that privilege should only be abrogated or modified in exceptional circumstances. Where a bill seeks to abrogate legal professional privilege, the committee would expect a sound justification for any such abrogation to be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no such justification—merely restating the operation and effect of the relevant provisions.⁵¹

1.80 Additionally, the committee considers that, where legal professional privilege is abrogated, 'use' and 'derivative use' immunities should ordinarily apply to documents or communications revealing the content of legal advice, in order to minimise harm to the administration of justice and to individual rights. As outlined above at [1.73], 'use' immunities are provided in relation to the information, answers to questions, documents and things given pursuant to a notice or a summons. However, the bill does not contain 'derivative use' immunities. The explanatory

48 Proposed paragraphs 79(4)(c) and 102(5)(c); clauses 99 and 100. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

49 Clause 101. The offence would be punishable by imprisonment for 6 months or 10 penalty units.

50 See e.g. *Baker v Campbell* (1983) 153 CLR 52.

51 Explanatory memorandum, pp. 33-34.

memorandum provides no explanation as to why such immunities have not been included.

1.81 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of abrogating legal professional privilege.

Evidentiary certificate constitutes prima facie evidence⁵²

1.82 Clause 94 seeks provide that, if the Commissioner is of the opinion that a person is in contempt of the Commission in relation to a hearing, the Commissioner may apply either to the Federal Court or the Supreme Court of the State or Territory in which the hearing is held for the person to be dealt with in relation to the contempt.

1.83 Subclause 94(3) provides that the application must be accompanied by a certificate that sates the grounds for making the application, and the evidence in support of the application. Subclause 95(3) provides that, in proceedings relating to the application, a certificate under subclause 94(3) is prima facie evidence of the matters specified in the certificate.

1.84 The committee notes that where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceeding. While a person still retains the right to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The use of evidentiary certificates therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common-law right to be presumed innocent until proven guilty. Consequently, the committee would expect a detailed justification for any proposed powers to issue or use evidentiary certificates to be included in the explanatory materials. In this instance, the explanatory memorandum provides no justification for allowing evidentiary certificates to be used in proceedings relating to contempt of the commission, merely restating the operation and effect of the relevant provisions.⁵³

1.85 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states, in relation to criminal proceedings, that evidentiary certificates:

52 Subclauses 94(3) and 95(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i)

53 Explanatory memorandum, pp. 30-31.

are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.⁵⁴

1.86 The *Guide to Framing Commonwealth Offences* further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.⁵⁵

1.87 In this instance, it appears that the matters that may be included in a certificate given in accordance with subclause 94(4) could cover the entirety of the Commissioner's evidence as to why a person should be held in contempt. Consequently, the committee considers it unlikely that a certificate would cover only formal or technical matters sufficiently removed from the relevant proceedings—such as might make its use appropriate.

1.88 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing that a certificate provided in accordance with subclause 94(3) is prima facie evidence of the matters specified in the certificate (noting that such a certificate may cover most if not all of the evidence provided by the Commission as to why a person should be held in contempt).

Reversal of evidential burden of proof⁵⁶

1.89 A number of clauses in the bill seek to create offences, and a number of these include offence-specific defences, which reverse the evidential burden of proof.

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

1.91 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.

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

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

56 Proposed subsections 76(2), 76(4), 77(2), 91(2), 91(4), 101(3), 101(5), 104(3) and 238(1), (2), (3) and (5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.92 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 raise evidence to positively prove the matter), the committee expects any reversal of the evidential burden of proof to be justified. In these instances, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.

1.93 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including a number of offence-specific defences (which reverse the evidential burden of proof).

Strict liability offence⁵⁷

1.94 Proposed subsection 101(1) would make it an offence for a person who has been served with a summons to attend a hearing or produce a document or thing to refuse or fail to answer a question or produce a document or thing in circumstances where the Commissioner has rejected a claim for legal professional privilege. Proposed subsection 101(2) would make this an offence of strict liability, subject to a penalty of imprisonment for up to 6 months or 10 penalty units.

1.95 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 person 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.

1.96 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*.⁵⁸ In this instance, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.⁵⁹

1.97 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate

57 Proposed subsection 101(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

59 Explanatory memorandum, p. 34.

where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.⁶⁰ In this instance, the bill proposes applying strict liability to an offence that is subject to up to 6 months imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

1.98 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying strict liability to the offence at clause 101, particularly as it is subject to a custodial penalty.

Investigations and inquiries by Whistleblower Protection Commissioner⁶¹

1.99 Part 9 of the bill also seeks to provide for whistleblower protection and Division 3 of Part 10 seeks to provide for the appointment of a Whistleblower Protection Commissioner. Section 178 provides that if the Whistleblower Protection Commissioner is investigating or conducting a public inquiry, Parts 5, 6 and 7 of the bill would apply to such an investigation or inquiry as if a reference to the National Integrity Commissioner were a reference to the Whistleblower Protection Commissioner and a reference to a corruption issue were a reference to a whistleblower protection issue.

1.100 As such, all of the committee's scrutiny concerns outlined above regarding the potential for the powers of the National Integrity Commissioner to unduly trespass on personal rights and liberties would apply equally to the powers of the Whistleblower Protection Commissioner.

1.101 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring all of the coercive investigation and inquiry powers outline above on the Whistleblower Protection Commissioner.

Immunity from civil liability⁶²

1.102 Clause 274 seeks to confer immunity from civil liability on certain persons performing functions under or in relation to the bill. These include:

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

61 Proposed section 178. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

62 Proposed subsection 274(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

- staff members of the Commission, in relation to actions taken in good faith in the performance or purported performance, or exercise or purported exercise, of the staff member's functions, powers or duties;
- persons whom the Commissioner has requested in writing to assist a staff member of the Commission, in relation to actions taken in good faith for the purpose of assisting the staff member; and
- persons producing information, evidence, documents or things to the Commission.

1.103 These immunities would remove any common-law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown.

1.104 The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve a personal attack on the honesty of the decision maker. As such, the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.105 The committee expects that, if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.⁶³

1.106 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring an immunity from civil proceedings on a broad range of persons.

63 Explanatory memorandum, p. 81.

Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019

| | |
|-------------------|---|
| Purpose | This bill seeks to amend <i>Corporations Act 2001</i> to remove grandfathering arrangements for conflicted remuneration and other banned remuneration from 1 January 2021 |
| Portfolio | Treasury |
| Introduced | House of Representatives on 1 August 2019 |

Significant matters in delegated legislation⁶⁴

1.107 Since 1 July 2012, the *Corporations Act 2001* has banned the provision of conflicted remuneration to financial advisers.⁶⁵ However, remuneration agreements that had been entered into prior to the ban were grandfathered and therefore not subject to the ban.

1.108 This bill seeks to make a number of amendments to end these grandfathering arrangements for conflicted remuneration and other banned remuneration in relation to financial advice provided to retail clients from 1 January 2021.

1.109 Proposed section 963N allows regulations made under the bill to provide for a scheme under which amounts that would have otherwise been paid as conflicted remuneration are rebated to affected consumers. The regulations may provide a number of key elements of the scheme, such as the timeframe and method for making payments. The regulations may also make different provisions for different classes of persons and circumstances and exclude persons from the operation of the regulations.

1.110 The committee has consistently raised concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such a scheme for the rebate of conflicted remuneration, should be included in the primary legislation unless a sound

64 Schedule 1, item 9, section 963N. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

65 See section 963A of the *Corporations Act 2001*

justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states that:

This regulation making power is intended to be a broad power to ensure that the rebating scheme can be effective for the variety of situations in which conflicted remuneration is provided.

1.111 While the committee notes this explanation, it is unclear why it would not be possible to set out at least some high-level requirements in relation to the operation of this scheme in the primary legislation. For example, by providing a maximum timeframe within which payments must be made.

1.112 In addition, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, section 19 of the *Legislation Act 2003* provides the fact that consultation does not occur cannot affect the validity or enforceability of an instrument. As a result, the committee does not consider that the consultation requirements of the *Legislation Act 2003* are sufficient where significant elements of a legislative scheme are left to delegated legislation.

1.113 The committee requests the Treasurer's more detailed advice as to:

- **why it is considered necessary and appropriate to leave the scheme for the rebate of conflicted remuneration to regulations; 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 regulations).**

Previous comments on reintroduced bills

1.114 The committee has previously commented and reiterates those comments on the following bills which have been restored to the *Notice Paper* or reintroduced into the Parliament between 25 July – 1 August 2019:

- Australian Passports Amendment (Identity-matching Services) Bill 2019
[Scrutiny Digest 2/18](#) and [Scrutiny Digest 3/19](#)
- Identity-matching Services Bill 2019
[Scrutiny Digest 2/18](#); [Scrutiny Digest 3/18](#) and [Scrutiny Digest 5/18](#)

Bills with no committee comment

1.115 The committee has no comment in relation to the following bills which were either restored to the Notice Paper, introduced or reintroduced into the Parliament between 29 July – 1 August 2019:

- Australian Broadcasting Corporation Amendment (Rural and Regional Measures) Bill 2019;
- Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 [No. 2];
- Constitution Alteration (Water Resources) 2019 [No. 2];
- Family Assistance Legislation Amendment (Extend Family Assistance to ABSTUDY Secondary School Boarding Students Aged 16 and Over) Bill 2019;
- Landholders' Right to Refuse (Gas and Coal) Bill 2015;
- New Skilled Regional Visas (Consequential Amendments) Bill 2019; and
- Veterans' Affairs Legislation Amendment (Partner Service Pension and Other Measures) Bill 2019.

Commentary on amendments and explanatory materials

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

- Australian Veterans' Recognition (Putting Veterans and Their Families First) Bill 2019;⁶⁶ and
- National Sports Tribunal Bill 2019 and National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019.⁶⁷

66 On 29 July 2019 the Senate agreed to three Jacqui Lambie Network amendments and the bill was read a third time.

67 On 29 July 2019 a correction to the explanatory memorandum to the bills was presented in the House of Representatives.

Chapter 2

Commentary on ministerial responses

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

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

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

Trespass on rights and liberties¹

2.2 In [Scrutiny Digest 3 of 2019](#) the committee requested the minister's advice as to why it is considered necessary and appropriate to further extend the sunsetting of ASIO's special powers relating to terrorism offences, noting that these powers could unduly trespass on personal rights and liberties.²

Minister's response³

2.3 The minister advised:

The powers were recently reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) who acknowledged the ongoing terrorism threat and concluded that ASIO should continue to have a

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

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 3-5.

3 The minister responded to the committee's comments in a letter dated 27 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

compulsory questioning power. The Australian Government accepts the findings of the PJCIS and is working towards introducing a reformed compulsory questioning framework for ASIO, accompanied by strong safeguards and oversight, as soon as possible.

The Government is developing these broader reforms in a considered, deliberate way, in close consultation with relevant stakeholders, including ASIO and the Office of the Inspector-General of Intelligence and Security.

The Government will ensure that the reformed framework keeps pace with the evolving threat environment and appropriately balances public safety with the need for strong safeguards and oversight. Particularly, an amended compulsory questioning framework must be necessary, appropriate and fit for purpose.

These powers continue to be necessary because they provide a critical means of collecting intelligence which may assist in the prevention of a terrorist attack. As a result, it is appropriate to extend the sunseting of these special powers to ensure the powers continue to remain available while these broader reforms are developed and progressed through Parliament.

Since their introduction in 2003, the powers have been used sparingly. In this time, only 16 questioning warrants have been issued and ASIO has never requested a questioning and detention warrant. As these numbers demonstrate, ASIO is judicious in the use of these intrusive powers, and wherever possible uses the least intrusive techniques to obtain intelligence.

Extending the sunseting of the provisions ensures the powers continue to remain available to ASIO while allowing the PJCIS sufficient time to consider the full reform package. This is consistent with the recent report into the operation, effectiveness and implications of ASIO's questioning and detention powers, where the PJCIS noted they would require at least three months to consider the reforms.

I acknowledge the Committee's comment about the extraordinary nature of these powers and advise that there are rigorous safeguards and oversight procedures in place for the use of these powers. In particular, the Inspector-General of Intelligence and Security may be present at questioning or the taking of a person into custody, a person may make a complaint to the Inspector-General of Intelligence and Security, a person may contact and seek advice from a lawyer and offences apply to officers who breach the safeguards that apply under the *Australian Security Intelligence Organisation Act 1979*.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate to extend the sunseting of ASIO's special powers relating to terrorism as they provide a critical means of collecting intelligence

which may assist in the prevention of a terrorist attack. The committee also notes the minister's advice that these powers have been used sparingly since their introduction in 2003 and that the government is working towards introducing a reformed compulsory questioning framework for ASIO.

