

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

**Annual Report 2020**

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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

## Secretariat

Mr Glenn Ryall, Secretary  
Ms Alexandra Logan, Principal Research Officer  
Ms Eloise Menzies, Principal Research Officer  
Ms Sarah Batts, Senior Research Officer  
Ms Katie Helme, Senior Research Officer  
Mr Matthew Kowaluk, Senior Research Officer  
Ms Hannah Wilkins, Senior Research Officer  
Ms Georgia Fletcher, Legislative Research Officer

## Committee legal adviser

Professor Leighton McDonald

## Committee contacts

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Phone: 02 6277 3050  
Email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny)



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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

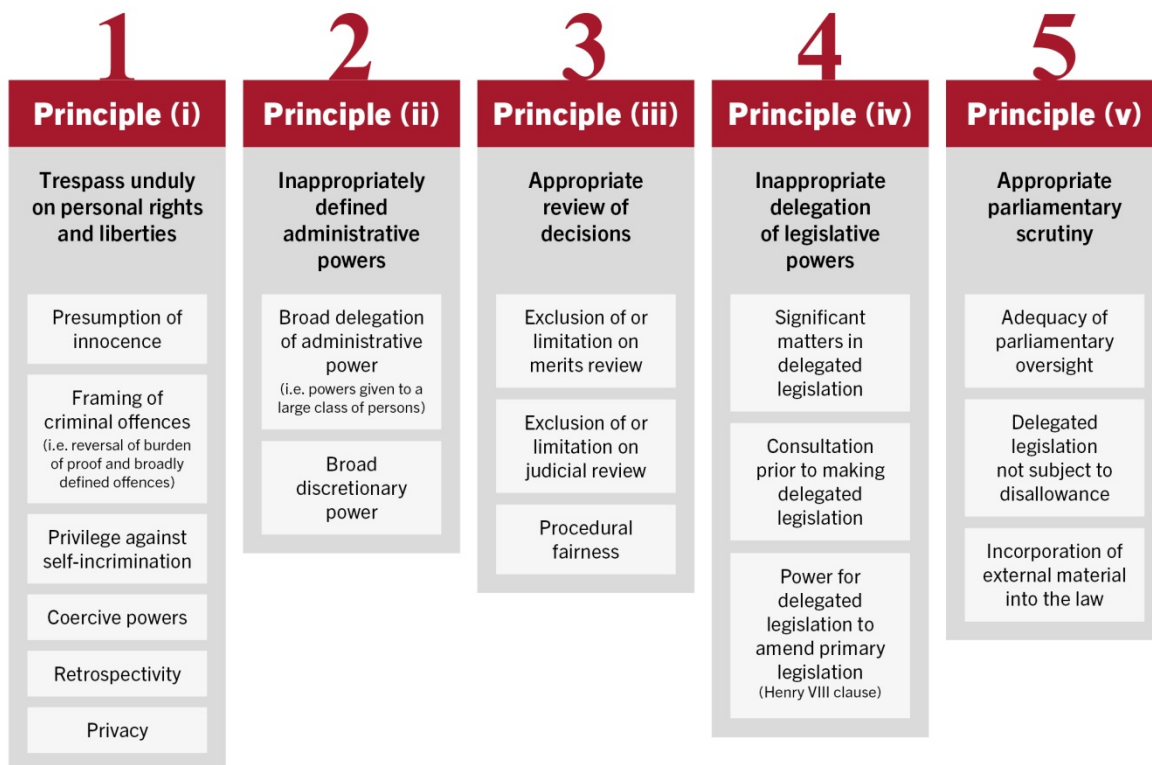
minority groups or independent senators). In accordance with standing orders 24(4) and 24(5), the chair of the committee is an opposition member, and the deputy chair is a government member.

**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 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. 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 2020.

