

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

Annual Report 2021

30 March 2022

© Commonwealth of Australia 2022

ISBN 978-1-76093-398-2

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

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 Hannah Wilkins, Principal Research Officer
Mr Matthew Kowaluk, Senior Research Officer
Ms Sarah Batts, Senior Research Officer
Ms Eleonora Fionga, Legislative 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
Website: http://www.aph.gov.au/senate_scrutiny

TABLE OF CONTENTS

Membership of the Committee	iii
--	------------

Chapter 1

Introduction

Background.....	1
Committee establishment.....	1
Committee membership	1
The committee's scrutiny principles	2
The committee's mode of operation	3
The committee's workflow.....	3
Committee publications and resources	5
Interaction with other legislative scrutiny committees.....	6
Acknowledgements	7

Chapter 2

Work of the committee in 2021

Statistics.....	8
Impact of the committee's work in 2021	9

Chapter 3

Case studies

Major Sporting Events (Indicia and Images) Protection and Other Legislation Bill 2021	15
The committee's consideration of the Appropriation bills.....	16
Review of exemption from disallowance provisions in the <i>Biosecurity Act 2015</i>	18

Appendix 1

The committee's scrutiny principles in detail	20
---	----

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, or to scrutinise Acts of the Parliament, to determine whether they:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject 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.

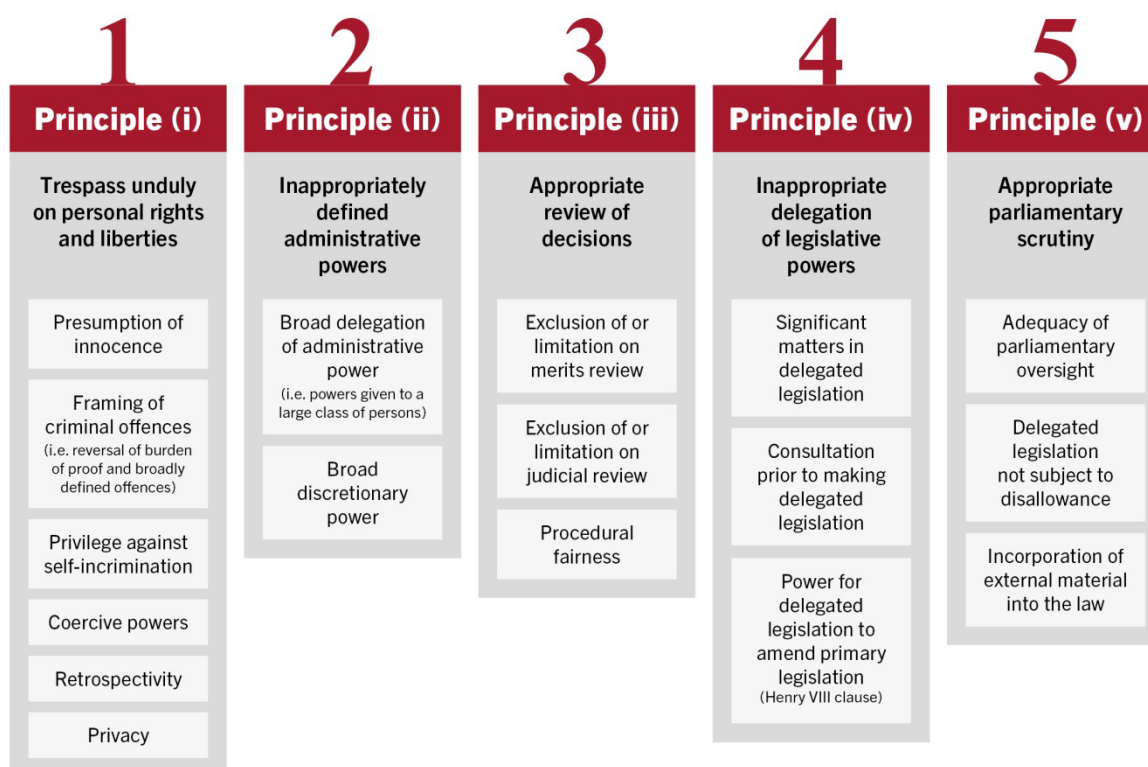
1.5 A list of current committee members can be found at the beginning of this report and can also be found on the committee's website.

The committee's scrutiny principles

1.6 As noted above, the scope of the committee's scrutiny of 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.

1.7 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

1.8 The committee examines all bills that come before the Parliament against the five principles set out in Senate standing order 24(1)(a),¹ and usually meets each sitting week to consider them. On occasion, the committee will also meet between sittings.