2.5 However, the committee reiterates its significant scrutiny concerns regarding the coercive nature of these powers and the potential impact of these powers on a number of rights and liberties. The committee also further reiterates its view that sunset clauses are important safeguards which facilitate increased parliamentary scrutiny and notes its concerns that the continued extension of the sunset date may create a risk that the measures that were originally introduced on the basis of being a temporary response to an emergency situation could become permanent by their continual renewal.

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

Combatting Child Sexual Exploitation Legislation Amendment Bill 2019

| | |
|--------------------|---|
| Purpose | This bill seeks to amend various Acts to create a number of new offences and amend existing offences relating to child pornography material and child abuse material, overseas child sexual abuse, forced marriage, failing to report child sexual abuse and failing to protect children from such abuse. |
| Portfolio | Home Affairs |
| Introduced | House of Representatives on 24 July 2019 |
| Bill status | Before the House of Representatives |

Privilege against self-incrimination⁴

2.7 In [Scrutiny Digest 4 of 2019](#) the committee drew its scrutiny concerns to the attention of senators, and left to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination in circumstances where a 'derivative use' immunity would not be available.

Minister's response⁵

2.8 The minister advised:

I note the Committee's concerns regarding the appropriateness of abrogating the privilege against self-incrimination in relation to the proposed failure to report offence (section 273B.5) in circumstances where a 'derivative use' immunity would not be available.

Proposed section 273B.5 introduces the offence of failure to report child sexual abuse. Under this offence, a Commonwealth officer, who exercises care or supervision over children, will be guilty of an offence if they know of information that would lead a reasonable person to believe or suspect that another person has or will engage in conduct in relation to a child that constitutes a child sexual abuse offence, and they fail to disclose that information as soon as practicable to a police force or service of a State or Territory or the Australian Federal Police.

4 Schedule 1, item 3, proposed subsection 273B.5(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

5 The minister responded to the committee's comments in a letter dated 27 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to [Scrutiny Digest 5 of 2019](#) available at: www.aph.gov.au/senate_scrutiny_digest

Proposed subsection 273B.5(5) explicitly abrogates the privilege against self-incrimination. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that the abrogation of this privilege may be justified where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence and where there is a public benefit in the removal of the common law principle against self-incrimination that outweighs the loss of the privilege (pages 95-96).

The abrogation of the privilege in subsection 273B.5(5) is necessary to ensure that all Commonwealth officers covered by the related offence provisions report abuse or take action to protect against abuse. A person should not be excused from these obligations if, for example, they were concerned that reporting that an employee was abusing a child would expose that they had not ensured that the employee held a valid working with children check card.

Information disclosed pursuant to this offence is subject to a 'use immunity' under subsection 273B.9(10), which prevents this information from being used in any 'relevant proceedings' against the discloser. This provides a constraint on the use of self-incriminating evidence and complies with the principles of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (pages 96-97).

A derivative use immunity is not expressly available to the information disclosed pursuant to the failure to report offence because it would open the immunity up to abuse by persons who are themselves involved in child sex offending. This could occur if such a person made a report for the putative purpose of complying with proposed section 273B.5. The report could lead authorities to discover evidence which showed that the person who had made the report was themselves involved in child sex offending. This evidence would not be able to be used against that person if a derivative use immunity were applied. The very purpose of proposed section 273B.5 is to ensure that child abuse offending is reported so that those involved in the offending can be subject to investigation and prosecution. As quoted in the Committee's report, the Royal Commission identified underreporting as a significant barrier to victims and survivors of child sexual abuse accessing justice.

A number of safeguards are in place to ensure the offence does not go beyond its stated purpose and unnecessarily infringe on the privilege against self-incrimination. A person will be compelled to make a disclosure only to police, who are bound by extensive obligations under State, Territory and Commonwealth privacy laws. Additionally, proceedings against a person cannot be commenced without the consent of the Attorney-General, providing an additional safeguard against the bringing of prosecutions in inappropriate circumstances. Further, the offence will not affect the powers of courts to manage criminal prosecutions that are

brought before them where they find that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the accused.

Committee comment

2.9 The committee thanks the minister for this additional advice as to why it is considered appropriate to abrogate the privilege against self-incrimination in circumstances where a 'derivative use' immunity is not available.

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

2.11 The committee leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination in circumstances where a 'derivative use' immunity would not be available.

Significant penalties

2.12 In [Scrutiny Digest 4 of 2019](#) the committee requested the minister's advice regarding the justification for applying a significant custodial penalty to the proposed offence of possession of certain dolls and other objects, and making current lawful possession unlawful from the day after the Act receives royal assent.⁶

Minister's response⁷

2.13 The minister advised:

I note the Committee's concerns regarding the application of a significant custodial penalty to the proposed offence of possession of certain dolls and other objects.

The Bill proposes to criminalise the possession of a child-like sex doll in the *Criminal Code Act 1995* (the Criminal Code) and, consequential to the expansion of the term 'child abuse material' in Schedule 7, expand the definition of 'child abuse material' to explicitly include child-like sex dolls. Amendments to the *Customs Act 1901* (Customs Act) will also ensure that the *Customs Regulation 2015* explicitly provides that child-like sex dolls are tier 2 goods and banned from import and export under the *Customs Act and Customs (Prohibited Imports) Regulations 1956* and the *Customs (Prohibited Exports) Regulations 1958*.

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2018*, pp. 16-17.

7 The minister responded to the committee's comments in a letter dated 27 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.apf.gov.au/senate_scrutiny_digest

Proposed section 273A.1 criminalises the possession of a child-like sex doll or other object and carries a maximum penalty of 15 years imprisonment. The penalty is consistent with overseas possession offences for child pornography material (as currently defined) and child abuse material in Division 273 of the Criminal Code. It is also consistent with possession offences for child pornography and child abuse materials, such as for videos and images, obtained via a carriage or postal service under Divisions 471 and 474 respectively. This is necessary and appropriate given child-like sex dolls provide for simulated engagement and sexual intercourse with a child, as opposed to visual stimulus. Although this is an under-researched topic, the Australian Institute of Criminology identifies that the use of these materials may objectify children as sexual beings and escalate offender behaviour.⁸ The penalty appropriately reflects this risk and the potential to increase danger to real children.

In relation to the Committee's concerns that the proposed section 273A.1 will make current lawful possession unlawful the day after the Bill receives Royal Assent, it is important to note that various dealings with child-like sex dolls are already prohibited under Commonwealth and State and Territory laws. The Criminal Code and Customs Act offences relating to 'child pornography material' (as currently defined)⁹ and State and Territory offences for possessing child abuse material may currently apply to certain dealings with child-like sex dolls. For example, the Commonwealth's definition of 'child pornography material' is non-exhaustive and doesn't exclude objects such as child-like sex dolls. The New South Wales (NSW) District Court has found that a 'child sex doll' can fall within the definition of child abuse material in section 91FB of the *Crimes Act 1900 (NSW)*. As a result possession and dissemination of a child-like sex doll can be an offence under NSW law.¹⁰

Whilst existing Commonwealth laws relating to child sexual abuse material may apply to dealings with child-like sex dolls, this is not unequivocal. These offences were introduced largely to target printed and electronic material, not three-dimensional objects, and are not fit-for-purpose for combatting child-like sex dolls as a newer form of child abuse material. The Bill updates and clarifies Commonwealth laws to provide that child-like sex

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- 8 Brown, R. and Shelling, J. 2019. Exploring the implications of child sex dolls. Trends and Issues in Crime and Criminal Justice, No. 570, March 2019. Australian Institute of Criminology, Australian Government.
- 9 Under section 473.1, the definition of 'child pornography material' includes: 'material the dominant characteristic of which is the depiction, for a sexual purpose, of: (1) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or (2) a representation of such a sexual organ or anal region; or (3) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age'.
- 10 *R v Miao* [2016] NSWDC 181 (19 August 2016), see: <https://www.cdpp.gov.au/news/man-possession-child-sexdoll-sentenced-imprisonment>.

dolls are 'child abuse material' to which existing Criminal Code offences apply, such as for the use of a carriage service to make available, advertise or solicit child abuse material (section 474.19), the use a postal service for child pornography material (section 471.16) or the possession of child abuse material overseas (Division 273). Proposed section 273A.1 will complement these existing offences to criminalise the possession of child-like sex dolls.

It is important that laws keep pace with new trends and technological developments. The Bill will help do so by ensuring the Commonwealth's legislative framework prohibits dealings with child-like sex dolls, as a new form of child abuse material, across the full spectrum of conduct, from manufacturing to procuring to importing and possession. This will provide certainty to border officials and police that child-like sex dolls are 'child abuse material' for the purposes of detecting and investigating these heinous materials.

Committee comment

2.14 The committee thanks the minister for this response. The committee notes the minister's advice that the penalties for proposed offences relating to the possession of child-like sex dolls are consistent with penalties for comparable offences relating to child abuse material and pornography under the *Criminal Code*.¹¹ The committee also notes the advice that the bill aims to bring child-like sex dolls within the scope of existing laws relating to child abuse material, to ensure that Commonwealth laws designed to combat child abuse keep pace with new trends and technological developments.

2.15 In relation to its concerns that the bill would make current lawful possession of dolls and other objects unlawful from the day of royal assent, the committee notes the minister's advice that various dealing with child-like sex dolls are already prohibited under Commonwealth, state and territory law. In this respect, the committee notes the advice that the Commonwealth definition of 'child pornography material' does not exclude such dolls, and that the NSW District Court has found that such dolls may fall within the definition of 'child abuse material' set out in the *Crimes Act 1900* (NSW).

2.16 The committee acknowledges that the penalties for the proposed offences relating to child-like sex dolls are consistent with those for comparable offences under Commonwealth, state and territory law relating to the possession of child abuse material and pornography.

2.17 Generally the committee will have scrutiny concerns where the introduction of a new offence makes a previously lawful activity unlawful, particularly where a

11 For example, overseas possession offences for child pornography and child abuse material in Division 273, and possession offences for child pornography and child abuse materials obtained via a carriage or postal service in Divisions 471 and 474.

significant penalty attaches to the new offence and people subject to the new offence may be unaware that a previously lawful activity is being criminalised. However, in this instance the committee acknowledges that existing Commonwealth laws relating to child sexual abuse material may already apply to dealings with child-like sex dolls, and notes that the bill seeks to clarify this position.

2.18 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that 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*).

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

Reversal of evidential burden of proof¹²

2.20 In [Scrutiny Digest 4 of 2019](#) the committee requested the minister's advice as to the appropriateness of including the specified matters as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offences, and requests the minister's advice in relation to this matter.¹³

Minister's response

2.21 The minister advised:

I note the Committee's concerns regarding the reversal of the evidential burden of proof in proposed sections 273B.5 and 273A.2, noting that all relevant matters may not be peculiarly within the knowledge of the defendant.

Failure to report child sexual abuse offences

Section 273B.5 introduces the new offences of failure to report child sexual abuse. Subsection 273B.5(4) contains a range of defences for the failure to report offences if:

- (a) the defendant reasonably believes that the information is already known to:
 - (i) the police force or police service of a State or Territory, or
 - (ii) the Australian Federal Police, or

12 Schedule 1, item 3, proposed subsection 273B.5(4) and Schedule 2, item 6, proposed section 273A.2 and 273B.5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2018*, pp. 17-19.

- (iii) to a person or body to which disclosure of such information is required by a scheme established under, or for the purposes of, a law of a State or Territory, or of a foreign country, or
- (b) the defendant has disclosed the information to a person or body for the purposes of a scheme mentioned above, or
- (c) the defendant reasonably believes that the disclosure of the information would put at risk the safety of any person, other than the potential offender, or
- (d) the information is in the public domain.

The defendant has an evidentiary burden in relation to making out a defence contained in subsection 273B.5(4). This is appropriate in this instance as the information to prove the existence of the elements of the defences would be peculiarly within the knowledge of the defendant and significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The prosecution would face significant difficulties if the defences at subsection 273B.5(4) were recast as offence elements. This becomes apparent when one considers, for example, the defence at paragraph 273B.5(4)(b) that the defendant has disclosed the information to a person or body for the purposes of certain other schemes. Were this cast as an offence element and not as a defence, then the Crown would need to raise evidence negating the possibility that each and every such person or body had received a disclosure from the defendant. This would be a very onerous process. It is more sensible for a defence to require the defendant to raise evidence indicating a relevant disclosure has been made to a specific person or body, before the Crown would need to disprove the same beyond reasonable doubt.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* notes that an evidential burden does not completely displace the prosecutor's burden (it only defers that burden). The defendant must point to evidence establishing a reasonable possibility that these defences are made out. If this is done, the prosecution must refute the defence beyond reasonable doubt.