## 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 has received a response but not yet finally reported.<sup>2</sup> In November 2017 the standing orders were amended to provide that any senator may ask a minister for an

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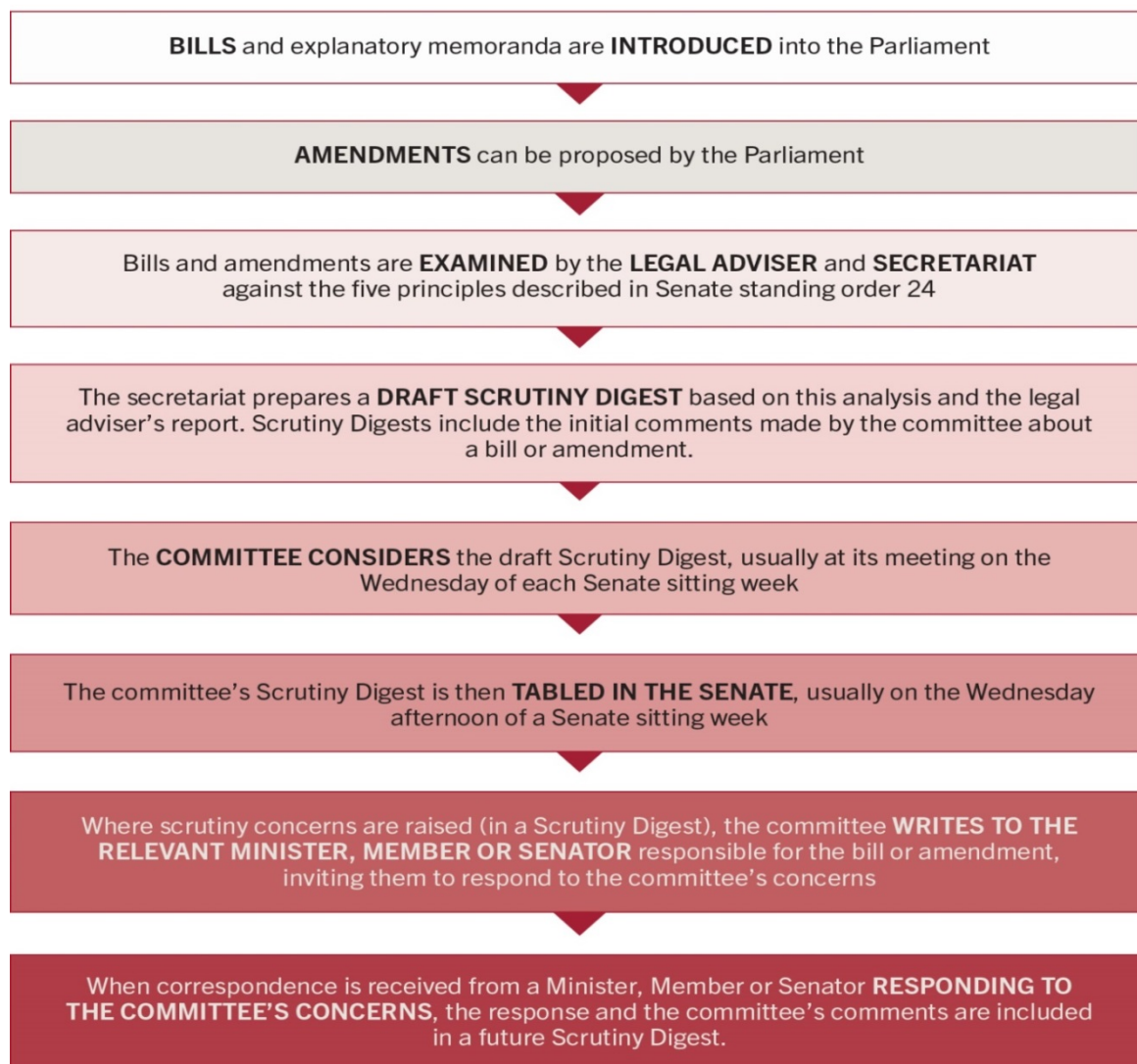
1 The five principles are discussed in detail in Appendix 1, with specific case studies in chapter 3.

2 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).

explanation as to why a response has not been provided to the committee.<sup>3</sup> During 2020, 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



### 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

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

committee had published its scrutiny comments from its commencement in 1981 until the end of 2016.<sup>4</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 secretariat's and legal adviser'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>5</sup> *Scrutiny News* highlights recent comments drawn from material in the 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*.

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4 *Scrutiny Digests*, as well as *Alert Digests* and *Reports* dating back to 1982, are available from the committee's website at [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny).

5 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).

