

**Senate Standing Committee  
for the Scrutiny of Bills**

**Annual Report 2019**

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## MEMBERSHIP OF THE COMMITTEE

### Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator Dean Smith (Deputy Chair)	LP, Western Australia
Senator Kim Carr	ALP, Victoria
Senator Perin Davey	NATS, New South Wales
Senator Janet Rice	AG, Victoria
Senator Paul Scarr	LP, Queensland

### Members in 2019

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

**Current secretariat**

Mr Glenn Ryall, Secretary

Ms Alexandra Logan, Principal Research Officer

Ms Katie Helme, Acting Senior Research Officer

Ms Georgia Fletcher, Legislative Research Officer

**Secretariat in 2019**

Ms Anita Coles, Secretary

Mr Glenn Ryall, Secretary

Ms Laura Sweeney, Acting Secretary

Ms Alexandra Logan, Principal Research Officer

Ms Katie Helme, Acting Senior Research Officer

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# Chapter 1

## Introduction

### Background

1.1 Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan 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 to determine whether it:

- trespasses unduly on personal rights and liberties;
- makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegates legislative powers; or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

### Committee establishment

1.2 The Scrutiny of Bills Committee was first established by a resolution of the Senate on 19 November 1981, following a report of the Senate's Constitutional and Legal Affairs Committee (tabled in November 1978). That report recommended the establishment of a new parliamentary committee to highlight provisions in bills which potentially affected individuals by interfering with their rights or by subjecting them to the exercise of an undue delegation of power.

1.3 The government of the day had considerable misgivings about this proposal, seeing it as having the potential to 'interfere' in the legislative process. Nevertheless, on the motion of Liberal Senator Alan Missen and Labor Senator Michael Tate, the committee was established on a trial basis in November 1981, was constituted on a discrete basis under a sessional order in May 1982 and became a permanent feature of the Senate committee system on 17 March 1987.

### Committee membership

1.4 Senate standing order 24(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members—three senators from the government party or parties and three from non-government parties (as nominated by the Leader of the Opposition in the Senate or by any

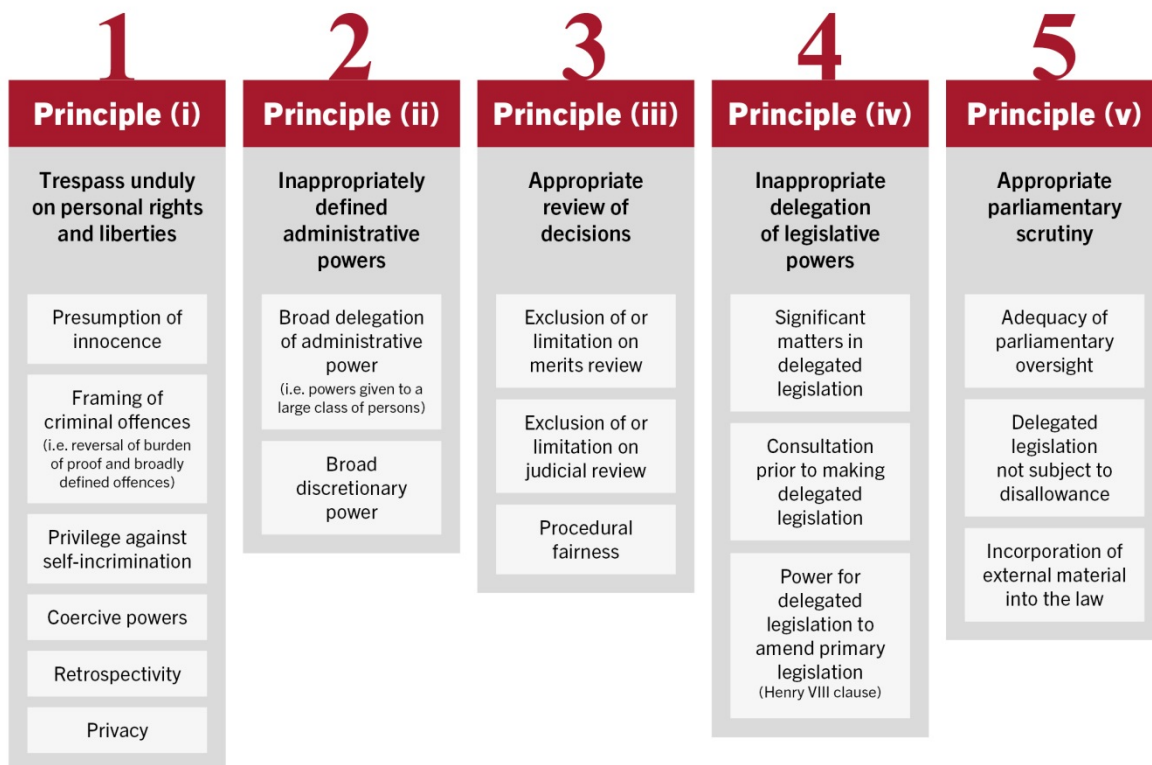
minority groups or independent senators). In accordance with standing orders 24(4) and 24(5), the chair of the committee is an opposition member, and the deputy chair is a government member.

**The committee's scrutiny principles**

1.5 As noted above, the scope of the committee's interest in bills, and amendments to bills, is established by the principles outlined in Senate standing order 24(1)(a). When applying each principle there are a number of well-established matters that the committee considers to be of concern. Therefore, when it is developing comments on the provisions of each new bill that comes before it for consideration, the committee takes its previous views on these matters into account, though it does not consider that it is constrained by them.