Child-like sex dolls

Proposed section 273A.1 introduces a new offence for possessing child-like sex dolls into the Criminal Code. Proposed section 273A.2 provides for a set of circumstances in which a person is not criminally responsible for an offence against section 273A.1. The defences are equivalent to the defences at section 471.18, which apply in relation to using a postal service for child abuse material and possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal service. The defences will protect people who have legitimate reasons for possessing child-like sex dolls or other similar objects.

Some of the defences in proposed section 273A.2 would be covered by the general defence of lawful authority in section 10.5 of the Criminal Code. However, that defence is not specific to the circumstances covered by these defences and does not sufficiently cover all the types of people that would be legitimately entitled to a defence for possession of child-like sex dolls, particularly as the lawful authority defence only applies to conduct justified or excused by or under Commonwealth law.

Subsection 273A.2(1) will provide a defence for persons who engage in particular conduct that is of public benefit and does not extend beyond what is of public benefit. The test is an objective one, meaning the motives or intentions of the person who engaged in the conduct are not relevant and would not be considered in determining whether the conduct is in fact of public benefit.

Subsection 273A.2(2) provides an exhaustive list of conduct that is of public benefit. If a person engages in conduct that meets one of the four criteria in subsection 273A.2(2) it will be considered to be 'of public benefit' for the purposes of subsection 273A.2(1). It will be a question of fact, to be determined by the court, as to whether the conduct meets one of the four criteria and therefore is of public benefit. It will also be a question of fact as to whether the conduct extends beyond what is of public benefit. The four criteria cover conduct that is necessary for, or of assistance in:

- a) enforcing a law of the Commonwealth, a State or a Territory
- b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory
- c) the administration of justice, or
- d) conducting scientific, medical or educational research.

Subsection 273A.2(3) provides a defence in relation to section 273A.1 for law enforcement officers, intelligence or security officers acting in the course of their duties where their conduct is reasonable in the circumstances for the purpose of performing that duty. 'Law enforcement officer' and 'intelligence or security officer' are defined in Part 10.6 of the Criminal Code.

The defendant bears an evidential burden in relation to the defences at subsections 273A.2(1) and 273A.2(3), replicating the existing defences for child abuse material and child pornography offences at sections 273.9, 471.18, 474.21 and 474.24 of the Criminal Code. This approach is consistent with criminal law policy as described in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. The Guide refers to the principle that it is legitimate to cast a matter as a defence where a matter is peculiarly within the defendant's knowledge and is not available to the prosecution.

Under these defences, the defendant has the evidential burden of proving that their possession of the child-like sex doll was of public benefit or constituted the reasonable performance of their duty as a law enforcement, intelligence or security officer. This is appropriate as a person's reasons for possessing a doll are often peculiarly within the defendant's knowledge and proving that the doll was not held for one of the above reasons may be unduly difficult or expensive for the prosecution to prove.

As previously noted, the evidential burden does not completely displace the prosecutor's burden (it only defers the legal burden to the prosecution). The defendant must point to evidence establishing a reasonable possibility that these defences are made out. If this is done, the prosecution must refute the defence beyond reasonable doubt (section 13.3 Criminal Code).

Committee comment

2.22 The committee thanks the minister for this response.

Failure to report child sexual abuse offences

2.23 The committee notes the minister's advice that the information needed to establish the defences in section 273B.5 would be peculiarly within the defendant's knowledge, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

2.24 The committee also notes the minister's advice that the prosecution would face significant difficulties if the relevant defences were included as elements of the offences to which they relate. In this respect, the committee notes the advice that casting the defence in proposed paragraph 273B.5(4)(b) would require the Crown to raise evidence negating the possibility that each of a large number of persons had received a disclosure from the defendant.

2.25 The committee appreciates that the matters set out in proposed paragraph 273B.5(4)(b) may be significantly more difficult for the prosecution to disprove than for the defendant to establish. Further, the relevant matters may be, if not peculiarly within the defendant's knowledge, at least better known to the defendant than to the prosecution or to any individual third party. The committee also acknowledges that the matters in proposed paragraphs 273B.5(4)(a) and (c) may be peculiarly within the knowledge of the defendant, noting that they relate to the defendant's state of mind.

2.26 However, it remains unclear that the matters set out in proposed paragraph 273B.5(4)(d) would be peculiarly within the defendant's knowledge, or significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. In this respect, the committee reiterates that whether information is in the public domain would appear to be public knowledge available to the prosecution.

Possession of child-like sex dolls offences

2.27 The committee notes the minister's advice that the defences in proposed subsections 273A.2(1) and (3) are appropriate. In this respect, the committee notes the advice that a defendant's reasons for possessing a child sex doll are peculiarly within their knowledge, and the advice that proving the doll was not held for one of the listed reasons may be unduly difficult or expensive for the prosecution.

2.28 However, it is not apparent to the committee that the matters set out in those provisions would be peculiarly within the defendant's knowledge. For example, whether a person is a law enforcement officer acting within the course of their duties, and whether particular conduct is reasonable in that context, could be established by the prosecution through reasonable inquiries, taking into account the legislative and policy environment within which the person operates.

2.29 It is also not apparent that whether conduct is of public benefit would be peculiarly within the defendant's knowledge. Rather, this appears to be a factual matter which would be left to the court to determine. This conclusion appears to be supported by the minister's response, which also states that 'the motives or intentions of [the defendant] are not relevant, and would not be considered in determining whether the conduct is in fact of public benefit'.

2.30 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that 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*).

2.31 In light of the minister's advice, the committee makes no further comment on the reversal of the evidential burden of proof in the offence-specific defences at proposed paragraphs 273B.5(4)(a), (b) and (c).

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 reversing the evidential burden of proof in the offence-specific defences at proposed paragraph 273B.5(4)(d) and proposed subsections 272A.2(1) and (3).

Reversal of legal burden of proof¹⁴

2.33 In [Scrutiny Digest 4 of 2019](#) the committee requested the minister's advice as to why it is proposed to reverse the legal burden of proof in this instance and why it is not sufficient to reverse the evidential, rather than legal, burden of proof.¹⁵

14 Schedule 6, item 1, proposed section 272.17. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2018*, pp. 19-21.

Minister's response

2.34 The minister advised:

I note the Committee's concerns regarding the reversal of the legal burden of proof in proposed section 272.17.

Schedule 6 of the Bill repeals a defence at existing section 272.17 that currently allows an offender to escape culpability for sexual intercourse or sexual activity with a child under 16 years outside Australia if they can prove they were in a genuine marriage with the child at the time.

The Bill proposes to substitute section 272.17 with a new, narrower defence that is only applicable to offences under subsections 272.12(1) and 272.13(1). These offences relate to engaging in sexual intercourse or sexual activity with a young person who has attained the age of at least 16 years but under 18 years outside of Australia and where the person is in a position of trust or authority.

To establish the new defence, the defendant must prove that, at the time of the alleged offence, there existed a marriage that was valid and genuine, and the young person had attained the age of 16 years. This requirement is to ensure that a sham or fictitious marriage is not used as a defence. This requirement is also consistent with section 272.16, which provides a defence against section 272.8 (sexual intercourse) or section 272.9 (sexual activity) with a child outside of Australia if the defendant proves that at the time of the sexual intercourse or sexual activity the defendant believed the child was at least 16. It is also consistent with the minimum legal marriageable age under the *Marriage Act 1961* (Cth).

The new defence retains the existing approach at section 272.17 by requiring that the defendant bears a legal burden in establishing the valid and genuine marriage defence (see section 13.4 and 13.5 of the Criminal Code). A legal burden is appropriate as the matters required to be positively proved would be peculiarly within the knowledge of the defendant, and also because the defendant would be best placed to adduce the evidence that would be required to establish them beyond reasonable doubt. These matters include the genuineness of the marriage and its validity under the relevant foreign country's laws. With respect to the genuineness of the marriage, the defendant could, for example, adduce evidence relating to the duration of the relationship and cohabitation arrangements. With respect to the validity of the marriage, the defendant could adduce evidence in the form of documents issued in the relevant foreign country (e.g. marriage certificate). Such matters would be significantly more difficult and costly for the prosecution to disprove beyond reasonable doubt than for the defendant to establish.

This approach is consistent with the guidance provided in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (page 50).

The amendment will bring Australia's overseas child sex offences into line with the Government's broader efforts to combat child sexual abuse and forced marriage.

Committee comment

2.35 The committee thanks the minister for this response. The committee notes the minister's advice that reversing the legal burden of proof is appropriate as the matters required to be proved are peculiarly within the defendant's knowledge, and the defendant is 'best placed' to adduce the evidence that would be required to establish those matters beyond reasonable doubt.¹⁶ The committee also notes the advice that the matters would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

2.36 The *Guide to Framing Commonwealth Offences* indicates that it may be appropriate to create an offence-specific defence (which reverses the burden of proof) where relevant matters are peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.¹⁷ In this respect, the committee notes that the creation of a defence relating to the existence of a valid marriage may be justified.

2.37 However, the Guide also states that placing a legal burden of proof on a defendant should be kept to a minimum and, where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.¹⁸ The minister's response does not appear to provide an express justification for reversing the legal, instead of only the evidential, burden of proof. It therefore remains unclear whether the imposition of a legal burden is appropriate in the relevant circumstances.

2.38 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

2.39 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of reversing the legal burden of proof in relation to the defences in proposed section 272.17, relating to the existence of a valid and genuine marriage.

16 The minister's advice notes that the defendant may adduce evidence relating to the duration of the marriage, cohabitation arrangements, and documents issued under the laws of the relevant foreign country.

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

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

Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

| | |
|--------------------|---|
| Purpose | This bill seeks to introduce an exclusion orders scheme to delay Australians of counter-terrorism interest from re-entering Australia |
| Portfolio | Home Affairs |
| Introduced | House of Representatives on 4 July 2019 |
| Bill status | Received Royal Assent on 30 July 2019 |

Trespass on personal rights and liberties

Broad discretionary power¹⁹

Exclusion of judicial review²⁰

Procedural fairness²¹

2.40 In [Scrutiny Digest 3 of 2019](#) the committee requested the minister's advice in relation to:

- the necessity and appropriateness of providing the minister with broad discretionary powers to both issue temporary exclusion orders and impose conditions on return permits;
- why merits review is not provided for;
- why the bill is not subject to additional parliamentary oversight, such as a sunset provision;²²
- why it is considered appropriate to exclude judicial review under the *Administrative Decisions (Judicial Review) Act 1977* in relation to decisions made under the bill;²³ and
- why it is appropriate and necessary to remove the obligation of the minister to observe the requirements of procedural fairness (and whether it may be

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

20 Clause 27. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

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

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 6-11.

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 11-13.

appropriate to amend the bill to remove clause 26 to ensure the minister is required to observe the usual requirements of procedural fairness when exercising powers under the bill).²⁴

Minister's response²⁵

2.41 The minister advised:

I note the Committee's concerns relating to the Minister's powers. Providing the Minister with these powers allows counter-terrorism authorities to respond rapidly to cases where information indicates a person of counter-terrorism interest is seeking to return to Australia. The TEO scheme does not permanently exclude a person from Australia, but rather can delay and regulate their return. The process for a person to apply for a return permit is not onerous. A third party, such as a legal representative or family member, can apply for a return permit on the person's behalf. Furthermore, the Minister has broad discretion to issue a return permit in other circumstances, including where the person is unable to apply.

Once in Australia under a return permit, the person may be subject to a number of notification requirements. These requirements are not onerous, and overwhelmingly are not a restriction on the person's activities. Notification requirements are necessary to allow security and law enforcement agencies to more easily identify changes in behaviour that may be of security concern. The Minister must be satisfied that the imposition of the condition and (if more than one condition is imposed) the conditions taken together are reasonably necessary, and reasonably appropriate and adapted, for the purpose of preventing terrorism-related activities.

In response to recommendations made by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in April 2019, the Bill establishing a TEO scheme was amended to provide additional independent oversight before being passed by the Parliament. The legislation appropriately balances independent oversight of the scheme with operational requirements. As noted by the Committee, the legislation provides that, except in urgent circumstances, a TEO does not come into force until a reviewing authority has reviewed the Minister's decision to make a TEO. If a reviewing authority determines the Minister's decision was not lawful, the TEO is taken to have never been made.

I note the Committee's request for advice on why merits review is not provided for, and why the legislation is not subject to additional

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 13-15.