## 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—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 2020, the committee drew 55 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 June 2020 the committee drew to the attention of the Scrutiny of Delegated Legislation Committee its scrutiny concerns about provisions in the Coronavirus Economic Response Package Omnibus Bill 2020 which sought to include broad powers to allow delegated legislation to amend the operation of the *Corporations Act 2001*.<sup>6</sup> When the Scrutiny of Delegated Legislation Committee considered the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 and Corporations (Coronavirus Economic Response) Determination (No. 4) 2020, made under provisions of the *Corporations Act 2001* as amended by that bill, that committee was able to draw on the Scrutiny of Bills Committee's comments when setting out its own scrutiny concerns about the modification of primary legislation by delegated legislation.<sup>7</sup>

1.24 The committee also provided a submission to the Scrutiny of Delegated Legislation Committee's inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>8</sup>

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6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2020*, 10 June 2020, pp. 37–39.

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 7 of 2020 – Committee correspondence*, pp. 28–29 and *Delegated Legislation Monitor 13 of 2020 – Committee correspondence*.

8 Senate Standing Committee for the Scrutiny of Bills, *Submission 4*, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary scrutiny*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Exemptfromoversight](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight)

1.25 The committee will continue to work closely with the Scrutiny of Delegated Legislation Committee and the Parliamentary Joint Committee on Human Rights where appropriate in the future.

### **Acknowledgements**

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

1.27 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 2020

2.1 This chapter provides information about the work of the committee during 2020, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills.

#### Statistics

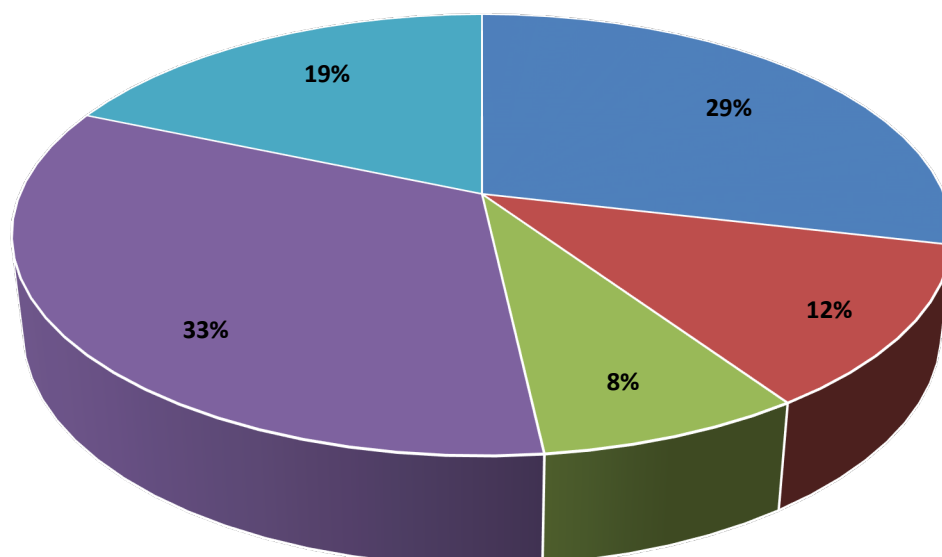
2.2 Each year the committee usually analyses around 200 to 250 bills. The table below sets out the bills scrutinised by the committee from 2018 to 2020.

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 2020 was significantly higher than in 2019. 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
2018	251	112	87	46
2019	255	102	39	3
2020	210	101	52	15

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 chart shows that the most common principle on which the committee commented in 2020 was principle (iv), relating to the inappropriate delegation of legislative power (33 per cent). During 2020, principle (i) relating to possible undue trespass on personal rights and liberties was the next most common principle commented on by the committee (29 per cent).

**Scrutiny comments on bills by principle under  
standing order 24(1)(a)  
January to December 2020**



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

### **Impact of the committee's work in 2020**

2.5 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.



2.6 As noted above, since the committee's establishment 40 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***

2.7 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>

2.8 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.

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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/resource-centre/government/legislation-handbook>.

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: <https://www.opc.gov.au/drafting-resources/drafting-directions>.

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

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>

2.10 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***

2.11 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.