1.6 Some of the long-standing matters of concern identified by the committee are included in the diagram below and are outlined in more detail in Appendix 1.

**Summary of standing order 24 and examples of issues considered under each principle**





## The committee's mode of operation

1.7 As noted above, the committee examines all bills that come before the Parliament against the five principles set out in Senate standing order 24(1)(a)<sup>1</sup> and usually meets each sitting week to consider them. The committee's long-standing approach is that it operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the scrutiny principles. The policy content of the bill provides context for its scrutiny, but is not a primary consideration for the committee. In addition, while the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24(1)(a) it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

1.8 In undertaking its work the committee is supported by a secretariat comprised of a secretary, a principal research officer, a senior research officer and a legislative research officer.<sup>2</sup> The committee also obtains advice from a legal adviser who is appointed by the committee with the approval of the President of the Senate. The committee enjoyed the assistance of Professor Leighton McDonald during 2019.

## The committee's workflow

1.9 The committee's usual process for undertaking its work is shaped by the process for the passage of bills through the Parliament. (The main steps in the committee's work are outlined in the diagram on page 4.)

1.10 In the usual scrutiny process, after the introduction of bills into either the Senate or the House of Representatives, the committee's secretariat and legal adviser consider the text of each bill, together with its explanatory memorandum, against the committee's scrutiny principles. The secretariat is also involved in examining parliamentary amendments to bills. The work undertaken by the secretariat and legal adviser provides the foundation for the committee's consideration of the legislative proposals before the Parliament.

1.11 Where a concern is raised about possible inconsistency with scrutiny principles, the committee's usual approach is to write to the responsible minister or other proposer seeking further information or requesting that consideration be given to amending the relevant provision.

1.12 The committee publishes on its website a list of bills on which it has sought advice from the responsible minister but has either not yet received a response or it

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1 The five principles are discussed in detail in Appendix 1, with specific case studies in chapter 3.

2 The secretariat is staffed by parliamentary officers drawn from the Department of the Senate's Legislative Scrutiny Unit, who regularly work across multiple scrutiny committee secretariats.

has received a response but not yet finally reported.<sup>3</sup> In November 2017 the standing orders were amended to provide that any senator may ask a minister for an explanation as to why a response has not been provided to the committee.<sup>4</sup> During 2019, no senator used this process to ask a minister for such an explanation.

1.13 Once a response is received, the committee reconsiders the relevant provisions and provides a further view on its compliance with the relevant scrutiny principle or principles and reports this to the Senate.

### Committee's Work Flow



3 Senate Standing Committee for the Scrutiny of Bills, *Ministerial Responses*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Ministerial\\_Responses](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Ministerial_Responses)

4 Senate standing orders 24(1)(d)–(h); *Journals of the Senate*, No. 74, 29 November 2017, pp. 2372-2373.

## Committee publications and resources

### *Scrutiny Digest*

1.14 From the first sitting week of 2017 onwards, the committee has published its scrutiny comments in a single document known as the *Scrutiny Digest*. This document replaced both the *Alert Digest* and the *Report*, through which the committee had published its scrutiny comments from its commencement in 1981 until the end of 2016.<sup>5</sup>

1.15 The committee considers a draft *Scrutiny Digest* at its regular meeting on the Wednesday morning of each Senate sitting week and, once agreed, the *Scrutiny Digest* is tabled in the Senate, generally on the afternoon of the same day.

1.16 Chapter 1 of the draft *Scrutiny Digest* is prepared by the secretariat on the basis of the legal adviser's report and the secretariat's examination of bills and parliamentary amendments and contains comments on bills and amendments the committee wishes to make. Comments are identified by reference to the relevant principles in standing order 24. When concerns are raised by the committee and outlined in chapter 1 of the *Scrutiny Digest*, correspondence is forwarded to the minister or proposer responsible for the bill inviting him or her to respond to the committee's concerns.

1.17 Where possible, the committee requests that any response from a minister be received in sufficient time for it to be scrutinised before the next committee meeting. As noted above, the committee aims to report to the Senate prior to the Senate's detailed consideration of bills so that its views can be taken into account before passage.

1.18 When a minister or other proposer responds to a concern raised in the *Scrutiny Digest*, the secretariat produces for the committee's consideration an entry for chapter 2 of the draft *Scrutiny Digest*, which contains the committee's original request, the text of the minister's response, and any further comments the committee wishes to make.

### *Scrutiny News*

1.19 The committee secretariat prepares a brief *Scrutiny News* publication each sitting week which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list.<sup>6</sup> *Scrutiny News* highlights recent comments drawn from material in the

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5 *Scrutiny Digests*, as well as *Alert Digests* and *Reports* dating back to 1998, are available from the committee's website at [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny).

6 Current and previous editions of *Scrutiny News*, as well as information about subscribing to the scrutiny mailing list, are available from the committee's website at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Scrutiny\\_News](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News).

committee's *Scrutiny Digest*, with a particular focus on information that may be useful when bills are debated and to raise awareness about the committee's scrutiny principles.