25 The minister responded to the committee's comments in a letter dated 27 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

parliamentary oversight, such as a sunset provision. The purpose of a TEO is to prevent terrorism-related conduct by a person who might return to Australia. Allowing merits review would lengthen the decision-making process and could result in the person returning to Australia without adequate notice or security measures being in place. Further, the relevant person is entitled to seek judicial review in the High Court of Australia under section 75(v) of the Constitution, or in the Federal Court of Australia under section 398 of the *Judiciary Act 1903*.

Similarly, the exclusion of *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) review is necessary to respond with speed and certainty in a dynamic threat environment. A reviewing authority already provides independent review of the Minister's decision to make a TEO against a person. Review under the ADJR Act would largely replicate existing forms of review undertaken by the reviewing authority. Additionally, review under the ADJR Act would create challenges for protecting sensitive information. Classes of decisions which are likely to rely on sensitive information are usually excluded from the ADJR Act to limit the possibility of that information being exposed. On balance, it is preferable that the TEO scheme have streamlined and efficient mechanisms for review but not where it results in duplication or risks to sensitive information.

While the Act does not contain a sunset provision, it contains provisions for parliamentary and other oversight. The Minister must prepare an annual report for Parliament about the operation of the Act. Consistent with the recommendations made by the PJCIS, the *Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Act 2019* provides that the PJCIS will review the Minister's exercise of power under the Act. The PJCIS will also be required to conduct a review of the TEO scheme within three years of the scheme's commencement. The Independent National Security Legislation Monitor also has a statutory function to review the operation, effectiveness and implications of the Act. These oversight mechanisms will assess whether the legislation continues to be necessary and fit for purpose.

Excluding procedural fairness and not providing for merits review are not matters the Government takes lightly. However, the extent to which this impacts a person's avenues for review is necessary to protect Australian communities. Providing procedural fairness in relation to the decision to make a TEO could allow the person to whom the TEO relates to return to Australia before the TEO is made. This would create an unacceptable risk to safety for Australian communities, thereby defeating the purpose of the Act.

There are also practical difficulties affording procedural fairness to a person offshore, who presents a security risk and may be located in a conflict zone. I note the Committee's views on the court's interpretation of procedural fairness taking into account the circumstances, as outlined in paragraph 1.49 of *Scrutiny Digest 3 of 2019*. However, the TEO scheme is

designed to manage Australians who pose a threat to community safety and are likely located in conflict zones. The safety of Australians, including Australian officials overseas, remains paramount in the development and implementation of our counter-terrorism framework. The extent to which notification can be given to a person will often be extremely limited. Furthermore, a TEO will be informed by highly sensitive intelligence, a substantial proportion of which could not be disclosed to the person.

If the person considers that there are reasons a TEO should not have been made, that person can make submissions to the Minister to have the TEO revoked under section 11 of the Act. As a matter of administrative law, the Minister will be obliged to take into account any information provided by the person in support of an application for the revocation of a TEO, or the variation or revocation of a return permit.

Committee comment

2.42 The committee thanks the minister for this response. The committee notes the minister's advice that providing the Minister with the power to make a temporary exclusion order and impose conditions on return permits allows counter-terrorism authorities to respond rapidly to cases where information indicates a person of counter-terrorism interest is seeking to return to Australia.

2.43 The committee reiterates its significant scrutiny concerns regarding the power of the minister to exclude Australian citizens from entering Australia, noting that the issuing of an exclusion order severely limits the citizenship rights of Australians to freely enter their country of nationality and could potentially leave an Australian citizen stranded in a conflict zone. The committee also reiterates its significant scrutiny concerns in subjecting persons to monitoring conditions without any requirement that the person needs to have been convicted of, let alone charged with, any offence. The committee considers that the minister's response does not adequately address why it is necessary and appropriate to provide the minister with such broad discretionary powers.

2.44 The committee notes the minister's advice that allowing merits review would lengthen the decision-making process and could result in the person returning to Australia without adequate notice or security measures being in place and that judicial review is available. However, the committee notes that the minister's response does not address the committee's comments regarding the limitations of judicial review in providing an adequate review mechanism for decisions made under this bill.

2.45 The committee also notes the minister's advice that, while the bill does not contain a sunset provision, there are other provisions to provide for parliamentary scrutiny and oversight, including a requirement that the Parliamentary Joint Committee on Intelligence and Security review the operation of the scheme.

2.46 The committee notes the minister's advice that the exclusion of *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) review is necessary to

respond with speed and certainty in a dynamic threat environment. While the committee notes the minister's advice that review under the ADJR Act would largely replicate existing forms of review undertaken by the reviewing authority, the minister's response does not address any of the potential issues raised by the committee that may limit the ability of the reviewing authority to provide an appropriate safeguard compared to the breadth of the discretionary power provided to the minister. The committee does not consider that the inclusion of the reviewing authority adequately compensates for the exclusion of judicial review under the ADJR Act.

2.47 The committee notes the minister's advice that providing for procedural fairness in relation to the decision to make a temporary exclusion order (TEO) could allow the person to whom the TEO relates to return to Australia before the TEO is made. The committee also notes the minister's advice that there are practical difficulties in relation to providing information or notifications to persons located in conflict areas, especially where the information may be highly sensitive or classified.

2.48 The committee reiterates its serious scrutiny concerns regarding the removal of the obligation of the minister to observe procedural fairness. The committee also notes that the minister's response does not adequately address scrutiny issues raised by the committee, including why it is appropriate to remove the right to procedural fairness in relation to decisions by the minister to vary or revoke a return permit and why the bias rule has been excluded.

2.49 In light of the fact that the bill has passed both Houses of Parliament, the committee makes no further comment on these matters.

Reversal of the evidential burden of proof²⁶

2.50 In [Scrutiny Digest 3 of 2019](#) the committee requested 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.²⁷

Minister's response

2.51 The minister advised:

I note the Committee's request for advice on the use of offence-specific defences in the legislation, which reverse the evidential burden of proof. The Guide to Framing Commonwealth Offences (the Guide) sets out some circumstances where creating an offence-specific defence is appropriate, relevantly:

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

27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 15-16.

- the matter in question is not central to the question of culpability for the offence; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.

The offence-specific defences in the Act have been drafted consistent with the Guide and do not relate to matters that are central to the question of culpability for the offence. Rather, the inclusion of specific defences ensures that the offences do not capture persons who were otherwise acting lawfully. Furthermore, the intent of the TEO scheme is to protect the Australian community from terrorism, and any conduct which would seek to undermine or circumvent the scheme could pose grave danger to public safety. Finally, the Guide provides that where an offence-specific defence is created, it should be made clear on the face of the legislation. This guidance has been followed in the drafting of the relevant sections of the Act.

Committee comment

2.52 The committee thanks the minister for this response. The committee notes the minister's advice that the offence-specific defences in the bill have been drafted consistent with the *Guide to Framing Commonwealth Offences*. The committee also notes the minister's advice that the defences do not relate to matters that are central to the question of culpability for the offence. Rather, the inclusion of specific defences ensures that the offences do not capture persons who were otherwise acting lawfully.

2.53 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.

2.54 It remains unclear to the committee that the offence-specific offences in the bill are either peculiarly within the knowledge or significantly more difficult and costly for the prosecution to disprove as this has not been addressed by the minister.

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

Criminal Code Amendment (Agricultural Protection) Bill 2019

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

Reversal of the evidential burden of proof²⁸

2.56 In [Scrutiny Digest 3 of 2019](#) the committee requested the Attorney-General's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offences, and requests the minister's advice in relation to this matter.²⁹

Attorney-General's response³⁰

2.57 The Attorney-General advised:

The Committee has requested that I provide detailed justification as to the appropriateness of the exemptions for journalists and whistleblowers being offence-specific defences in the Bill, and asks whether it would be appropriate for these defences to be redrafted as elements of the offences. The Committee has noted the two step test in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* for establishing whether it is appropriate that a circumstance be established as an offence-specific defence rather than an element of the offence, specifically that:

- it is peculiarly with 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.

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

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 17-19.

30 The minister responded to the committee's comments in a letter dated 8 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

Each of the proposed provisions (subsections 474.46(2) and (3) and subsections 474.47(2) and (3)) meet this threshold, for the reasons outlined in further detail below.

While any defendant would bear the evidential burden in relation to these exemptions, the legal burden of proof would remain with the prosecution. A defendant would merely need to raise evidence that suggests a reasonable possibility that the exemption would apply to their circumstances, before the prosecution would need to disprove the same beyond reasonable doubt.

I note that the defences will only be engaged in rare cases where there is a question as to whether the defendant is a bona fide journalist or whistleblower. In practice, the Prosecution Policy of the Commonwealth would likely exclude bona fide journalists and whistleblowers before proceedings were even commenced where this defence would clearly be available.

I also note that in some circumstances the evidential burden may be discharged through evidence adduced by the prosecution or the court, as provided by subsection 13.3(4) of the Criminal Code. In such cases, the defendant would not need to adduce additional evidence that the exemption would apply to their circumstances, and the application of the exemption would be a matter solely for the prosecution to disprove beyond reasonable doubt.

Subsections 474.46(2) and 474.47(2)–Journalism

Subsections 474.46(2) and 474.47(2) provide exemptions to their associated offences (which are found in subsections 474.46(1) and 474.47(1) respectively) where the material relates to a news report, or a current affairs report, that is in the public interest and is made by a person working in a professional capacity as a journalist.

These offences will not capture the legitimate activities of a journalist or media organisation. It would be difficult to conceive of circumstances where a legitimate news article or similar report would evince an actual intention that readers, viewers, or listeners trespass, cause damage or steal on agricultural land. Intention is an inherently high threshold and would require significantly more than an inadvertent, accidental or even negligent suggestion in a news report.

However, as highlighted in the explanatory memorandum to the Bill, this exemption puts beyond doubt that bona fide journalism is not captured by the offences. It is intended that persons involved at any stage of bona fide journalism, from research to publication, are not captured by the offence.

The inclusion of exemptions is also appropriate to ensure that the offences do not criminalise public interest journalism, given that the general defences in the Criminal Code may not apply to all circumstances.

Matters are peculiarly within the knowledge of the defendant

The defendant would be best placed to raise evidence that they are working in a professional capacity as a journalist and that the conduct in question relates to this employment. For example, details of an individual's employment situation and the work they undertake in this capacity would be peculiarly within their knowledge, as would their reasons as to publication (including planned publication) and therefore why the material is in the public interest.

Matters would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish

As already noted, it would be difficult to envisage the legitimate activities of journalists being capable of falling within the terms of the primary offence. This said, were the exemption achieved through an element in the primary offence, essentially requiring the prosecution to disprove the matter in every case, this would add unnecessary complexity to all prosecutions.

I acknowledge there may be circumstances where it would be just as easy for the prosecution to disprove as it is for the defendant to establish that the material related to bona fide journalism. This may be the case where material involves a well-known journalist or is published in a well-known journalistic publication. However, in such cases it would be usual practice for the prosecution to take this information into account before deciding to proceed with any prosecution in the first place, consistent with the Commonwealth's prosecution policy.

However, there are a range of circumstances where it will be substantially more difficult for the prosecution to disprove the existence of the exemption were they to bear the burden.

For example, where a freelance journalist is working for multiple companies on a commission basis, it could be more difficult for the prosecution to establish whether any particular conduct is a result of the person acting in their role as a journalist, or in a personal capacity. Comparatively, for a defendant to establish that the material related to bona fide journalism, they could simply have their employer or publisher provide evidence confirming their role, the professional nature of the conduct or to otherwise demonstrate the links to a particular publication.

Similarly, where a journalist is self-publishing, it would be far easier for the journalist to point to evidence of bona fide journalism, than it would be for the prosecution to disprove that the person was acting as a journalist.

In most—if not all—cases of bona fide journalism, relevant evidence to establish the exemption will likely be in the possession of the defendant, whereas only in some cases will the prosecution be in possession of similar evidence.

For these reasons, it is appropriate that the defendant bear an evidential burden in relation to this defence.

Subsections 474.46(3) and 474.47(3)–Whistleblowers

Subsections 474.46(3) and 474.47(3) provide exemptions to their associated offences (which are found in subsections 474.46(1) and 474.47(1) respectively) where, as a result of the operation of a law of the Commonwealth, a State or a Territory, the person is not subject to any civil or criminal liability for that conduct. As discussed in the explanatory memorandum to the Bill, this is primarily intended to ensure that a person making a disclosure under a statutory whistleblower or lawful disclosure scheme is not subject to the offence.