2.12 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 2020 government amendments were moved that addressed one of the committee's scrutiny concerns in relation to the Aged Care Amendment (Aged Care Recipient Classification) Bill 2020. The bill, as originally introduced, provided that a delegate of the secretary could make a record of or use or disclose identifiable personal information about an aged care recipient for broad purposes under the *Aged Care Act 1997*, including for the purposes of monitoring, reporting on, or conducting research into the general quality or safety of aged care, or the level of need in the community. Following the committee's comments,<sup>7</sup> government amendments were agreed to which addressed the committee's concerns in relation to the use and disclosure of personal information.<sup>8</sup>

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5 OPC Drafting Direction 4.1, *Dealing with instructors*, 16 July 2020 p. 3.

6 OPC Drafting Direction 4.1, *Dealing with instructors*, 16 July 2020 p. 3.

7 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 15 of 2020* at pp. 1–6 and Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 17 of 2020* at pp. 27–34.

8 The committee thanked the minister for moving amendments to the bill which appeared to address its scrutiny concerns: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021*, 29 January 2021, p. 53.

***Improved explanatory material***

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

2.14 For example:

- in August 2020 an addendum to the explanatory memorandum to the Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020 was tabled in the House of Representatives to explain how the retrospective commencement of sections of the bill restored necessary protections to providers and families receiving care, and restored civil penalties which were unintentionally repealed; and
- in September 2020 an addendum to the explanatory memorandum to the Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 was tabled in the House of Representatives to clarify that paragraphs 36B(1)(a)–(c) of the bill outlined the matters the minister must, rather than may, be satisfied of when determining to cease a person's Australian citizenship.

2.15 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 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 5 November 2020, the Foreign Affairs, Defence and Trade Legislation Committee (FADT Committee) tabled its report on the provisions of the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020. The report considered issues raised by this committee in its

*Digest 14 of 2020*, including in relation to leaving significant matters in the scheme, including significant definitions, to delegated legislation.<sup>9</sup> The FADT committee considered, in particular, the definition of 'institutional autonomy', in relation to foreign universities who may be included in the in scope of the bill, and recommended that the definition of 'institutional autonomy' be included in the bill itself, rather than as a disallowable rule.<sup>10</sup> The FADT committee also recommended that the government consider including a definition of corporate autonomy in the bill to clarify the operation of the legislation in relation to corporations.<sup>11</sup> In its *Scrutiny Digest 18 of 2020*, this committee noted advice from the minister that the government successfully moved amendments to the bill to introduce a definition of foreign universities that lack institutional autonomy. However, the committee also reiterated its scrutiny concerns in relation to allowing delegated legislation to determine the scope of other key definitions in the bill.<sup>12</sup>

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

2.18 The committee's comments on bills are regularly referred to in debate in both Houses of the Parliament. For example, the committee's comments were substantively discussed in 2020 during consideration of the following bills:

- Agriculture Legislation Amendment (Streamlining Administration) Bill 2019;<sup>13</sup>
- Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019;<sup>14</sup>
- Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019;<sup>15</sup>

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9 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]*, 5 November 2020, pp. 16–19 and 33–35.

10 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]*, 5 November 2020, p. 51.

11 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]*, 5 November 2020, p. 51.

12 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 18 of 2020* at p. 43.

13 *Senate Hansard*, 24 February 2020, pp. 1263–1264.

14 *House of Representatives Hansard*, 11 November 2020, p. 9515.

15 *Senate Hansard*, 11 June 2020, pp. 2870–2871.

- Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019;<sup>16</sup>
- Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019;<sup>17</sup>
- Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020;<sup>18</sup>
- Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020;<sup>19</sup>
- National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020;<sup>20</sup>
- Recycling and Waste Reduction Bill 2020 and related bills;<sup>21</sup>
- Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019;<sup>22</sup>
- Transport Security Amendment (Serious Crime) Bill 2019;<sup>23</sup> and
- Transport Security Amendment (Testing and Training) Bill 2019.<sup>24</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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16 *Senate Hansard*, 4 December 2020, p. 4991.

17 *Senate Hansard*, 15 June 2020, pp. 3171–3173.

18 *House of Representatives Hansard*, 19 October 2020, p. 7407.

19 *House of Representatives Hansard*, 31 August 2020, pp. 6019–6021, 6030–6040.

20 *House of Representatives Hansard*, 13 February 2020, pp. 1169–1170, and 17 June 2020, pp. 4715–4716.

21 *House of Representatives Hansard*, 26 October 2020, p. 8108.

22 *House of Representatives*, 12 June 2020, p. 4109; *Senate Hansard*, 26 August 2020, pp. 4048–4049.