1.20 Highlights from the Senate Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor* are also included in *Scrutiny News*.<sup>7</sup>

### **Interaction with other legislative scrutiny committees**

1.21 The Scrutiny of Bills Committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The work of the three committees is complementary in many respects. The committee therefore monitors the work of the two other legislative scrutiny committees—the Senate Scrutiny of Delegated Legislation Committee and the Parliamentary Joint Committee on Human Rights (PJCHR)—and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

1.22 The committee regularly draws certain matters to the attention of the Scrutiny of Delegated Legislation Committee, including provisions of bills which authorise a significant delegation of legislative power or seek to modify the usual disallowance processes for legislative instruments. In 2019, the committee drew 14 bills to the attention of the Scrutiny of Delegated Legislation Committee. When the committee draws such provisions to the attention of the Scrutiny of Delegated Legislation Committee, that committee will consider the Scrutiny of Bills Committee's comments as part of their examination of any legislative instruments made under the relevant authorising provision.

1.23 For example, in September 2018 the committee drew to the attention of the then Regulations and Ordinances Committee its scrutiny concerns about the Aged Care Quality and Safety Commission Bill 2018, which sought to leave the Commissioner's complaints and regulatory functions, including review rights in relation to decisions made under these functions, to be set out entirely in delegated legislation.<sup>8</sup> When, in 2019, the then Regulations and Ordinances Committee considered the Aged Care Quality and Safety Commission Rules 2018 made under the Act, the committee was able to draw on the Scrutiny of Bills Committee's comments when setting out its own scrutiny concerns about the inclusion of significant matters in the rules.<sup>9</sup>

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7 On 4 December 2019 the Senate agreed to change the title of the Senate Regulations and Ordinances Committee to the Senate Scrutiny of Delegated Legislation Committee.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018, pp. 4-6; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, 17 October 2018, pp. 67-74.

9 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 7-9.

1.24 The committee will continue to work closely with the Scrutiny of Delegated Legislation Committee and the PJCHR where appropriate in the future.

### **Acknowledgements**

1.25 The committee wishes to acknowledge the work and assistance of its legal adviser Professor Leighton McDonald.

1.26 The committee also wishes to acknowledge the assistance of ministers and other proposers of bills, departments and agencies during the reporting period. Their responsiveness to the committee is critical to the legislative process as it ensures that the committee can perform its scrutiny function effectively.



## Chapter 2

### Work of the committee in 2019

2.1 This chapter provides information about the work of the committee during 2019, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills.

#### Statistics

2.2 Each year the committee usually analyses around 200 to 250 bills. The table below sets out the bills scrutinised by the committee from 2017 to 2019.

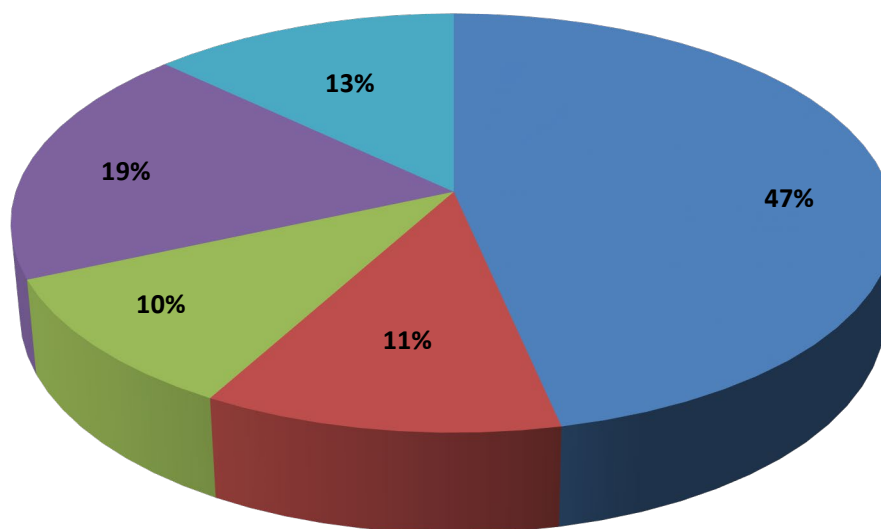
2.3 The table also outlines statistics in relation to the number of bills and amendments for which the committee had comments. The number of amendments commented on in 2019 was significantly lower than in 2017 and 2018. This reflects the fact that most amendments agreed to in 2019 were relatively minor amendments that did not raise any scrutiny concerns, such as amendments to insert statutory review provisions into the relevant bill.

Year	Bills considered	Bills commented on	Amendments to bills considered	Amendments to bills commented on
2017	266	119	61	25
2018	251	112	87	46
2019	255	102	39	3

2.4 The chart on page 10 provides a breakdown of the committee's comments on bills by the five principles set out in standing order 24(1)(a). The accompanying table sets out the specific issues on which the committee commented under each of these five broad principles.

2.5 The chart shows, consistent with previous years, that the most common principle on which the committee commented in 2019 was principle (i) relating to possible undue trespass on personal rights and liberties (47 per cent). During 2019 principle (iv), relating to the inappropriate delegation of legislative power, was the next most common principle commented on by the committee (19 per cent).

**Scrutiny comments on bills by principle under  
standing order 24(1)(a)  
January to December 2019**



- (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
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny

### Impact of the committee's work in 2019

2.6 The work of the committee in scrutinising bills against the five principles outlined above assists and improves parliamentary consideration of legislation in a number of important ways, including:

- amendments to legislation;
- improved explanatory material;
- more informed consideration of issues in legislation committee reports;
- more informed debate in the Senate and committees; and
- more comprehensive Parliamentary Library Bills Digests.

2.7 As noted above, since the committee's establishment 39 years ago it has developed a consistent position in relation to several long-standing matters of



concern. It may be expected that the committee's consistent commentary has had a positive impact on the formulation and drafting of bills that may raise these types of scrutiny concerns.