1.9 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.

1.10 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.

1.11 The committee also obtains advice from an external legal adviser, who is appointed by the committee with the approval of the President of the Senate. Professor Leighton McDonald served as the committee's legal adviser during the reporting period.

The committee's workflow

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

1.13 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.

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

1.15 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.² 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.³ During 2021, no senator used this process to ask a minister for such an explanation.

1.16 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



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.

3 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

1.17 Since 2017 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 2016.⁴

1.18 Chapter 1 of the *Scrutiny Digest* comprises the committee's initial comments on bills and amendments, identified by reference to the committee's scrutiny principles. Chapter 2 comprises the committee's comments on responses received from ministers.

1.19 The *Scrutiny Digest* is generally published on the Wednesday of each sitting week, although on occasion the committee will also report between sittings.

Scrutiny News

1.20 The committee secretariat prepares a brief *Scrutiny News* publication each sitting week which is sent to all senators and their staff, Senate committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list.⁵ *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.

1.21 Highlights from the Senate Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor* are also included in *Scrutiny News*.

Guidelines

1.22 In December 2021 the committee published guidelines setting out the committee's expectations in relation to its technical scrutiny principles. The guidelines also include a brief summary of the committee's work practices.⁶ The committee's guidelines are regularly reviewed by the committee's secretariat and will be updated as appropriate.

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.

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.

6 Senate Standing Committee for the Scrutiny of Bills, *Guidelines, 1st Edition*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Guidelines.

Index of bills

1.23 The *Index of Bills* is an alphabetical list of all bills, and amendments to bills, that the committee has considered during a calendar year.

Interaction with other legislative scrutiny committees

1.24 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.

1.25 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 2021, the committee drew 39 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.

1.26 For example, in December 2020 the committee drew to the attention of the Scrutiny of Delegated Legislation Committee its scrutiny concerns about provisions in the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 which would allow the minister to, by legislative instrument, exempt state and territory arrangements from the application of the legislative scheme established by the bill.⁷ In 2021 the Scrutiny of Delegated Legislation Committee set out its own scrutiny concerns in relation to rules made under these provisions,⁸ noting that the specification of exempt arrangements is a significant matter that goes to the scope of the scheme as a whole.⁹ In response to the committees' scrutiny concerns, the Minister for Foreign Affairs amended the rules on 10 August 2021 to provide that they sunset after five years.¹⁰

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18 of 2020*, pp. 41-42.

8 Australia's Foreign Relations (State and Territory Arrangements) Rules 2020 [F2020L01569].

9 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Correspondence relating to the Australia's Foreign Relations (State and Territory Arrangements) Rules 2020*, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/-/media/97316975756041A1B683D9E73E2D37B8.ashx.

10 Australia's Foreign Relations (State and Territory Arrangements) Amendment (Repeal) Rules 2021 [F2021L01125].

1.27 In December 2021, the three legislative scrutiny committees provided a joint submission to the 2021-22 Review of the *Legislation Act 2003*.¹¹

1.28 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

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

1.30 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.

11 Attorney-General's Department, *2021-22 Review of the Legislation Act 2003*, [https://www.ag.gov.au/legal-system/administrative-law/legislation-act-2003/2021-22-review-
legislation-act-2003](https://www.ag.gov.au/legal-system/administrative-law/legislation-act-2003/2021-22-review-legislation-act-2003).

Chapter 2

Work of the committee in 2021

2.1 This chapter provides information about the work of the committee for the period from 1 January to 31 December 2021, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills.