23 *House of Representatives Hansard*, 7 October 2020, p. 6920.

24 *Senate Hansard*, 24 August 2020, pp. 3834–3850.



## Chapter 3

### Case studies

3.1 This chapter includes examples of the committee's work during 2020. 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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#### Transport Security Amendment (Testing and Training) Bill 2019

3.2 This bill was initially introduced into the Senate on 4 December 2019. Among other measures, the bill sought to provide for the implementation of new screening officer training and to expand the testing of security systems used by the aviation industry. The committee initially commented on the bill in *Scrutiny Digest 1 of 2020*, noting scrutiny concerns regarding significant matters in delegated legislation and the adequacy of parliamentary oversight.<sup>1</sup>

3.3 The bill sought to permit an aviation security inspector to test an aviation industry participant's security system, including by using an item, weapon or vehicle to test its detection. Requirements for such tests would be prescribed in the regulations.

3.4 Based on the explanatory materials accompanying the bill, it was not clear to the committee why it was necessary or appropriate to prescribe the requirements for aviation security tests in delegated legislation. The committee also noted, while that the explanatory memorandum to the bill stated that any 'test pieces' are designed to be inert and to not cause harm, this requirement was not included in the primary legislation.

3.5 The committee also commented on provisions in the bill which would allow the secretary to exempt classes of screening officers from certain training and qualification requirements by non-legislative instrument, which is not subject to parliamentary disallowance. The committee was concerned that these provisions in the bill provided the secretary with a broad discretionary power to exempt persons from the operation of the legislation in circumstances where there would be no

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1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2020*, pp. 34–36.

parliamentary oversight regarding the number of exemptions issued or the operation of the secretary's power to make exemptions. The committee considered that the bill could be amended to allow for parliamentary oversight of the exemptions without compromising the need for operational security.

3.6 In response to the committee, the minister advised that requirements for aviation security tests needed to be flexible enough to cater for modifications needed to respond to emerging threats and risks and that establishing the requirements in primary legislation may unintentionally fetter Australia's ability to rapidly respond to unanticipated changes in the security threat or risk environments. In relation to the committee's query in relation to 'test pieces' used by aviation security inspectors, the minister thanked the committee for bringing this question to his attention and advised that, following the receipt of legal and technical advice, the government would propose amendments to the bill to specify that 'test pieces' must be inert.

3.7 In response to the committee's questions about the adequacy of parliamentary oversight in relation to training exemptions, the minister also advised that, after consideration of the concerns raised by the committee, the government would propose amendments to the bill to provide that information on the exercise of the exemption power is to be published in the department's annual report or through another appropriate mechanism.

3.8 On 24 August 2020 the Senate agreed to seven Government amendments and three Opposition amendments to the bill.

3.9 The committee considered the amendments in *Scrutiny Digest 11 of 2020*, and welcomed the amendments that set out a definition of 'test weapon' on the face of the primary legislation and inserted new reporting requirements to provide parliamentary oversight of any exemption of a class of screening officers from one or more training or qualification requirements.<sup>2</sup>

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## Coronavirus Economic Response Package Omnibus Bill 2020

3.10 During 2020, the committee requested additional detailed information from various ministers in relation to the operation of the first and second tranches of the Coronavirus Economic Response Package Bills.<sup>3</sup> In its initial comments, and in considering responses provided by ministers, the committee also drew nine bills to the attention of the Senate Select Committee on COVID-19, covering a number of matters including:

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2 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2020*, p. 17.

3 See, in particular, *Scrutiny Digests 5 and 6 of 2020*.



- the classification of ordinary annual services in Appropriation bills;<sup>4</sup>
- unprecedented amounts allocated under Advance to the Finance Minister provisions in Appropriations and Supply bills;<sup>5</sup>
- a range of broad discretionary powers;<sup>6</sup> and
- the inclusion of significant matters, including the establishment or modification of regulatory schemes, in delegated legislation.<sup>7</sup>

3.11 For example, the Coronavirus Economic Response Package Omnibus Bill 2020 was introduced into and passed both Houses of the Parliament on 23 March 2020. The committee initially commented on the bill in *Scrutiny Digest 5 of 2020*.