### ***Impact prior to the introduction of bills into the Parliament***

2.8 While difficult to quantify, it is clear that, prior to the introduction of bills into the Parliament, the Scrutiny of Bills Committee has an 'unseen influence' on the development of bills through the legislative drafting process. Legislative drafters often refer to the reports and long-standing scrutiny concerns of the committee when they are advising instructing departments and agencies and therefore many provisions that may have been of concern under the committee's scrutiny principles may not be included in the final text of bills that come before the Parliament.<sup>1</sup>

2.9 Underpinning this 'unseen influence' is formal guidance available to agencies and departments as part of the legislative development and drafting process. The *Legislation Handbook*,<sup>2</sup> *Guide to Framing Commonwealth Offences*,<sup>3</sup> and *OPC Drafting Directions*<sup>4</sup> all draw attention to long-standing scrutiny concerns of the committee to ensure that these concerns are considered as part of the legislative drafting process. The long-standing concerns relate to a large number of matters, including:

- retrospectivity;
- absolute and strict liability offences and reversal of the burden of proof;
- excessive delegation of legislative power;
- entry, search and seizure powers; and
- penalty provisions.

2.10 In relation to the adequacy of explanatory memoranda accompanying bills, OPC Drafting Direction 4.1 advises legislative drafters to:

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1 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5<sup>th</sup> ed, 2017, pp. 192-193.

2 *Legislation Handbook*, Department of the Prime Minister and Cabinet, February 2017, available at: <https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf>.

3 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, available at: <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

4 OPC Drafting Directions Series, Office of Parliamentary Counsel, available at: [http://www.opc.gov.au/about/draft\\_directions.htm](http://www.opc.gov.au/about/draft_directions.htm).

alert your instructors to any requested provisions that are likely to be of interest to the [Scrutiny of Bills] Committee, and advise your instructors to set out clearly in the explanatory memorandum the reasons for such provisions.<sup>5</sup>

2.11 In addition, legislative drafters are advised to proactively monitor the committee's Scrutiny Digests to see what comments have been made on bills that they have drafted, and to contact their instructors to provide assistance in preparing the response to the committee.<sup>6</sup>

### ***Amendments to legislation***

2.12 One of the most noticeable outcomes of the committee's scrutiny of bills is amendments to legislation arising from the committee's work. Amendments may be moved by any senator directly in response to the committee's comments, or as a result of a recommendation of a Senate legislation committee which, in turn, explicitly drew on this committee's comments. Alternatively, amendments which reflect the committee's comments can be moved by a senator without any direct acknowledgment of the committee's work, or there may have been a cumulative impact if a similar point was also made in another forum (such as a legislation committee inquiry)—it is therefore difficult to gauge with complete accuracy the impact the committee has in terms of amendments to legislation.

2.13 It is, however, clear that some amendments are moved that directly address the committee's scrutiny concerns in relation to particular matters. For example, in 2019 government amendments were moved that addressed the committee's scrutiny concerns in relation to the Criminal Code Amendment (Agricultural Protection) Bill 2019. The bill, as originally introduced, included offence-specific defences that reversed the evidential burden of proof. Following the committee's comments,<sup>7</sup> and submissions to the Senate Legal and Constitutional Affairs Legislation Committee endorsing the committee's comments, government amendments were agreed to which provided that the burden of proof would instead reside with the prosecution.<sup>8</sup>

### ***Improved explanatory material***

2.14 The committee regularly requests that additional information be included in explanatory memoranda to ensure that provisions of bills on which the committee

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5 OPC Drafting Direction 4.1, *Dealing with instructors*, 29 May 2019 p. 3.

6 OPC Drafting Direction 4.1, *Dealing with instructors*, 29 May 2019 p. 3.

7 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 3 of 2019* at pp. 17-19 and Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 5 of 2019* at pp. 52-57.

8 The committee welcomed the amendments made which addressed its scrutiny concerns: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2019*, 18 September 2019, p. 24. Further details about the committee's consideration of this bill is provided in Chapter 3.

has commented are adequately explained. The committee's intention in requesting that important information be included in explanatory memoranda is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill. For example, in 2019 an addendum to the explanatory memorandum to the Communications Legislation Amendment (Deregulation and Other Measures) Bill 2019 was tabled in the Senate to explain how the appointment of a numbering scheme manager would be subject to parliamentary scrutiny and that decisions by the numbering scheme manager would be subject to judicial review.

2.15 In addition, the committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions. In relation to the scrutiny process, a comprehensive explanatory memorandum can provide the foundation for avoiding adverse scrutiny committee comment because whether or not a provision is of concern often depends on the context and circumstances. An explanatory memorandum should demonstrate that the proposed policy approach reflects an informed choice that is appropriately justified.

#### ***Use in legislation committee reports***

2.16 The committee routinely forwards its comments on bills to Senate legislation committees so that these committees may take the Scrutiny of Bills Committee's comments into consideration during their inquiries into particular bills. This practice is reflected in standing order 25(2A) which provides that:

The legislation committees, when examining bills or draft bills, shall take into account any comments on the bills published by the Standing Committee for the Scrutiny of Bills.