Statistics

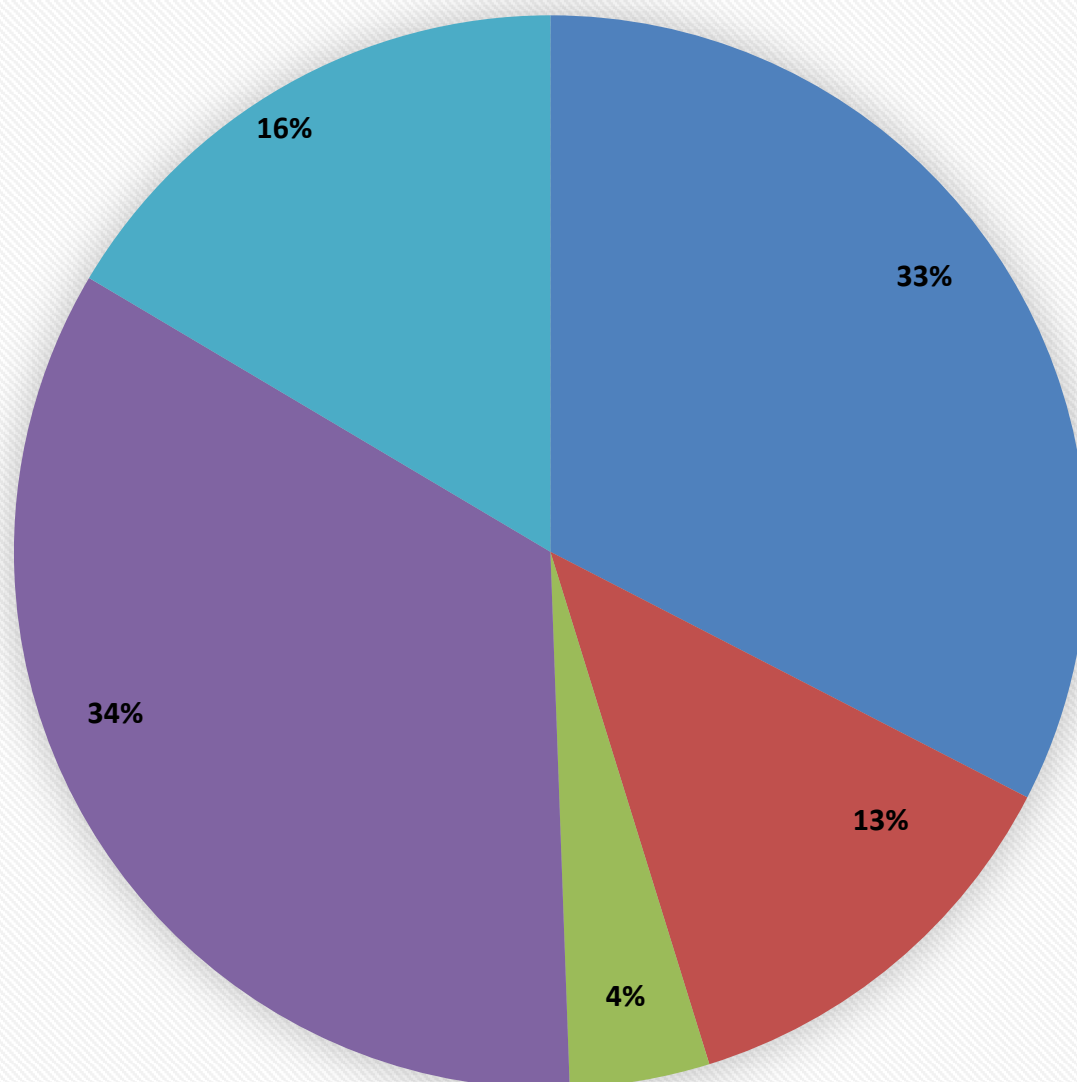
2.2 Each year the committee usually analyses around 200 to 250 bills. The table below sets out the bills scrutinised by the committee from 2019 to 2021.

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 2021 was significantly higher than in 2020.

Year	Bills considered	Bills commented on	Amendments to bills considered	Amendments to bills commented on
2019	255	102	39	3
2020	210	101	52	15
2021	223	107	81	36

2.4 The chart on page 9 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 2021 was principle (iv), relating to the inappropriate delegation of legislative power (34 per cent). During 2021, principle (i) relating to undue trespass on personal rights and liberties was the next most common principle commented on by the committee (33 per cent).

Scrutiny comments on bills by principle under standing order 24(1)(a) January to December 2021



- (i) undue trespass on personal rights and liberties
- (ii) insufficiently defined administrative powers
- (iii) inadequate review of decisions
- (iv) inappropriate delegation of legislative powers
- (v) insufficient parliamentary scrutiny

Impact of the committee's work in 2021

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.¹

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*,² *Guide to Framing Commonwealth Offences*,³ and *OPC Drafting Directions*⁴ 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:

- exemptions from the disallowance regime;⁵
- retrospectivity;
- absolute and strict liability offences and reversal of the burden of proof;
- entry, search and seizure powers; and
- penalty provisions.

1 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5th 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>.