3.12 The bill sought to amend and implement changes to various Commonwealth Acts to respond to the coronavirus pandemic and included provisions that would allow the executive to:

- temporarily exempt specified classes of persons from the operation of specified provisions, or temporarily modify the operation of specified provisions of, the *Corporations Act 2001* or the Corporations Regulations; and
- modify social security law to vary provisions relating to the qualifications of persons for social security payments and the rate of social security payments.

3.13 The committee noted that such provisions, sometimes referred to as ‘Henry VIII clauses’, raise significant scrutiny concerns as they impact on the level of parliamentary scrutiny of a measure and may subvert the appropriate relationship between the Parliament and the executive. The committee also noted that the explanatory memorandum contained no justification for the use of Henry VIII clauses.

3.14 The committee also sought advice from ministers about provisions in the bill that delegated legislative power and conveyed broad discretionary powers in relation to the operation of supplement payments, and about provisions providing for the deferral of sunseting.

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4 See, for example, Appropriation (Coronavirus Economic Response Package) Bill (No. 1) 2019-2020, *Scrutiny Digest 5 of 2020*, pp. 1–4.

5 See, for example, Appropriation (Coronavirus Economic Response Package) Bill (No. 2) 2019-2020, *Scrutiny Digest 5 of 2020*, pp. 5–7.

6 See, for example, Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020, *Scrutiny Digest 5 of 2020*, pp. 8–10.

7 See, for example, Coronavirus Economic Response Package Omnibus Bill 2020, *Scrutiny Digest 6 of 2020*, pp. 14–15.

3.15 In response to the committee's requests about the use of delegated legislation to amend the operation of the *Corporations Act 2001*, the Treasurer advised that the provisions established a time-limited mechanism to provide short-term regulatory relief to classes of persons that, due to the coronavirus, were unable to meet obligations under relevant corporations legislation.<sup>8</sup>

3.16 In response to the committee's questions about the use delegated legislation to modify the operation of the social security law, the Minister for Families and Social Services advised that the provisions would allow the government to act rapidly to provide support to persons in need. The minister also provided advice regarding circumstances in which the provisions had been used.<sup>9</sup>

3.17 While welcoming the additional information provided by the ministers, the committee took the opportunity to reiterate that there are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament. The committee further emphasised its scrutiny view that if Parliament is sitting changes to, or exemptions from, primary legislation should be made by introducing a bill for consideration by the Parliament, rather than relying on the use of a Henry VIII clause.

3.18 The committee also drew this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

**Senator Helen Polley**  
**Chair**

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8 *Scrutiny Digest 7 of 2020*, pp. 37–39.

9 *Scrutiny Digest 6 of 2020*, pp. 22–25.

# **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:**

- Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020 (*Scrutiny Digest 15 of 2020*, pp. 7–9);
- Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019 (*Scrutiny Digest 1 of 2020*, pp. 47–49);
- Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020 (*Scrutiny Digest 6 of 2020*, pp. 9–12);
- Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020 (*Scrutiny Digest 15 of 2020*, pp. 25–26);
- Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Bill 2020 (*Scrutiny Digest 17 of 2020*, pp. 21–22); and
- Treasury Laws Amendment (2020 Measures No. 1) Bill 2020 (*Scrutiny Digest 3 of 2020*, pp. 16–17).

***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:**

- Australian Security Intelligence Organisation Amendment Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 5–6);
- Crimes Legislation Amendment (Economic Disruption) Bill 2020 (*Scrutiny Digest 13 of 2020*, pp. 6–7); and
- National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 (*Scrutiny Digest 12 of 2020*, pp. 8–9).

***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:**

- Australian Security Intelligence Organisation Amendment Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 8–9);
- National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 (*Scrutiny Digest 12 of 2020*, pp. 3–5);

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

- National Redress Scheme for Institutional Child Sexual Abuse Amendment (Technical Amendments) Bill 2020 (*Scrutiny Digest 15 of 2020*, pp. 27–28);
- Payment Reporting Times Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 23–24);
- Recycling and Waste Reduction Bill 2020 (*Scrutiny Digest 12 of 2020*, pp. 22–24); and
- Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019 (*Scrutiny Digest 1 of 2020*, pp. 32–33).

### ***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 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:**

- Australian Security Intelligence Organisation Amendment Bill 2020 (*Scrutiny Digest 7 of 2020*, p. 10);
- Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (*Scrutiny Digest 17 of 2020*, pp. 3–5);
- Crimes Legislation Amendment (Economic Disruption) Bill 2020 (*Scrutiny Digest 13 of 2020*, pp. 3–4); and
- Recycling and Waste Reduction Bill 2020 (*Scrutiny Digest 12 of 2020*, pp. 24–26).