2.17 For example, on 19 September 2019, the Economics Legislation Committee tabled its report on the Currency (Restrictions on the Use of Cash) Bill 2019. The report considered issues raised by the committee, including in relation to the proposed imposition of significant penalties on entities that make or accept a payment of over \$10,000 in cash in circumstances where the explanatory memorandum did not provide any specific justification for the significant penalties, including imprisonment.<sup>9</sup> In its report, the Economics Legislation Committee supported these comments, stating its concerns that a disproportionate penalty could be applied to a small or medium-sized business, whose processes and procedures may not be as sophisticated as larger businesses.<sup>10</sup>

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9 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2019*, 17 October 2019, p. 19-20.

10 Senate Economics Legislation Committee, *Currency (Restrictions on the Use of Cash) Bill 2019 [Provisions]*, 28 February 2020, pp. 11-12 and 32-34.

### ***Debate in the Parliament and committees***

2.18 The committee's comments on bills are regularly referred to in debate in the Parliament. For example, the committee's comments were substantively discussed in 2019 during consideration of the following bills:

- Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019;<sup>11</sup>
- Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019;<sup>12</sup>
- Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019;<sup>13</sup>
- Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019;<sup>14</sup>
- Future Drought Fund Bill 2018;<sup>15</sup>
- Migration Amendment (Strengthening the Character Test) Bill 2019;<sup>16</sup>
- National Integrity Commission Bill 2018 (No. 2);<sup>17</sup> and
- National Sports Tribunal Bill 2019.<sup>18</sup>

### ***Use in Parliamentary Library Bills Digests***

2.19 The Parliamentary Library prepares Bills Digests to assist senators, members and others in understanding the key matters in many bills introduced into the Parliament. These Bills Digests regularly canvass issues raised by the Scrutiny of Bills Committee, thereby assisting interested senators and members in assessing key issues raised by this committee.

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11 *House of Representatives Hansard*, 4 December 2019, pp. 6948-6950 and 7020-7022.

12 *Senate Hansard*, 4 December 2019, pp. 4989-4994.

13 *House of Representatives Hansard*, 15 October 2019, pp. 4152-4094 and 4156-4159.

14 *Senate Hansard*, 26 November 2019, pp. 4219-4227 and 4237-4240.

15 *House of Representatives Hansard*, 21 February 2019, pp. 1358-1368.

16 *House of Representatives Hansard*, 18 September 2019, pp. 3450-3459 and 3473-3477.

17 *Senate Hansard*, 9 September 2019, pp. 1554-1563.

18 *Senate Hansard*, 10 September 2019, pp. 1748-1751.

## Chapter 3

### Case studies

3.1 This chapter includes examples of the committee's work during 2019. The case studies provide examples of the committee's work to illustrate:

- the committee's approach to its scrutiny role;
- the committee's role in identifying matters of concern as assessed against the scrutiny principles outlined in standing order 24(1)(a) and in obtaining relevant information which informs the legislative process; and
- the committee's role in providing the foundation for amendments to provisions and improvements to the content of explanatory material.

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#### Crimes Legislation Amendment (Police Powers at Airports) Bill 2019

3.2 This bill was initially introduced into the House of Representatives on 12 September 2018. It sought to broaden existing identity check provisions and create offences and powers in relation to identity check, move-on and ancillary directions by constables and protective services officers (PSOs) at Australia's major airports. The committee initially commented on the bill in *Scrutiny Digest 11 of 2018*, noting scrutiny concerns regarding trespass on personal rights and liberties.<sup>1</sup>

3.3 The bill sought to provide constables and PSOs with enhanced powers to direct a person to produce evidence of their identity, direct a person to leave airport premises or to not take particular flights, and direct a person to stop, or to do, anything else the constable considers on reasonable grounds to be necessary to facilitate the exercise of a power.

3.4 Based on the explanatory materials accompanying the bill, it was not clear to the committee why it was necessary for such broad powers to safeguard the 'good order' of an airport or flight, particularly as it would appear such powers may be used to direct persons to produce identity documents, vacate airports and related premises, and abstain from taking flights, in circumstances where there is no suspicion of criminal activity and no threat to safety.<sup>2</sup>

3.5 The committee was therefore concerned that allowing constables and PSOs to exercise powers to protect 'aviation security' may unduly trespass on individuals'

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1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, pp. 13-15.

2 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018, p. 14.

rights to privacy, free speech and free movement, particularly where the powers are exercised to promote 'good order'.<sup>3</sup>

3.6 In response to the committee, the minister advised that under the current framework, police are unable to request the identification of persons engaging in suspicious conduct at airports without a reasonable suspicion that an offence has been, is being, or will be, committed, and that the proposed powers would ensure that police could respond to serious threats that arise in the aviation environment in a more tailored and proportionate way. However, from a scrutiny perspective, the committee remained concerned that the bill would confer on the AFP broad powers to direct persons to produce identity documents, vacate airports and related premises, and abstain from taking flights, in circumstances where there is no suspicion of criminal activity and no identified threat to safety.<sup>4</sup>

3.7 The bill lapsed at the end of the 45<sup>th</sup> Parliament and was reintroduced into the House of Representatives on 4 July 2019. The new bill contained a more limited threshold for the exercise of the identity checking and move-on powers which removed the reference to the protection of 'aviation security'. The minister's second reading speech noted that the changes to the bill were consistent with the views expressed by the committee.<sup>5</sup>

3.8 As a result of the changes, the committee made no comment on the bill in the 46<sup>th</sup> Parliament.<sup>6</sup>

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### **Criminal Code Amendment (Agricultural Protection) Bill 2019**

3.9 The bill was introduced into the House of Representatives on 4 July 2019, and the committee initially commented on the bill in *Scrutiny Digest 3 of 2019*.