As with journalists, these offences will not capture the legitimate activities of whistleblowers. In particular, it would be difficult to conceive of circumstances where a person is making a lawful disclosure with the actual intention to incite trespass, cause damage or steal on agricultural land. As noted above, where the legitimate activities of whistleblowers are in question, it would be usual practice for the prosecution to take this information into account before deciding to proceed with any prosecution in the first place, consistent with the Commonwealth's prosecution policy.

While the defence of lawful authority (section 10.5 of the Criminal Code) may already apply to any whistleblowers in relation to disclosures permitted under Commonwealth law, it does not provide protection for people whose disclosures might be permitted or justified under relevant State or Territory laws. There are no general defences in the Criminal Code that would provide protection where State or Territory laws might exclude criminal liability. As such it is necessary to include a broader exemption to ensure that the offence does not criminalise lawfully protected disclosures under state and territory whistleblowing laws.

The existing defence of lawful authority in section 10.5 of the Criminal Code places the evidential burden on the defendant. For consistency with this provision and the reasons discussed below, it is appropriate that the evidential burden be placed on the defendant in relation to this exemption as well.

Matters are peculiarly within the knowledge of the defendant

Whistleblowing regimes exist in Commonwealth, State and Territory jurisdictions. These regimes will often include protections for the discloser's identity, including from a court or tribunal. For example, section 20 of the *Public Interest Disclosure Act 2013* makes it an offence for a person to disclose identifying information about a second person who made a Public Interest Disclosure. Furthermore, section 21 of that Act provides that a person is not to be required to disclose (or produce) to a court or tribunal identifying information (or a document containing such information). As such, knowledge of whether a person has taken the

necessary steps for their disclosure to be covered by a whistleblowing regime are peculiarly within the knowledge of the defendant.

Matters would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish

Similarly, the secrecy provisions of the various whistleblowing regimes would make it very difficult and costly for the prosecution to establish whether or not a defendant had complied with the requirements of the regime. This is particularly true in cases where multiple regimes may be applicable. In most cases the relevant documentation about the applicable regimes and the necessary steps to disclose appropriately would be in the possession of the whistleblower. Therefore it would be easier for the defendant to lead evidence of a reasonable possibility that they had engaged with the requirements of the whistleblowing regime.

Committee comment

2.58 The committee thanks the Attorney-General for this response. In relation to the exemption for journalism, the committee notes the Attorney-General's advice that the defendant would be best placed to raise evidence that they are working in a professional capacity as a journalist and that the conduct in question relates to this employment. The committee also notes the Attorney-General's advice that in most—if not all—cases of bona fide journalism, relevant evidence to establish the exemption will likely be in the possession of the defendant, whereas only in some cases will the prosecution be in possession of similar evidence. While the committee accepts that it may be easiest for the defendant to lead evidence in relation to their professional capacity, it remains unclear that this information would be *peculiarly* within the knowledge of the defendant.

2.59 In addition, the committee notes that the bill contains no definition as to when a news or current affairs report will be in the public interest. While the Attorney-General's response suggests that an individual's reasons for publication would be peculiarly within their knowledge, the committee considers that the undefined nature of what would constitute a news or current affairs report made 'in the public interest' would potentially make it difficult for a person to raise evidence to suggest the exemption applies.

2.60 In relation to the exemption for whistleblowers, the committee notes the Attorney-General's advice that the exceptions in subsections 474.46(3) and 474.47(3) are primarily intended to ensure that a person making a disclosure under a statutory whistleblower or lawful disclosure scheme is not subject to the offence. The committee also notes the Attorney-General's advice that provisions preventing the disclosure of a whistleblower's identity mean that knowledge of whether a person has taken the necessary steps for their disclosure to be covered by a whistleblowing regime are peculiarly within the knowledge of the defendant. The committee further notes the advice that the secrecy provisions of the various whistleblowing regimes

would make it very difficult and costly for the prosecution to establish whether or not a defendant had complied with the requirements of the regime.

2.61 The committee also notes the Attorney-General's advice that in practice, the Prosecution Policy of the Commonwealth would likely exclude bona fide journalists and whistleblowers before proceedings were even commenced where this defence would clearly be available. The committee does not consider non-legislative policy guidance to be a sufficient justification for the use of offence-specific defences, noting that there is no parliamentary oversight of changes to policy documents.

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

2.63 The committee considers that it may be appropriate for the bill to be amended to incorporate the matters outlined in subsections 474.46(2) and 474.47(2) as elements of the relevant offences. The committee otherwise 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 relation to the matters set out in those subsections, which do not appear to be peculiarly within the knowledge of the defendant.

2.64 In respect of subsections 474.46(3) and 474.47(3), in light of the information provided, the committee makes no further comment.

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

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

Strict liability offences³¹

2.65 In *Scrutiny Digest 3 of 2019* the committee requested the minister's more detailed justification for the application of strict liability to offences attracting

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

penalties of either 100 penalty units and two years' imprisonment or 120 penalty units.³²

Minister's response³³

2.66 The minister advised:

The Committee has sought a more detailed justification for the application of strict liability to offences attracting penalties of either 100 penalty units and 2 years imprisonment or 120 penalty units under the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill).

As identified by the Committee, strict liability applies to proposed sections 226, 3230 and 323H of the Bill. Strict liability offences remove the requirement to prove fault, that is, no mental element is required.

Proposed section 226

Proposed section 226 of the Bill would provide for a number of new offences including standing for or continuing to hold office, or effectively acting as a shadow officer, whilst disqualified.

As stated in the Explanatory Memorandum to the Bill, strict liability will only apply to the physical element of the offences, being that the person is disqualified from holding office by an order of the Federal Court. Strict liability is justified and appropriate in these circumstances because a person would be aware that the Federal Court has made such an order. The defence of honest and reasonable mistake of fact is also available and strict liability will not apply where a person is automatically disqualified.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) published by my Department, states that elements of offences that provide for strict liability can be justified where they are necessary to provide the required deterrent effect.

In the Final Report of the Royal Commission into Trade Union Governance and Corruption (the Final Report), Commissioner Heydon noted what he termed an 'obvious lacuna' in the current provisions in the Fair Work (Registered Organisations) Act 2009 (Cth) (the FW(RO) Act) being that there is no consequence for a person who continues in an office after disqualification.

In contrast, Commissioner Heydon noted that s 206A(1) of the *Corporations Act 2001* (Cth) (Corporations Act) specifies that a person who is disqualified from managing corporations and continues to act in that

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 20-22.

33 The minister responded to the committee's comments in a letter dated 7 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

manner commits a criminal offence of strict liability. Commissioner Heydon specifically recommended, that the FW(RO) Act be amended to make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office. Further, he explicitly stated that the offence should be an offence of strict liability with a maximum penalty of 100 penalty units or imprisonment for two years, or both. It is notable that the equivalent Corporations Act offence carries a maximum penalty of 600 penalty units or imprisonment for five years, or both.

In light of Commissioner Heydon's findings, having considered the extensive evidence and testimony before him, it is my view that applying a fault element, whether intention, knowledge, recklessness or negligence, would unnecessarily weaken the deterrent effect of disqualification orders under new section 226. Further, departing from the Commissioner's considered view of the appropriate elements and penalty of the offence would also weaken the legitimate policy imperative of ensuring that disqualified officers do not hold, or act as if they hold, office in an organisation.

Proposed section 323

Section 323 of the Bill provides a scheme for dysfunctional organisations to be placed into administration. Specifically, proposed sections 323G and 323H respectively make it a criminal offence for failure to assist an administrator or provide an organisation's books on request.

The use of strict liability for these offences is consistent with the principles relating to strict liability at 2.2.6 of the Guide insofar as strict liability is required to ensure the integrity of the regulatory regime related to registered organisations. In addition, the penalty unit amount, while exceeding the maximum recommended penalty units, does not include a term of imprisonment.

As the explanatory memorandum notes, the defence of honest and reasonable mistake of fact will be available. In addition, I also note that these strict liability offences, including the level of penalty units, are modelled on similar offences in the Corporations Act.

Committee comment

2.67 The committee thanks the minister for this response. The committee notes the minister's advice that, in relation to proposed section 226, the penalty was recommended by Commissioner Heydon in the *Final Report of the Royal Commission into Trade Union Governance and Corruption* and that departing from the Commissioner's considered view of the penalty for the offence would weaken the legitimate policy imperative of the measures. In relation to proposed sections 323G and 323H, the committee notes the minister's advice that the level of penalty units is modelled on similar offences in the *Corporations Act 2001*.

2.68 While noting the explanation provided by the minister, from a scrutiny perspective, the committee remains concerned about the application of strict liability to offences carrying penalties of either 100 penalty units and two years' imprisonment or 120 penalty units. In this regard, the committee reiterates that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the relevant offence is only punishable by up to 60 penalty units.³⁴

2.69 Making an offence one of strict liability removes the requirement for the prosecution to prove the defendant's fault. This undermines the fundamental criminal law principle that 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). Consequently, the committee has a long-standing view that strict liability will never be appropriate for offences which are punishable by a period of imprisonment. In this instance, the committee does not consider consistency with existing penalties to be sufficient justification for applying strict liability in circumstances in which the penalty is inconsistent with the recommendations of the *Guide to Framing Commonwealth Offences*.

2.70 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing strict liability for offences attracting penalties of either 100 penalty units and two years' imprisonment or 120 penalty units.

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

Migration Amendment (Repairing Medical Transfers) Bill 2019

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

Trespass on rights and liberties³⁵

2.71 In [Scrutiny Digest 3 of 2019](#) the committee requested the minister's advice as to why it is necessary and appropriate to include sub-item 15(1) of Schedule 1 to the bill (which provides that subsection 7(2) of the *Acts Interpretation Act 1901* does not apply to the repeal of the medical transfer provisions) and whether its inclusion will trespass on the rights and liberties of any person.³⁶

Acting Minister's response³⁷

2.72 The acting minister advised:

The Committee has requested I provide more detailed information as to why it is necessary and appropriate to include sub-item 15(1) of Schedule 1 to the Bill and whether its inclusion will trespass on the rights and liberties of any person (Senate Scrutiny of Bills Committee Digest No. 3 of 2019, dated 24 July 2019 refers).

Sub-item 15(1) of the Bill provides that subsection 7(2) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act) does not apply in relation to the repeal of the medical transfer provisions inserted into the Migration Act by Schedule 6 of the Miscellaneous Measures Act. Subsection 7(2) of the Acts Interpretation Act would, if applicable,

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

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 23-24.

37 The acting minister responded to the committee's comments in a letter received 26 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

preserve, amongst other things, any right, privilege, obligation or liability acquired, accrued or incurred under the medical transfer provisions.

By expressly excluding the applicability of subsection 7(2) of the Acts Interpretation Act, any right, privilege, obligation or liability acquired, accrued or incurred under the medical transfer provisions, including those acquired, accrued or incurred by a relevant transitory person, will be extinguished on commencement of the Bill other than those rights preserved by sub-item 15(2), which is addressed below.

This position was taken because the existing power in section 198B of the Migration Act can still be exercised to effect the temporary transfer of a transitory person to Australia, including for the delivery of medical care to that person. This power continues to operate in parallel to the medical transfer provisions introduced in March 2019. These existing transfer mechanisms mean that those persons in need of medical attention in Australia or a third country will receive that attention. As such, it is an unnecessary duplication to preserve any rights accrued under the medical transfer provisions, other than those preserved in sub-item 15(2).

Significant medical support and services are available in Nauru and Papua New Guinea, delivered by experienced and professional health contractors. This support is supplemented by tele-medicine and visiting health specialists. Medical transfer options outside Australia are in place with Papua New Guinea and Taiwan for transitory persons in Nauru. These options cannot be explored and used under the medical transfer provisions introduced by Schedule 6 of the Miscellaneous Measures Act.

It is also important to note the operation of sub-item 15(2). This provides that, despite sub-item 15(1), the repeal of the medical transfer provisions does not affect rights or liabilities arising between parties to proceedings in which judgment is reserved by a court or has been delivered by a court as at the commencement of this item, and the judgment sets aside, or declares invalid, a decision made under a medical transfer provision. The purpose of this sub-item is to confirm that the repeal of a medical transfer provision will not affect cases where judgment has been reserved or delivered by a court before the commencement of this item. The effect of this is to preserve any such decision (or pending decision) of a court prior to the commencement of this item where that decision sets aside, or declares invalid, a decision made under the medical transfer provisions.

Noting the above, I do not consider that sub-item 15(1) does trespass on the rights of any person.

I thank the Committee for its consideration of the Bill, and trust that this information is of assistance. I note the Legal and Constitutional Affairs Legislation Committee is also inquiring into this Bill.