### ***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).



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

- Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (*Scrutiny Digest 14 of 2020*, pp. 18–20); and
- Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 16–18, and pp. 20–21).

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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:**

- Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020 (*Scrutiny Digest 5 of 2020*, pp. 8–10);
- Australian Security Intelligence Organisation Amendment Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 11–12);
- Coronavirus Economic Response Package Omnibus Bill 2020 (*Scrutiny Digest 5 of 2020*, pp. 14–15);
- National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020 (*Scrutiny Digest 9 of 2020*, pp. 39–42); and
- Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019 (*Scrutiny Digest 1 of 2020*, pp. 31–32).

### ***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.

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

- Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020 (*Scrutiny Digest 2 of 2020*, pp. 1–3);
- Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 7–8);
- Export Market Development Grants Legislation Amendment Bill 2020 (*Scrutiny Digest 15 of 2020*, pp. 20–21);
- Payment Reporting Times Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 22–23); and
- Territories Legislation Amendment Bill 2020 (*Scrutiny Digest 15 of 2020*, pp. 40–41).

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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:**

- Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 (*Scrutiny Digest 14 of 2020*, pp. 10–11);
- Export Market Development Grants Legislation Amendment Bill 2020 (*Scrutiny Digest 15 of 2020*, pp. 23–24);
- Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (*Scrutiny Digest 16 of 2020*, pp. 19–20); and
- National Emergency Declaration (Consequential Amendments) Bill 2020 (*Scrutiny Digest 18 of 2020*, pp. 20–21).

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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:

- Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020 (*Scrutiny Digest 15 of 2020*, p. 7–9);
- Coronavirus Economic Response Package Omnibus Bill 2020 (*Scrutiny Digest 5 of 2020*, pp. 14–15);
- Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020 (*Scrutiny Digest 6 of 2020*, pp. 10–12); and
- National Emergency Declaration Bill 2020 (*Scrutiny Digest 18 of 2020*, pp. 14–16).

### ***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 set out in primary legislation that is subject to full parliamentary consideration and not left to the subordinate legislation disallowance process.

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

- Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020 (*Scrutiny Digest 5 of 2020*, pp. 11–12);
- Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (*Scrutiny Digest 16 of 2020*, pp. 10–13 and 21–23);
- Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020 (*Scrutiny Digest 11 of 2020*, pp. 14–15); and
- National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020 (*Scrutiny Digest 3 of 2020*, pp. 7–8).

### ***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:**

- Civil Aviation (Unmanned Aircraft Levy) Bill 2020 (*Scrutiny Digest 11 of 2020*, pp. 3–4);
- Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020 (*Scrutiny Digest 11 of 2020*, pp. 13–14); and
- Primary Industries (Customs) Charges Amendment (Dairy Cattle Export Charge) Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 26–27).

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## Appropriate parliamentary scrutiny of legislative power

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### 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 exceptional circumstances that warrant the need for the exemption.

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

- Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 (*Scrutiny Digest 11 of 2020*, pp. 5–6);
- Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (*Scrutiny Digest 7 of 2020*, pp. 19–20);
- National Emergency Declaration Bill 2020 (*Scrutiny Digest 18 of 2020*, pp. 11–14);
- National Vocational Education and Training Regulator Amendment Bill 2019 (*Scrutiny Digest 1 of 2020*, pp. 24–25);
- Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 (*Scrutiny Digest 15 of 2020*, pp. 34–37); and
- Structured Finance Support (Coronavirus Economic Response Package) Bill 2020 (*Scrutiny Digest 5 of 2020*, pp. 19–20).

***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:**

- Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 (*Scrutiny Digest 6 of 2020*, pp. 7–8);
- Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (*Scrutiny Digest 11 of 2020*, pp. 11–12);
- Export Control Amendment (Miscellaneous Measures) Bill 2020 (*Scrutiny Digest 17 of 2020*, pp. 11–12);
- Recycling and Waste Reduction Bill 2020 (*Scrutiny Digest 12 of 2020*, pp. 31–32); and
- Therapeutic Goods Amendment (2020 Measures No. 1) Bill 2020 (*Scrutiny Digest 4 of 2020*, pp. 12–14).



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***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.**