3.10 The bill sought to insert new offences into the Criminal Code to make it an offence to use a carriage service for inciting either trespass or property damage or theft on agricultural land. Both offences contained offence-specific defences which reverse the evidential burden of proof. The defences provided that the offence would not apply if the material related to a news report, or a current affairs report that is in the public interest and made by a person working in a professional capacity as a journalist.

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3 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018, p. 14.

4 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, 17 October 2018, p. 82.

5 *House of Representatives Hansard*, 4 July 2019, p. 295.

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2019*, 24 July 2019, p. 28.

3.11 The committee noted that 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 the common law right to be presumed innocent until proven guilty. The committee also noted that the explanatory memorandum did not contain a sufficient justification for the use of offence-specific defences. For example, no explanation was provided as to why the question of whether a news or current report is in the public interest would be a matter that is peculiarly within the knowledge of the defendant.<sup>7</sup>

3.12 In response to the committee, the Attorney-General advised that the reversal of the burden of proof was appropriate because 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 noted 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.<sup>8</sup>

3.13 On 12 September 2019 the Senate agreed to five Government amendments to the bill. The amendments provide that a defendant will not bear an evidential burden in relation to whether the material relates to a news report made in the public interest by a person working in a professional capacity as a journalist.

3.14 The committee considered the amendments in *Scrutiny Digest 6 of 2019*, and welcomed the amendments noting that they appeared to address the committee's scrutiny concerns.<sup>9</sup>

## Senator Helen Polley Chair

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7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2019*, 24 July 2019, p. 18.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2019*, 11 September 2019, p. 56.

9 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2019*, 18 September 2019, p. 24.





## **Appendix 1**

**The committee's scrutiny principles in detail**



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## Provisions which trespass unduly on personal rights and liberties

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### **Application of criterion set out in standing order 24(1)(a)(i)**

The committee is required to report on whether the provisions of proposed legislation could 'trespass unduly on personal rights and liberties'. For example, a bill might raise issues relating to:

- having a retrospective and adverse effect on those to whom it applies, sometimes from the date of a media announcement (in these instances known as 'legislation by press release');
- abrogating the privilege against self-incrimination (the right people have at common law to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved);
- reversing the common law burden of proof (requiring a person to prove their innocence when legal proceedings are taken against them);
- imposing strict or absolute liability as an element of fault for an offence;
- authorising search and seizure without the need to obtain a judicial warrant;
- privacy, including the confidentiality of professional communications with a person's legal advisers; or
- equipping officers with oppressive powers, especially for use against a vulnerable group of people.

These are categories that have arisen for consideration during most parliaments and are ones with which the committee is very familiar. However, standing order 24(1)(a)(i) may also apply in other circumstances and the committee is alert to identifying any new matters that may be considered inconsistent with the intent of the principle. More detail about matters that give rise to scrutiny concern and examples are discussed below.

### ***Retrospectivity***

Legislation has retrospective effect when it makes a law apply to an act or omission that took place before the legislation itself was enacted. Criticism of this practice is longstanding. The committee considers that retrospective legislation is of concern where it will, or might, have a detrimental effect on people. The committee will comment adversely in these circumstances. Where proposed legislation will have retrospective effect the committee expects that the explanatory memorandum should set out in detail the reasons retrospectivity is sought. The justification should include a statement of whether any person will or might be adversely affected and, if

so, the number of people involved and the extent to which their interests are likely to be affected.

**For examples, see the committee's comments concerning the:**

- Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (*Scrutiny Digest 1 of 2019*, pp. 30-31);
- Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019 (*Scrutiny Digest 10 of 2019*, pp. 3-5);
- Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019 (*Scrutiny Digest 8 of 2019*, pp. 19-20);
- Native Title Legislation Amendment Bill 2019 (*Scrutiny Digest 10 of 2019*, pp. 53-54); and
- Treasury Laws Amendment (Tax Integrity and Other Measures No. 1) Bill 2019 (*Scrutiny Digest 5 of 2019*, pp. 73-76).

### ***Abrogation of the privilege against self-incrimination***

At common law, a person can decline to answer a question on the ground that their reply might tend to incriminate them. Legislation that interferes with this common law entitlement trespasses on personal rights and liberties and causes the committee considerable concern. However, the committee is also conscious of a government's need to have sufficient information to enable it to properly carry out its duties for the community. The committee accepts that in some circumstances good administration might require access to information that can only be obtained, or can best be obtained, by requiring a person to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence.

The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a provision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.

One of the factors the committee considers is the subsequent use that may be made of any incriminating disclosures. The committee generally holds to the view that it is relevant to take into account whether the proposed legislation balances the harm of abrogating the privilege by including a prohibition against any direct and indirect uses of the information beyond the purpose for which it is being obtained.

To date the only exception to this that the committee generally finds acceptable is that a forced disclosure should only be available for use in criminal proceedings when they are proceedings for giving false or misleading information in the disclosure the person has been compelled to make. The committee's experience is that the importance of the availability of these use and derivative use immunities are

generally understood and they are usually included in bills that seek to abrogate the privilege against self-incrimination.

**For examples, see the committee's comments concerning the:**

- Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill (*Scrutiny Digest 1 of 2019*, pp. 4-6); and
- Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (*Scrutiny Digest 4 of 2019*, pp. 13-15).

### ***Reversal of the burden of proof***

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence; the accused is not required to prove anything. Provisions in some legislation reverse this burden and require the person charged with an offence to prove, or disprove, a matter in order to establish his or her innocence or at least identify evidence that suggests a reasonable possibility that the matter exists or does not exist.