Committee comment

2.73 The committee thanks the acting minister for this response, and notes the acting minister's view that sub-item 15(1) of the bill does not trespass on the rights of any person.

2.74 The committee notes the acting minister's advice that, despite the repeal of the medical transfer provisions inserted by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Miscellaneous Measures Act), the power in section 198B of the *Migration Act 1958* (Migration Act) can still be exercised to effect the temporary transfer of a person to Australia, including for the delivery of medical care. The committee notes the advice that it is therefore an 'unnecessary duplication' to preserve rights accrued under the medical transfer provisions, other than those preserved by sub-item 15(2).

2.75 The committee also notes the acting minister's advice that significant medical support and services are available in Nauru and Papua New Guinea, supplemented by telemedicine and visiting health specialists. The committee further notes the advice that medical transfer options outside Australia are in place with Papua New Guinea and Taiwan, and that these options cannot be used under the existing medical transfer provisions.

2.76 The committee acknowledges that, despite the repeal of the medical transfer provisions, the minister may still approve the temporary transfer of a person to Australia for medical treatment. The committee also acknowledges that medical services remain available to persons in regional processing centres. However, it is unclear from the acting minister's response why this justifies extinguishing any right, privilege, obligation or liability accrued under the medical transfer provisions. The committee also finds it difficult to reconcile the fact that sub-item 15(1) of the bill will extinguish 'any right....accrued or incurred under the medical transfer provisions' with the assertion that the sub-item does not trespass on the rights of any person. The acting minister's response does not provide sufficient information in this regard. In particular, the response does not identify the rights that may have accrued under the medical transfer provisions, or how a transitory person may be affected if those rights are extinguished.

2.77 The committee therefore remains concerned that, by dis-applying subsection 7(2) of the *Acts Interpretation Act 1901*, the bill would extinguish certain rights and expectations accrued under or as a result of the medical transfer provisions.³⁸ The committee is also concerned that these rights and expectations may be extinguished retrospectively, noting that they have accrued prior to enactment of the present bill.

38 In particular, a person's right to be transferred to Australia following a ministerial decision under the medical transfer provisions.

2.78 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of extinguishing any right, privilege, obligation or interest accrued under the medical transfer provisions inserted by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*.

National Sports Tribunal Bill 2019

| | |
|--------------------|---|
| Purpose | This bill seeks to establish the National Sports Tribunal as a specialist independent tribunal to provide a system of sports dispute resolution |
| Portfolio | Youth and Sport |
| Introduced | House of Representatives on 24 July 2019 |
| Bill status | Before the Senate |

Reversal of evidential burden of proof³⁹

2.79 In [Scrutiny Digest 4 of 2019](#) the committee requested the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offence, and requested the minister's advice in relation to this matter.⁴⁰

Minister's response⁴¹

2.80 The minister advised:

Context of secrecy provision

Clause 72 plays a key role in protection of highly sensitive information

Clause 72 plays a key role in the Bill because it is critical, in circumstances where information about a person that identifies a person, or is reasonably capable of identifying a person, is disclosed to the Tribunal (or persons assisting the Tribunal), that this information is kept confidential. Much of the information with which the Tribunal and the persons assisting it will be dealing will be information obtained in circumstances giving rise to a statutory or equitable obligation of confidence.

Examples of personal information that may be disclosed to the Tribunal, or persons assisting the Tribunal, include information obtained in confidence during doping control processes (for example, sensitive medical information on doping control forms) or evidence provided by an athlete in compliance with either a disclosure notice issued by the CEO of the

39 Clause 72. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2019*, pp. 23-24.

41 The minister responded to the committee's comments in a letter dated 15 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

Australian Sports Anti-Doping Authority (ASADA), or under a contractual obligation imposed by their sport.

In the General Division, it is envisaged the Tribunal will deal with disputes arising under the member protection policies of sports. Such disputes will potentially involve allegations of bullying, discrimination, or other unfair or inappropriate conduct.

An example of other information that might be disclosed to the Tribunal or the persons assisting it is personal information a witness has provided after being compelled to appear at the Tribunal under Division 8 of Part 3 of the Bill. More generally, disputes relating to sport tend to generate significant public interest and so, accordingly, there is likely to be significant interest, particularly from media organisations, in obtaining protected information. However, public disclosure of the categories of information described above could have catastrophic consequences for relevant individuals.

At a broader level, without confidence successful prosecutions can follow the unauthorised use or disclosure of protected information, sporting bodies are unlikely to refer disputes to the Tribunal for consideration. In consultations, sports have expressed the need for Tribunal hearings to remain confidential.

In summary, it is vital clause 72 of the Bill be drafted so as to provide the highest possible level of protection to the personal information of those interacting with the Tribunal.

Clause 72 applies to a limited class of persons who will be acutely aware of their responsibilities

It is also important to note clause 72 is not a provision of general application. Rather, it applies only to disclosures of protected information by entrusted persons. Because entrusted persons will have privileged access to highly sensitive information, it is reasonable to expect they understand and comply with a provision such as clause 72 and they place themselves in a position to be able to discharge an evidential burden in relation to the matters set out in subclauses 72(2)–(4).

It is appropriate for the application of clause 72 to be consistent with the application of the ASADA Act secrecy provision

It is also important to note protected information for the purposes of the Bill will often also be protected information for the purposes of the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) (for example, medical information on doping control forms or evidence provided by an athlete in compliance with a disclosure notice issued by the ASADA CEO).

Section 67 of the ASADA Act makes it an offence (punishable with imprisonment for up to 2 years) for an entrusted person to disclose

protected information to another person where they have obtained the protected information in their capacity as an entrusted person.

Subsection 67(2) recognises that a disclosure is not unlawful if it is authorised by a provision of Part 8, or if it is required to be made under a law of the Commonwealth, or under state or territory law, which is prescribed for these purposes. Consistent with subsection 13(3) of the Criminal Code, the defendant bears an evidential burden in establishing the offence in subsection 67(1) does not apply because one of the circumstances in subsection 67(2) exists. Separate provisions authorise the disclosure of protected information by an entrusted person for particular purposes, including, relevantly:

- for the purposes of the ASADA Act or legislative instrument made under it (section 68(a)), or
- for the purposes of the performance of the functions or duties, or the exercise of the powers, of the CEO (section 68(c)), or
- in accordance with the consent of the person to whom the protected information relates (section 68A), or
- of protected information that has already been lawfully made available to the public (section 68C).

Given the Tribunal will be dealing with ASADA protected information, it is appropriate for clause 72 of the Bill to operate consistently with the provisions of the ASADA Act. This will ensure the highly sensitive personal information of athletes and others is not afforded a lower level of protection when handled by the Tribunal than when it is handled by ASADA.

Burden of proof is evidential and not legal

It is relevant to note the burden of proof imposed by the proposed offence-specific defences is an evidential burden of proof (under which a defendant bears the burden of adducing or pointing to evidence suggesting a reasonable possibility a matter exists or does not exist), and is not a legal burden of proof (under which a defendant bears the burden of proving a matter).

Peculiarly within the knowledge of the defendant

As a general proposition, at the time of a potential prosecution, within the prosecutor/defendant paradigm, the knowledge of whether the defendant used or disclosed protected information in reliance on one or more exemptions in clause 72 is peculiar to the person. The prosecution can only prove whether or not the use or disclosure has occurred, but it will often be impossible to prove the reasons for it. It cannot disprove every conceivable circumstance that might fall within an exemption. It needs notice of the circumstance the defendant says he or she relied on. It would then be up to the prosecution to prove beyond reasonable doubt the circumstance did not apply.

Importantly, the prosecution cannot know whether relevant records of witnesses exist unless the defendant tells them. The Bill would not require records to be kept. Without an evidentiary onus on the defendant, the only way a prosecution could be successful would be, for the prosecutor to somehow interview every conceivable witness to, in effect, try to find any evidence of innocence to prove beyond reasonable doubt there could not have been a lawful purpose for the disclosure. Some of the exemptions, such as 'for the purposes of the Act or rules', could give rise to countless types of legitimate and permissible disclosures. An example is in the context of the Tribunal's day-to-day operations, including interactions between staff of the Tribunal. If an evidentiary burden was not placed on the defendant, it would likely render prosecution of an offence – and protection of the information – all but impossible except in the cases where there could be no legitimate purpose for a particular disclosure. This risks bypassing the intent of the provisions, with far-reaching effects on the willingness of sports to engage with the Tribunal.

Subclause 72(2)

The first set of offence-specific defences is set out in subclause 72(2). These apply where an entrusted person discloses or uses information:

- for the purposes of the Act or the rules, or
- for the purposes of the performance of the functions or powers of the CEO or the exercise of the CEO's powers, or
- for the purposes of, or in connection with, the performance or exercise of the person's functions, duties or powers in the person's capacity as an entrusted person, or
- in accordance with the rules prescribed for the purposes of paragraph 72(2)(d).

The Bill does not impose an obligation on an entrusted person who discloses or uses protected information to make a record of the purpose of their disclosure or use. This is with good reason - legitimate uses and disclosures of protected information will occur frequently in the course of day-to-day Tribunal operations (for example, discussions between Tribunal members, or between the CEO and employees of the Tribunal, or consultants discussing their work with third parties to inform the advice they give to the CEO). Even if such records were required to be kept, the absence of a record in a given case would not prove the absence of a proper basis for the disclosure. It would only prove the failure to find a record.

If a defendant has not made a record of the purpose for which they, as an entrusted person, have used or disclosed information, the consequence will generally be that the purpose remains peculiarly within the knowledge of that person. For example, the purposes of the Act are broad, as are the functions and powers of the CEO and other entrusted persons. Without the defendant being required to provide some indication of the purpose

for which they had disclosed protected information, it would in many circumstances be impossible for the prosecution to otherwise prove beyond reasonable doubt the use or disclosure was not for any conceivable purpose falling within subclause 72(2).

Turning to paragraph 72(2)(d), it is relevant to note the proposed rules are currently being drafted to be made once the Bill is enacted. The proposed rule for the purposes of paragraph 72(2)(d) provides as follows:

For the purposes of paragraph 72(2)(d) of the Act, subsection 72(1) of the Act does not apply in relation to a disclosure or use of protected information if the disclosure or use is made by the CEO in circumstances where the CEO considers it necessary to prevent or lessen a serious risk to the safety, health or well-being of a person.

Again, for reasons analogous to those discussed above, whether the CEO considered that a use or disclosure was necessary to prevent or lessen a serious risk to the safety, health or well-being of a person is something that may be peculiarly within the knowledge of the CEO.

Subclause 72(3)

The second offence-specific defence is set out in subclause 72(3) and applies where the person to whom the protected information relates has consented to the disclosure or use, and the disclosure or use is in accordance with that consent. In every investigation, it would be necessary to seek a statement from the person(s) to whom the information relates to prove that there was no consent.

Whether the relevant person consented, and the terms of that consent, are matters that may be peculiarly within the knowledge of the defendant. For example, if the consent was given verbally, no record was made of the consent and the person to whom the protected information relates refused to provide any information or had subsequently died, the prosecution would not have access to any information as to whether consent had been given. This would also be the case if consent had not been given and the person to whom the protected information relates refused to provide any information or had subsequently died. The Bill does not provide any powers to enable the prosecution to coercively obtain information from a person to whom protected information relates.

Again, if a person used or disclosed protected information in reliance on the exception in subclause 72(3), it would be expected a record of the relevant consent and its terms would exist. In such circumstances the defendant should readily be able to discharge the evidential burden.

Subclause 72(4)

The third offence-specific defence applies in relation to a disclosure of protected information if the information has already been lawfully made available to the public. Circumstances in which information might already have been lawfully made available to the public would include where a

participant to a dispute before the Tribunal has already disclosed the information, or where the information has previously been publicly disclosed in another context, for example, under a different statutory scheme permitting the disclosure of that information, such as under section 68E of the ASADA Act, which permits the ASADA CEO to disclose protected information for the purposes of the ASADA Act to respond to certain public comments attributed to an athlete or support person or their representative.

Where a defendant has used or disclosed protected information in reliance on the information having already made available to the public, the lawful disclosure will be within the knowledge of the defendant. However, whether particular information has or has not been made available to the public may not be within the knowledge of the prosecution. Information can be made available to the public by many means, such as at a public lecture or on a radio program, where there is no enduring record of the disclosure. Consequently, unless the defendant first raised evidence of a lawful public disclosure, the best a prosecution could do is seek evidence from any person who might conceivably have lawfully made the information public.