5 OPC Drafting Direction 4.1, *Subordinate legislation*, December 2021, p. 18.

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.⁶

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.⁷

2.11 In December 2021, the committee published guidelines setting out the committee's expectations in relation to its technical scrutiny principles to further support consideration of matters of ongoing interest to the committee in the development of legislation.⁸

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 the government or a 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. In 2021 amendments were moved that addressed the committee's scrutiny concerns in relation to a number of bills, including the:

- Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021;
- Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Bill 2019; and

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

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

8 Senate Standing Committee for the Scrutiny of Bills, *Guidelines, 1st Edition*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Guidelines.

- Major Sporting Events (Indicia and Images) Protection and Other Legislation Amendment Bill 2021.⁹

2.14 The Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021, as originally introduced, did not provide for progress reports on the strategic investment plan to be tabled in the Parliament. Following the committee's comments,¹⁰ on 30 November 2021 the Senate agreed to amendments which addressed the committee's scrutiny concerns in relation to the tabling of documents in Parliament.¹¹

2.15 The Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Bill 2019, as originally introduced, sought to allow the Australian Pesticides and Veterinary Medicines Authority (APVMA) to arrange for the use of computer programs for any purpose for which the APVMA may make a decision, exercise a power or comply with an obligation, or do anything related to those matters. Following the committee's comments,¹² on 1 December 2021 government amendments were agreed to which addressed the committee's scrutiny concerns in relation to computerised decision-making.¹³

Improved explanatory material

2.16 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.

For example:

- on 18 March 2021 an addendum to the explanatory memorandum to the Regulatory Powers (Standardisation Reform) Bill 2020 was tabled in the Senate to clarify matters relating to the expansion of the application of monitoring

9 For further discussion of the committee's consideration of this bill see page 15.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2021*, pp. 4-5; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021*, pp. 42-44.

11 The committee welcomed the Senate amendments to the bill which appeared to address its scrutiny concerns: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022*, 4 February 2022, p. 24.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2019*, pp. 2-4; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2019*, pp. 37-42; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2019*, pp. 31-33.

13 The committee welcomed the Senate amendments to the bill which appeared to address the committee's scrutiny concerns: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022*, 4 February 2022, p. 24.

powers, strict liability offences, the use of force, and the broad delegation of investigatory powers; and

- on 2 September 2021 an addendum to the explanatory memorandum to the Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021 was tabled in the Senate to clarify the application of the *Legislative Act 2003* to the Admiralty Rules 1988.

2.17 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

2.18 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.

2.19 For example, on 8 June 2021, the Senate Environment and Communications Legislation Committee tabled its report on the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021.

2.20 The report considered issues raised by this committee in its *Scrutiny Digest 5 of 2021*, including in relation to leaving significant matters to delegated legislation.¹⁴ The Senate Environment and Communications Legislation Committee recommended that the government introduce amendments to the bill to specify that interim national environmental standards sunset after a period of two years from the date of commencement and that any renewal of an interim standard is subject to disallowance.¹⁵ In *Scrutiny Digest 10 of 2021*, the committee welcomed amendments to the bill which provided for the sunset of the first national environmental standards.¹⁶

14 Senate Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021*, 8 June 2021, pp. 17–20.

15 Senate Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021*, 8 June 2021, p. 60.

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 21–23.

Debate in the Parliament and committees

2.2 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 discussed in 2021 during consideration of the following bills:

- Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021;¹⁷
- Major Sporting Events (Indicia and Images) Protection Bill 2021;¹⁸
- Social Security Legislation Amendment (Remote Engagement Program) Bill 2021;¹⁹ and
- Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020.²⁰

Use in Parliamentary Library Bills Digests

2.21 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.

17 *Senate Hansard*, 21 October 2021, pp. 6320–6329.

18 *Senate Hansard*, 30 August 2021, pp. 5467–5478.

19 *House of Representatives Hansard*, 25 October 2021, pp. 9975–9986.

20 *Senate Hansard*, 25 August 2021, pp. 5149–5174.

Chapter 3

Case studies

3.1 This chapter includes examples of the committee's work during 2021. 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.

Major Sporting Events (Indicia and Images) Protection and Other Legislation Bill 2021

3.2 This bill was introduced into the Senate on 16 June 2021. The bill sought to amend the definition of 'event body' in the *Major Sporting Events (Indicia and Images) Protection Act 2014* to provide that additional event bodies may be prescribed in the rules (delegated legislation). The committee initially commented on the bill in *Scrutiny Digest 9 of 2021*.¹

3.3 Based on the explanatory materials accompanying the bill, it was not clear to the committee why it was necessary or appropriate to allow the definition of 'event body' to be amended to allow additional event bodies to be prescribed in the rules. The committee also noted that given the nature of the relevant events and the amount of planning generally undertaken, there would be time for any additional event bodies to be included by amendments to the primary legislation.