The committee usually comments adversely on a bill that places the burden on an accused person to disprove one or more elements of the offence with which he or she is charged, unless the explanatory memorandum clearly and adequately justifies the rationale for the approach, particularly by reference to the principles outlined in its comments on this issue recorded in the committee's *Scrutiny Digests* and in the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. In this respect, the burden of proof should only be reversed if the relevant matter 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.<sup>1</sup>

**For examples, see the committee's comments concerning the:**

- Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 (*Scrutiny Digest 10 of 2019*, pp. 35-36);
- Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019 (*Scrutiny Digest 10 of 2019*, pp. 9-10); and
- Protection of the Sea (Prevention of Pollution from Ships) Amendment (Air Pollution) Bill 2019 (*Scrutiny Digest 8 of 2019*, pp. 91-97).

### ***Strict and absolute liability offences***

The committee draws the Senate's attention to provisions that create offences of strict or absolute liability and expects that where a bill creates such an offence the

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

reasons for its imposition will be set out in the explanatory memorandum that accompanies the bill.

An offence is one of **strict liability** where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. A person charged with a strict liability offence is able to invoke a defence of mistake of fact.

An offence of **absolute liability** also provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. However, in the case of absolute liability offences, the defence of mistake of fact is not available.

**For examples, see the committee's comments concerning the:**

- Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (*Scrutiny Digest 5 of 2019*, pp. 58-61);
- Migration Amendment (Regulation of Migration Agents) Bill 2019 (*Scrutiny Digest 10 of 2019*, pp. 14-16); and
- Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (*Scrutiny Digest 5 of 2019*, pp. 77-79).

#### ***Powers of search and seizure without warrant***

The committee consistently draws the Senate's attention to provisions that allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties. A provision giving such a power will be acceptable only when the circumstances and gravity of the matter justify it (and this information should be included in the explanatory memorandum).

**This issue was not raised by the committee in 2019.**

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## Insufficiently defined administrative powers

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### **Application of criterion set out in standing order 24(1)(a)(ii)**

Legislation may contain provisions which make rights and liberties unduly dependent on insufficiently defined administrative powers. For example, a provision might:

- give administrators ill-defined and/or wide powers; or
- delegate power to 'a person' without any further qualification as to who that person might be.

### ***Broad discretionary powers***

Since its establishment in 1981, the committee has drawn the Senate's attention to legislation that gives administrators seemingly ill-defined and wide powers. If a provision that is of interest to the committee is accompanied by a comprehensive explanation of the rationale for the approach in the explanatory memorandum, the committee is able to better understand the proposal and either make no further comment or leave the matter to the consideration of the Senate.

**For examples, see the committee's comments concerning the:**

- Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (*Scrutiny Digest 8 of 2019*, pp. 43-48);
- Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019 (*Scrutiny Digest 10 of 2019*, pp. 1-2); and
- Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (*Scrutiny Digest 5 of 2019*, pp. 46-50).

### ***Delegation of power to 'a person' or to a wide class of persons***

The committee consistently draws attention to legislation that allows significant and wide-ranging powers to be delegated to anyone who fits an all-embracing description (such as 'a person') or which allows delegations to a relatively large class of persons with little or no specificity as to appropriate qualifications or attributes. Generally the committee prefers to see a limit set either on the sorts of powers that might be delegated or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where delegations are made the committee also expects that an explanation of why they are considered necessary should be included in the explanatory memorandum, especially if the delegation is broad.

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**For examples, see the committee's comments concerning the:**

- Aged Care Legislation Amendment (New Commissioner Functions) Bill 2019 (*Scrutiny Digest 9 of 2019*, pp. 12-14);
- Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019 (*Scrutiny Digest 8 of 2019*, pp. 70-73);
- Emergency Response Fund Bill 2019 (*Scrutiny Digest 7 of 2019*, pp. 67-70); and
- Health Legislation Amendment (Data-matching and Other Matters) Bill 2019 (*Scrutiny Digest 9 of 2019*, pp. 23-25).



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## Undue dependence on non-reviewable decisions

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### **Application of criterion set out in standing order 24(1)(a)(iii)**

Legislation may contain provisions which make 'rights, liberties or obligations unduly dependent upon non-reviewable decisions'. Relevantly, a bill may:

- exclude review on the merits by an appropriate appeal tribunal;
- exclude judicial review of the legality of a decision;
- provide that reasons need not be given for a decision; or
- fail to provide for people to be notified of their rights of appeal against administrative decisions.

### ***Excluding merits and judicial review***

The committee is of the view that, where a decision may have a substantial impact on a person's rights and interests, judicial review should generally be available to ensure that such decisions are lawfully made. Since its establishment, the committee has drawn attention to provisions that explicitly or otherwise exclude or fail to provide for effective judicial review.

The committee also routinely draws attention to bills that seek to deny the opportunity for independent merits review. However, the committee also accepts that there are circumstances in which merits review is not, or may not be, necessary. The committee is assisted when the explanatory memorandum comprehensively and persuasively describes the rationale for the proposed approach.

### **For examples, see the committee's comments concerning the:**

- Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (*Scrutiny Digest 8 of 2019*, pp. 51-52);
- Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 (*Scrutiny Digest 2 of 2019*, pp. 10-12);
- Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (*Scrutiny Digest 5 of 2019*, pp. 46-50); and
- Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019 (*Scrutiny Digest 10 of 2019*, pp. 12-13).