Significantly more difficult and costly for the prosecution to disprove

As discussed in the explanatory memorandum to the Bill, in the event of a prosecution, it would be significantly more difficult and costly for the prosecution to disprove any of the circumstances set out in subclauses 72(2)–(4) than it would be for a defendant to establish the existence of those circumstances. Specifically, it would be significantly more difficult and costly for the prosecution to disprove the defendant's state of mind (that is, the defendant had a particular purpose for using or disclosing the information) than it would be for the defendant to provide evidence about their state of mind. It would generally be significantly more difficult and costly for the prosecution to disprove that a disclosure or use was in accordance with consent of the person to whom the protected information relates than it would be for the defendant to provide evidence that it was, and it would generally be significantly more difficult and costly for the prosecution to disprove that the relevant information had already been lawfully made available to the public than it would be for the defendant to provide evidence that it had.

Committee comment

2.81 The committee thanks the minister for this response. The committee notes the minister's advice that, in relation to subclause 72(2), whether the defendant has disclosed information in accordance with the Act, rules or for the purpose of the exercise of their powers will be within the knowledge of the defendant. The committee also notes the minister's advice that records may not be kept of every disclosure made and in such circumstances the purpose for which a person used or

disclosed information will generally be peculiarly within the knowledge of the person who used or disclosed the information.

2.82 In relation to subclause 72(3), the committee notes the minister's advice that whether the protected information was disclosed with the consent of the person to whom the information related to is a matter that may be peculiarly within the knowledge of the defendant. The committee notes the advice that this would be particularly true if the person who consented to the disclosure refused to comment or had subsequently died.

2.83 In relation to subclause 72(4), the committee notes the minister's advice that where a defendant has used or disclosed protected information in reliance on the information having already made available to the public, the lawful disclosure will be within the knowledge of the defendant. The committee also notes the minister's advice that unless the defendant first raised evidence of a lawful public disclosure, in some circumstances the best a prosecution could do would be to seek evidence from any person who might conceivably have lawfully made the information public.

2.84 In addition, the committee notes the minister's advice that it would be significantly more difficult and costly for the prosecution to disprove any of the circumstances set out in subclauses 72(2)–(4) than it would be for a defendant to establish the existence of those circumstances.

2.85 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 15 AB of the *Acts Interpretation Act 1901*).

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

Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019

| | |
|--------------------|---|
| Purpose | <p>This bill seeks to amend various Acts in relation to taxation.</p> <p>Schedule 1 removes inappropriate tax deductions which arise on the repayment of loan principal for certain privatised entities</p> <p>Schedule 2 ensures that partners in partnerships cannot access the small business capital gains tax concessions when they alienate future income from the partnership</p> <p>Schedule 3 denies deductions for losses or outgoings incurred that relate to holding vacant land</p> <p>Schedule 4 extends to family trusts a specific anti-avoidance rule that applies to other closely held trusts that engage in circular trust distributions</p> <p>Schedule 5 allows taxation officers to disclose the business tax debt information of a taxpayer to credit reporting bureaus when certain conditions and safeguards are satisfied</p> <p>Schedule 6 allows the Australian Taxation Office to implement an electronic invoicing framework</p> <p>Schedule 7 ensures that an individual's salary sacrifice contributions cannot be used to reduce an employer's minimum superannuation guarantee contributions</p> |
| Portfolio | Treasury |
| Introduced | House of Representatives on 24 July 2019 |
| Bill status | Before the Senate |

Retrospective application⁴²

2.87 In *Scrutiny Digest 4 of 2019* the committee requested the Assistant Treasurer's detailed advice as to how many individuals will be detrimentally affected by the retrospective application of the legislation, and the extent of their detriment.

2.88 The committee also requested the Assistant Treasurer's advice as to the extent to which the bill as introduced is consistent with the measures announced on 8 May 2018.⁴³

42 Schedule 1, item 5 and Schedule 2, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Assistant Treasurer's response⁴⁴

2.89 The Assistant Treasurer advised:

Schedule 1 to the Bill does not directly impact any individual as it only affects tax exempt entities that hold concessional loans and that are privatised and become taxable entities.

Whilst the exact number of individuals affected by Schedule 2 to the Bill is not known, it is expected to be very small as it only applies to a subset of taxpayers (partners of partnerships), who have entered into an artificial arrangement to alienate future income from the partnership, and very few of whom are likely to have entered into such arrangements in the period between the announcement of the measure and the date of passage.

Both Schedules are consistent with the measures announced on 8 May 2018.

Schedule 1 - Tax treatment of concessional loans involving tax exempt entities

Schedule 1 to the Bill preserves the integrity of the corporate tax base by preventing unintended deductions from arising in respect of concessional loans provided in the past and that may be provided in the future by Commonwealth, State and Territory governments. This Schedule protects the revenue base, as it is inappropriate for deductions to be available for the repayment of loan principal.

The Schedule applies from the date of announcement to ensure taxpayers cannot take advantage of the unintended tax deductions. Bidders for the limited number of privatising entities are likely to have factored in the non-availability of the deduction into bid prices following the Budget 2018-19 announcement, so any change to the commencement date would otherwise result in a windfall gain to those bidders at the expense of government owners of privatising entities and Commonwealth tax revenue.

The Schedule does not directly impact on any individual. It affects previously tax exempt entities (such as government owned entities) that hold concessional loans and that are subsequently privatised and become taxable entities. Schedule 1 to the Bill as introduced is consistent with the measure as announced on 8 May 2018.

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2019*, pp. 25-26.

44 The minister responded to the committee's comments in a letter received 15 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

Schedule 2 - Enhancing the integrity of the small business CGT concessions in relation to partnerships

Schedule 2 to the Bill ensures that partners in partnerships cannot access the small business capital gains tax concessions when they seek to alienate future income from the partnership. The Schedule applies from the date of announcement to ensure taxpayers do not seek to further access the concessions outside of the original policy intent and prior to Parliament acting to close the tax loophole.

This retrospective application may disadvantage some taxpayers if they have sought to access the small business CGT concessions between announcement and the date of passage of the legislation but are no longer eligible as a result of the amendments.

The number of taxpayers affected and the extent of the consequences for those taxpayers is not known as this information is not collected in tax returns. However, the number affected is expected to be very small, as the amendments only affect a specific type of artificial arrangement that can only be entered by a small number of sophisticated taxpayers (partners of certain partnerships). Further, only an even smaller proportion of those taxpayers are likely to have established new arrangements and sought to access the CGT concessions in the period between the announcement of the measure and the date of passage.

Retrospective application is necessary as the amendments are an important integrity measure to prevent inappropriate access to the CGT small business concessions for arrangements undertaken to reduce partner's tax liabilities. If the amendments did not apply from announcement, partners would be able to enter into such arrangements during the period between announcement and the passage of legislation and avoid the operation of the measure. Schedule 2 to the Bill as introduced is consistent with the measure as announced on 8 May 2018.

Committee comment

2.90 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice in relation to Schedule 1 that the Schedule does not directly impact any individuals, only previously tax exempt entities. The committee also notes the Assistant Treasurer's advice that bidders for the limited number of privatising entities are likely to have factored in the non-availability of the relevant deduction into bid prices following the Budget 2018-19 announcement.

2.91 The committee notes the Assistant Treasurer's advice in relation to Schedule 2 that the retrospective application is necessary to prevent inappropriate access to the CGT small business concessions. However, from a scrutiny perspective, the committee is concerned by the Assistant Treasurer's advice that the retrospective application may disadvantage some taxpayers, especially when the

government is not aware of the extent of the detrimental impact that will be caused by the retrospective application of the amendments in Schedule 2.

2.92 The committee reiterates its long standing scrutiny concern that the retrospective application of legislative provisions challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive.

2.93 While the committee has previously been prepared to accept that some amendments may permissibly have some retrospective effect where the relevant bill was introduced within six calendar months after the date of that announcement. The committee notes that it has been more than 12 months since the announcement of these measures.

2.94 The committee requests that the key information provided by the Assistant 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*).

2.95 Noting the advice that the amendments in Schedule 1 will not directly impact any individual, the committee makes no further comment in relation to Schedule 1.

2.96 The committee considers that it may be appropriate for the bill to be amended to apply the changes in Schedule 2 from when the bill receives Royal Assent.

2.97 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively applying the amendments in Schedule 2 to the bill.

Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019

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

Strict liability offences⁴⁵

2.98 In [Scrutiny Digest 3 of 2019](#) the committee requested the assistant minister's detailed justification for the application of strict liability to an offence attracting a penalty of 120 penalty units.⁴⁶

Assistant Minister's response⁴⁷

2.99 The assistant minister advised:

Proposed section 203AA ensures directors are held accountable for misconduct by preventing company directors from improperly backdating resignations. If the resignation of a director is reported to ASIC more than 28 days after the purported resignation, the resignation takes effect from the day it is reported to ASIC. However, a company or a director may apply to ASIC, or the Court, to give effect to the resignation notwithstanding the delay in reporting the change to ASIC. If the Court makes an order to backdate the effective date of a director's resignation, proposed

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

46 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, pp. 25-26.

47 The minister responded to the committee's comments in a letter dated 8 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

subsection 203AA(6) provides that the applicant must provide a copy of the order to ASIC within two business days.

The obligation to inform ASIC of a Court order is necessary to ensure the company register maintained by ASIC is accurate. A failure by an applicant to inform ASIC of an order fixing a director's date of resignation would cause the company register to be inaccurate and the register could not then be relied on by consumers and other members of the community dealing with the relevant company or director. An offence of strict liability is necessary to ensure compliance with this simple but important obligation. The obligation to inform ASIC of the order would be known to the applicant that sought the order under proposed subsection 203AA(2).

The *Guide to Framing Commonwealth Offences* suggests an appropriate penalty for a strict liability offence is 60 penalty units for an individual. While the amendments depart from the Guide, the fine imposed is justified by the important nature of the obligation, the significant consequences on the community of non-compliance and the need for a strong and appropriate deterrent.

The fine also aligns with other comparable strict liability offences in the Corporations Act 2001 (as amended by the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019). Specifically and appropriately, the fine aligns with the related strict liability offence for failing to notify ASIC of the resignation under subsection 205B(5) of the Act, which gives rise to the same community detriment.

Committee comment

2.100 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that, while the penalty in proposed section 203AA departs from the recommendation in the *Guide to Framing Commonwealth Offences*, the penalty is justified by the important nature of the obligation, the significant consequences on the community of non-compliance and the need for a strong and appropriate deterrent.

2.101 While noting the explanation provided by the minister, from a scrutiny perspective, the committee remains concerned about the application of strict liability to an offence carrying a penalty of 120 penalty units. In this regard, the committee reiterates that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the relevant offence is only punishable by up to 60 penalty units.⁴⁸

2.102 The committee also notes the assistant minister's advice that the penalty aligns with other comparable strict liability offences in the *Corporations Act 2001* (as amended by the *Treasury Laws Amendment (Strengthening Corporate and Financial*

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

Sector Penalties) Act 2019). However, the committee does not consider consistency with existing penalties to be sufficient justification for applying strict liability in circumstances where the penalty is above what is recommended by the *Guide to Framing Commonwealth Offences*. The committee also notes that it has previously raised scrutiny concerns regarding the use of strict liability offences in the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*.⁴⁹

2.103 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing strict liability for an offence attracting a penalty of 120 penalty units.

49 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, pp. 16 – 17.

Treasury Laws Amendment (Consumer Data Right) Bill 2019

| | |
|--------------------|--|
| Purpose | This bill seeks to amend the <i>Competition and Consumer Act 2010</i> and the <i>Australian Information Commissioner Act 2010</i> to introduce a consumer data right for consumers to authorise data sharing and use |
| Portfolio | Treasury |
| Introduced | House of Representatives on 24 July 2019 |
| Bill status | Received Royal Assent on 12 August 2019 |

No invalidity clauses⁵⁰

2.104 In [Scrutiny Digest 4 of 2019](#) the committee requested the Treasurer's advice as to the rationale for including a number of no-invalidity clauses in relation to consultation requirements in the bill.⁵¹

Treasurer's response⁵²

2.105 The Treasurer advised:

No-invalidity clauses in relation to the consultation requirements were included in the Bill to provide certainty on the validity of the instruments for the benefit of users and consumers of the Consumer Data Right (CDR).

The no-invalidity clauses in the Bill reflect the general position as set out in section 19 of the *Legislation Act 2003*, that the validity or enforceability of a legislative instrument is not affected by a failure to consult. Recognising the importance of consultation given the broad rule-making power, the Bill creates considerably stricter consultation requirements than those set out in the *Legislation Act 2003*. This sets significantly higher expectations in respect of the CDR than standard legislative processes.