3.4 In response to the committee, the minister advised that to support the delivery of the FIFA Women's World Cup 2023, FIFA had established a wholly owned entity in Australia and New Zealand that was not yet established at the time the bill was introduced. The minister also advised that it was prudent to retain the option to prescribe additional event bodies through the rules to accommodate any unforeseen new bodies FIFA may wish to add.²

3.5 The committee did not consider that the minister's advice had adequately addressed the committee's scrutiny concerns and requested further advice regarding

1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2021*, pp. 4–5.

2 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2021*, pp. 36–38.

whether the bill could be amended to prescribe the new FIFA entity as an event body and include at least high-level guidance on the face of the primary legislation as to the circumstances in which it would be appropriate to prescribe additional event bodies in the rules.

3.6 In a further response to the committee, the minister agreed to implement both of the committee's recommended amendments.³ On 30 August 2021, the Senate agreed to four government amendments to the bill. The bill passed the Senate on 25 October 2021.

3.7 The committee considered the amendments in *Scrutiny Digest 15 of 2021*, and welcomed the amendments, which addressed the committee's scrutiny concerns.⁴

The committee's consideration of the Appropriations bills

3.8 The committee has consistently raised scrutiny concerns regarding a number of recurring issues within the appropriation bills. In 2021 the committee received undertakings from the Finance Minister in relation to several of these issues. These undertakings have significantly improved the quality of the explanatory materials provided in relation to appropriation bills.

Advance to the Finance Minister provisions

3.9 Appropriation bills usually provide that the Finance Minister may, in certain circumstances, allocate additional funds to agencies up to a limited cap amount. The allocated amount is referred to as the Advance to the Finance Minister (AFM).

3.10 Appropriation Bill (No. 1) 2021-2022 and Appropriation Bill (No. 2) 2021-2022 contained AFM provisions providing a total amount of \$5 billion. This amount is significantly higher than that available in previous annual appropriation bills prior to the onset of the COVID-19 pandemic.

3.11 In light of the unprecedented amount available under the AFM provisions in the 2020-21 supply bills, the former Minister for Finance advised the Senate that the government had agreed to provide for increased transparency and oversight of the use of the AFM. Under these measures the former minister advised that a media release would be issued each week that AFM determinations are made and the minister would write to the shadow finance minister to seek her concurrence prior to drawing any funding from an AFM for proposed expenditure greater than \$1 billion.⁵

3.12 In *Scrutiny Digest 8 of 2021*, the committee requested advice from the Finance Minister as to whether the additional transparency measures applying in relation to

3 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2021*, pp. 21–23.

4 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2021*, p. 27.

5 *Senate Hansard*, 23 March 2020, p. 1860.

AFM determinations made since the 2020-2021 supply bills would continue in relation to AFM determinations made under Appropriation Bill (No. 1) 2021-2022 and Appropriation Bill (No. 2) 2020-2021 and whether information about AFM transparency measures can be included in the explanatory materials to future appropriation bills.

3.13 The Finance Minister subsequently made an undertaking to the committee that the additional transparency measures applying in relation to AFM determinations made under the 2020-2021 supply bills would continue in relation to future appropriation bills and that details of these transparency measures would be included within explanatory memoranda to future bills.⁶ Further information addressing the committee's scrutiny concerns, including in relation to transparency measures, was subsequently included in explanatory memoranda to Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022 and Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022,⁷ as well as Appropriation Bill (No. 3) 2021-2022 and Appropriation Bill (No. 4) 2021-2022.⁸

Debit Limits

3.14 Clause 13 of Appropriation Bill (No. 2) 2021-2022 specified debit limits for certain grant programs. A debit limit must be set each financial year otherwise grants under these programs cannot be made. The total amount of grants cannot exceed the relevant debit limit set each year.

3.15 In *Scrutiny Digest 8 of 2021*, the committee requested the Finance Minister's advice as to the level of expected expenditure in 2021-22 under the grants programs specified at clause 13 of Appropriation Bill (No. 2) 2021-2022. The committee also requested that future explanatory memoranda to appropriation bills containing debit limit provisions include this information to assist in ensuring meaningful parliamentary oversight of the debit limits for these grant programs.