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## Inappropriate delegation of legislative power

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### Application of criterion set out in standing order 24(1)(a)(iv)

Legislation often includes the delegation of a power to make laws, giving delegates (usually a member or representative of the Executive Government) the authority to make regulations or other instruments that are not required to be considered and approved by Parliament before they take effect. The committee's task under this criterion is therefore to draw the Senate's attention to provisions that seek to delegate Parliament's power inappropriately. Examples of provisions that may inappropriately delegate legislative power include those which:

- enable delegated legislation to amend or modify the operation of an Act of Parliament (often called a 'Henry VIII' clause);
- provide for matters which are so important that they should be regulated by Parliament but are, in fact, to be dealt with by delegated legislation;
- provide that a levy or a charge be set by regulation; or
- give to the Executive unfettered control over whether or when an Act passed by the Parliament should come into force.

### *Henry VIII clauses*

A Henry VIII clause is a provision which authorises the amendment of either the empowering Act, or any other primary legislation, by means of delegated legislation. Since its establishment, the committee has consistently drawn attention to Henry VIII clauses and other provisions which permit delegated legislation to amend or take precedence over primary legislation. A clear and helpful explanation in the explanatory memorandum can allow the committee to leave the matter to the Senate.

### For examples, see the committee's comments concerning the:

- Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (*Scrutiny Digest 2 of 2019*, pp. 84-85); and
- Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2018 (*Scrutiny Digest 1 of 2019*, pp. 65-66).

### *Significant matters in delegated legislation*

The committee also draws attention to provisions that inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. Significant matters should be undertaken directly by Parliament and not left to the subordinate legislation disallowance process.

**For examples, see the committee's comments concerning the:**

- Currency (Restrictions on the Use of Cash) Bill 2019 (*Scrutiny Digest 8 of 2019*, pp. 62-64);
- Health Legislation Amendment (Data-matching and Other Matters) Bill 2019 (*Scrutiny Digest 9 of 2019*, pp. 21-23);
- National Housing Finance and Investment Corporation Amendment Bill 2019 (*Scrutiny Digest 7 of 2019*, pp. 77-81); and
- Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 (*Scrutiny Digest 7 of 2019*, pp. 91-94).

***Setting the rate of a 'levy' by regulation***

The committee has also consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation, particularly where such a levy may amount to taxation. It is for the Parliament, rather than the makers of delegated legislation, to set a rate of tax.

The committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by delegated legislation, the committee expects that there will be some limits imposed on the exercise of this power. For example, the committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose levies or fees.

**For example, see the committee's comments concerning the:**

- Higher Education Support (HELP Tuition Protection Levy) Bill 2019 and VET Student Loans (VSL Tuition Protection Levy) Bill 2019 (*Scrutiny Digest 8 of 2019*, pp. 79-81).

## Appropriate parliamentary scrutiny of legislative power

### Application of criterion set out in standing order 24(1)(a)(v)

Whenever Parliament delegates power to legislate, it should properly address the question of how much oversight to maintain over the exercise of that delegated power. Provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny include those which:

- provide a power to make delegated legislation that is not to be tabled in Parliament, or which is to be tabled, but is not disallowable;
- provide that legislative instruments to be made under primary legislation may incorporate rules or standards of other bodies as in force from time to time;
- enable a Minister or other person to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised, with no obligation that they be tabled in Parliament or subject to disallowance; or
- provide for the ongoing appropriation of an unspecified amount of money from the Consolidated Revenue Fund.

### ***Delegated legislation not subject to disallowance***

When a provision of a bill specifies that an instrument is not subject to disallowance the committee expects the explanatory memorandum to set out a full explanation justifying the need for the exemption.

**For examples, see the committee's comments concerning the:**

- Emergency Response Fund Bill 2019 (*Scrutiny Digest 7 of 2019*, pp. 63-67); and
- Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (*Scrutiny Digest 7 of 2019*, pp. 82-86).

### ***Incorporating material 'as in force from time to time'***

The *Legislation Act 2003* includes a general rule which allows a legislative instrument, such as a regulation, to adopt or incorporate additional material and give it the force of law. The incorporated material applies in the form in which it exists *at the time of adoption* unless a provision in the relevant Act allows material to be incorporated 'as in force from time to time'. Typical wording included in bills to achieve this outcome provides that the relevant regulations may:

...apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing as in force from time to time.

Allowing material to be incorporated 'as in force from time to time' is of concern from a scrutiny perspective because it:

- allows a change in legal obligations to be imposed without the Parliament's knowledge and without the opportunity for Parliament to scrutinise the variation;
- can create uncertainty in the law because those affected may not be aware that the law has changed; and
- those obliged to obey the law may have inadequate access to its terms, depending on the nature of the material being incorporated.

The committee expects that the explanatory memorandum for a bill that includes a provision which seeks to incorporate non-legislative material 'as in force from time to time' will clearly and comprehensively explain the necessity for this approach and indicate how the concerns outlined above will be met.

**For examples, see the committee's comments concerning the:**

- Customs Amendment (Product Specific Rule Modernisation) Bill 2019 (*Scrutiny Digest 9 of 2019*, pp. 1-3).
- Treasury Laws Amendment (Consumer Data Right) Bill 2019 (*Scrutiny Digest 5 of 2019*, pp. 85-86).

### ***Standing Appropriations***

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.

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation on the period during which it applies.

**The committee reports on its scrutiny of standing appropriations in chapter 3 of each Scrutiny Digest.**