However, the importance of thorough consultation was balanced against the need for certainty and consumer protection once the rules have been made. Without a no-invalidity clause, the designation instrument or rules

50 Schedule 1, item 1, proposed section 56AH and subsections 56BQ(2), 56BS(2) and 56DA(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii), (iv) and (v).

51 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2019*, pp. 27-29.

52 The minister responded to the committee's comments in a letter dated 15 August 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

may be challenged on the issue of whether consultation undertaken was adequate and whether submissions were properly considered and acted or not acted upon.

The lack of a no-invalidity clause would also create perceived and, actual risk for the validity of the rules, even where consultation in accordance within the requirements in the Bill have been undertaken. The rules create rights for consumers and inform how the privacy safeguards will be applied once data has been shared under the rules. As a result, it is not desirable from a consumer protection perspective for the rules or designation instrument to be subject to challenge on the basis of the quality of the consultation.

As noted by the Committee, both the designation by the Minister of a sector to which the regime applies and the consumer data rules made by the ACCC are instruments subject to Parliamentary scrutiny and disallowance. The latter can only be made with the Minister's consent, unless they are emergency rules, which the minister can direct to be revoked. It is expected that the extent and quality of the ACCC's consultation would be a consideration when providing this consent.

Committee comment

2.106 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that no-invalidity clauses in relation to the consultation requirements were included in the bill to provide certainty on the validity of the instruments for the benefit of users and consumers of the Consumer Data Right. The committee also notes the Treasurer's advice that the lack of a no-invalidity clause would also create perceived and, actual risk for the validity of the rules, even where consultation in accordance within the requirements in the bill have been undertaken.

2.107 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 the ACCC or the Minister fail to comply with the consultation requirements may undermine including such requirements in the legislation.

2.108 The committee notes the Treasurer's advice that the relevant instruments are subject to Parliamentary scrutiny and disallowance and that the consumer data rules can only be made with the minister's consent. Although the instruments may be disallowable, it may be difficult for parliamentarians to know whether appropriate consultation has taken place within the timeframe for disallowance. There is also no requirement on the face of the bill that the minister is required to consider the extent and quality of consultation when consenting to the making of consumer data rules.

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

Delegated legislation not subject to disallowance⁵³
Significant matters in non-statutory standards⁵⁴

2.110 In [Scrutiny Digest 4 of 2019](#) the committee requested the Treasurer's more detailed advice as to why it is considered necessary and appropriate to allow potentially significant matters to be included in instruments or standards that would not be subject to any parliamentary control or scrutiny.⁵⁵

Treasurer's response

2.111 The Treasurer advised:

The Committee raised concerns about the potential for significant matters to be included in two classes of instruments, the data standards and an instrument recognising an external dispute resolution scheme, which are not subject to Parliamentary control or scrutiny.

Data standards

In relation to the data standards, the use of non-statutory standards was appropriate because of the highly technical and specialised nature of the data standards. Further, given the expected frequency and volume of revisions, it would be inappropriate to designate the standards as legislative instruments.

As technical adviser to the interim data standards body, Data61 prepared large volumes of draft data standards, much of which are comprised of, or closely resemble, computer programming code. Data61's log of changes identified almost 40 revisions to the draft standards between December 2018 and July 2019.

Importantly, in making consumer data rules, the ACCC is appropriately empowered to place limits and controls on the content and scope of the data standards where necessary. The data standards must not be inconsistent with the consumer data rules, and are not binding unless the consumer data rules so require.

53 Schedule 1, item 1, proposed section 56DA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

54 Schedule 1, item 1, proposed section 56FA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

55 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2019*, pp. 29-31.

External dispute resolution scheme

The ability to recognise an external dispute resolution scheme by notifiable instrument was appropriate as it is a mechanical matter appropriately within the administrative control of the ACCC as a CDR regulator.

The use of a notifiable instrument is consistent with arrangements under section 35A of the *Privacy Act 1988*, which provides the Australian Information Commissioner the ability to recognise an external dispute resolution scheme by written notice. Similarly, section 1050 of the *Corporations Act 2001* provided for the authorisation of the Australian Financial Complaints Authority scheme by notifiable instrument.

Committee comment

2.112 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that, in relation to the data standards, the use of non-statutory standards was appropriate because of the highly technical and specialised nature of the data standards and that given the expected frequency and volume of revisions, it would be inappropriate to designate the standards as legislative instruments. The committee also notes that the data standards must not be inconsistent with the consumer data rules, and are not binding unless the consumer data rules so require.

2.113 The committee also notes the Treasurer's advice that the ability to recognise an external dispute resolution scheme by notifiable instrument was appropriate as it is a mechanical matter appropriately within the administrative control of the ACCC as a regulator. The committee also notes the use of a notifiable instrument in this instance is consistent with arrangements under section 35A of the *Privacy Act 1988*.

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

Reversal of evidential burden of proof⁵⁶

2.115 In [Scrutiny Digest 4 of 2019](#) the committee requested the Treasurer's detailed justification as to the appropriateness of including specified matters as an offence-specific defence. The committee suggested that it may be appropriate if proposed subsection 56BN(2) was amended to be included as an element of the offence. The committee requested the Treasurer's advice in relation to this matter.⁵⁷

56 Schedule 1, item 1, proposed subsection 56BN(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

57 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2019*, pp. 31-33.

Treasurer's response

2.116 The Treasurer advised:

Section 56BN of the *Competition and Consumer Act 2010* (the CCA) regulates misleading or deceptive conduct in a wide range of circumstances relating to the disclosure of CDR data, both in terms of the actors (e.g., data holders, accredited data recipients and CDR consumers) and the provisions of the CCA, and consumer data rules in relation to which an offence may occur.

Subsection 56BN(2) includes an offence-specific defence where the misleading particular is not material, and as noted by the Committee, this mechanism places the evidentiary burden on the defendant. This was appropriate because the mitigating circumstance will often rely on information that is peculiarly within the knowledge of the defendant and therefore it was included an exception, rather than as an element of the offence.

For example, an accredited person is required when seeking consent to collect CDR data to be specific as to the purpose for which the CDR data may be collected. Where proceedings for an offence arises relating to whether particular conduct fell within that purpose, the accredited person may argue that any differences in interpretation of that purpose were not misleading in a material particular. However, the evidence about the materiality would likely be peculiarly within the knowledge of the defendant, relating to the manner in which the accredited person's business provides services with the use of CDR data.

It would be unduly onerous in this case to require the plaintiff to prove the materiality in the absence of evidence having first been raised by the defendant and, by comparison, relatively straightforward for the defendant to raise this evidence.

The offence in section 56BN was designed to be similar to equivalent offence provisions in the *Criminal Code* (sections 136.1 and 137.1). These *Criminal Code* provisions also contain offence-specific defences for circumstances where the misleading particular was not material. The consistency between section 56BN and the *Criminal Code* provisions is appropriate as they are enacted to regulate similar kinds of circumstances.

Further, given the prosecution is also required to establish that the conduct leads to the result that a person is, or is likely to be, misled-or deceived about the use or disclosure of CDR data under the regime (paragraph 56BN(1)(c)), the circumstances in which the defence may actually arise are likely to be limited.

Committee comment

2.117 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the use of an offence-specific defence was appropriate because the mitigating circumstance will often rely on information that is peculiarly

within the knowledge of the defendant and therefore it was included an exception, rather than as an element of the offence.

2.118 The committee also notes the Treasurer's advice that it would be it would be unduly onerous in this case to require the plaintiff to prove the materiality in the absence of evidence having first been raised by the defendant and, by comparison, relatively straightforward for the defendant to raise this evidence.

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

Incorporation of external materials existing from time to time⁵⁸

2.120 In [Scrutiny Digest 4 of 2019](#) the committee requested the Treasurer's more detailed advice as to whether the relevant IOS standards will be made freely available to all persons interested in the law.⁵⁹

Treasurer's response

2.121 The Treasurer advised:

The Committee requested advice on the accessibility of relevant International Organisation for Standardisation (IOS) standards and it is acknowledged that the Bill allows the incorporation by reference of external material, such as a number of IOS standards, which may attract a fee for access.

The costs to the affected businesses of accessing any such materials is relatively moderate and would be far outweighed by the costs to those businesses of having to comply with bespoke standards, rather than broadly adopted existing widely used ones. In addition to reducing implementation and operational costs for participants, the use of widely accepted standards may also be required to support the broader interoperability of the system.

However, data standards which are developed by the data standards body itself will be made publicly available at no cost, and be published under creative commons licenses - see section 56FC of the CCA. The introduction of any standards, or similar documents, are done in consultation with stakeholders primarily through GitHub, and the Data Standards Body Advisory Committee.

58 Schedule 1, item 1, proposed section 56GB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

59 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2019*, pp. 33-34.

Committee comment

2.122 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the costs to the affected businesses of accessing incorporated International Organisation for Standardisation standards is relatively moderate and would be far outweighed by the costs to those businesses of having to comply with bespoke standards, rather than broadly adopted existing widely used ones.

2.123 The committee takes this opportunity to reiterate that it is fundamental principle of the rule of the law that every person subject to the law should be able to freely and readily access its terms. As a result, the committee will have scrutiny concerns when external materials that are incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law.

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

Broad discretionary power⁶⁰**Significant matters in delegated legislation⁶¹**

2.125 In [Scrutiny Digest 4 of 2019](#) the committee requested the Treasurer's more detailed advice as to why it is considered necessary and appropriate to allow the ACCC and the regulations to provide exemptions from the operation of the new consumer data right scheme.⁶²

Treasurer's response

2.126 The Treasurer advised:

The exemption and modification regulation-making powers in section 56GB of the CCA and the ACCC's power in section 56GD of the CCA to exempt individuals are necessary and appropriate as the matters covered are of a highly specific nature, apply to a limited number of entities and are only intended to be used in exceptional circumstances.

The CDR regime will apply to broad sectors of the economy, likely resulting in circumstances for particular participants, or classes of participants, where the generally applicable rules will lead to an unintended result. Exemptions of these kinds are generally not appropriate for inclusion in

60 Schedule 1, item 1, proposed section 56GD. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

61 Schedule 1, item 1, proposed section 56GE. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

62 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2019*, pp. 34-36.

the primary law, as they would increase the complexity of the primary law while addressing matters relevant only to a limited number of entities.

These exemption powers are intended to be used in exceptional circumstances. An example of exceptional circumstances which might justify granting an exemption or modification in regulations for section 56GB is where compliance by a class of entities with the CDR regime might conflict with the laws of another jurisdiction. The ACCC's power in section 56GD is narrower, applying only to individuals. An example of where an individual exemption from the ACCC might be necessary under section 56GD is where a particular data holder may not be in a position to comply with requests in accordance with the regime at the time it begins to apply to the entity.

As the Committee notes, there is no criteria for making a decision whether to exempt a person set out in section 56GD. As the regime will eventually apply to many sectors of the economy, it would not be possible to foresee where exceptional circumstances will arise for each sector that may necessitate an exemption. This is because those circumstances usually arise on a sector or participant-specific basis and it would not be possible to develop meaningful criteria for the exercise of exemption and modification powers. However, the ACCC would be required to consider the object of Part IVD of the CCA when making a decision.

The Committee's concerns about the lack of a specific consultation requirement before making regulations for the purposes of new section 56GE are noted. Consistent with usual practice, it is expected that consultation would occur before making regulations for the purposes of this section, especially where this would impact businesses and consumers as required under section 17 of the *Legislation Act 2003*.

Committee comment

2.127 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the exemption and modification regulation-making powers to exempt individuals are necessary and appropriate as the matters covered are of a highly specific nature, apply to a limited number of entities and are only intended to be used in exceptional circumstances.

2.128 The committee also notes the Treasurer's advice that as the regime will eventually apply to many sectors of the economy, it would not be possible to foresee where exceptional circumstances will arise for each sector that may necessitate an exemption. However, it remains unclear to the committee why at least high level guidance or criteria around how the power to exempt entities from the operation of the consumer data rules could not have been included on the face of the bill.

2.129 The committee notes the Treasurer's advice that it is expected that consultation would occur before making regulations as required under section 17 of the *Legislation Act 2003*. The committee reiterates that where the Parliament delegates its legislative power in relation to significant regulatory schemes the

committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. As a failure to consult in accordance with section 17 of the *Legislation Act 2003* does not affect the validity of an instrument, the committee does not consider that the consultation requirements of the *Legislation Act 2003* are sufficient where significant elements of a legislative scheme are left to delegated legislation.

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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