3.16 The Finance Minister subsequently made an undertaking to the committee that additional information regarding the setting of debit limits will be included in the explanatory memorandum to future appropriation bills.⁹ Further information addressing the committee's scrutiny concerns in relation to debit limits was subsequently included in the explanatory memorandum to Appropriation Bill (No. 4) 2021-2022.¹⁰

Budget measures earmarked as 'not for publication'

6 *Scrutiny Digest 13 of 2021*, pp. 20-21.

7 *Scrutiny Digest 2 of 2022*, pp. 10-11.

8 *Scrutiny Digest 2 of 2022*, pp. 15-19.

9 *Scrutiny Digest 13 of 2021*, pp. 23-24; *Scrutiny Digest 16 of 2021*, pp. 51-52.

10 *Scrutiny Digest 2 of 2022*, pp. 22-24.

3.17 In *Scrutiny Digest 8 of 2021* the committee also raised additional scrutiny concerns in relation to the inclusion of measures within the Portfolio Budget Statements (PBS) that are marked as 'not for publication', meaning that the proposed allocation of resources to those budget measures is not published within the PBS.

3.18 Given that scrutiny of proposed appropriations is one of the Parliament's most fundamental functions, the committee considers that the default position should be to publish the full amount of funding allocated to each budget measure. However, where it is considered necessary and appropriate not to publish the total funding amount for a measure, the committee considers that an explanation should be included within the PBS. The committee therefore expressed significant scrutiny concerns in relation to the inclusion of measures within the PBS that are earmarked as 'not for publication' where there is either no, or very limited, explanation as to why this is appropriate.

3.19 The minister advised that it is a longstanding practice to identify certain budget measures as not for publication where disclosure of amounts would be prejudicial to national security, where there are legal sensitivities, or for commercial-in-confidence reasons.

3.20 In a further response to the committee, the minister undertook to update future guidance to entities on the preparation of the portfolio budget statements to reflect the committee's scrutiny concerns.¹¹ The minister subsequently updated the Department of Finance *Guide to Preparing the 2022-23 Portfolio Budget Statements* to include a new requirement that a high-level explanation must be included within a portfolio budget statement to describe why a measure has been reported as 'not for publication'.¹²

Review of exemption from disallowance provisions in the *Biosecurity Act 2015*

3.21 During 2021, the committee conducted a review into the appropriateness of provisions within the *Biosecurity Act 2015* which allow delegated legislation to be exempt from parliamentary disallowance. This review was undertaken following a recommendation of the Senate Standing Committee for the Scrutiny of Delegated Legislation in the interim report of its inquiry into the exemption of delegated legislation from parliamentary oversight.¹³

3.22 In *Scrutiny Digest 7 of 2021*, the committee identified 30 provisions within the *Biosecurity Act* which it considers may inappropriately exempt delegated legislation made under the Act from parliamentary disallowance.

11 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18 of 2021*, pp. 36-41.

12 Department of Finance, *Guide to Preparing the 2022-23 Portfolio Budget Statements*, pp. 7 and 36.

13 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. ix.

3.23 The committee sought advice from the Agriculture Minister and Health Minister regarding the exceptional circumstances that are said to justify these exemptions from disallowance and whether the Biosecurity Act could be amended so that instruments made under the Biosecurity Act are subject to the usual parliamentary disallowance process.

3.24 On 17 November 2021, the committee held a private briefing with senior officials from the Department of Agriculture, Water and the Environment and the Department of Health, to discuss the committee's scrutiny concerns in relation to exemption from disallowance provisions within the Biosecurity Act.

3.25 In *Scrutiny Digest 1 of 2022*, the committee finalised its review and concluded that, noting the continued emphasis and commitment of this committee, and the Senate as a whole, to ensuring that delegated legislation made by the executive is subject to appropriate parliamentary oversight, the Biosecurity Act should be amended to provide that instruments made under the Act are subject to disallowance.¹⁴

Senator Dean Smith
Acting Chair

14 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022*, pp. 76-87.

Appendix 1

The committee's scrutiny principles in detail

Provisions which trespass unduly on personal rights and liberties

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:

- Biosecurity Amendment (Clarifying Conditionally Non-prohibited Goods) Bill 2021 (*Scrutiny Digest 6 of 2021*, pp. 4–5);
- Charter of the United Nations Amendment Bill 2021 (*Scrutiny Digest 13 of 2021*, pp. 1–3);
- COAG Legislation Amendment Bill 2021 (*Scrutiny Digest 16 of 2021*, pp. 12–13);
- Crimes Amendment (Remissions of Sentences) Bill 2021 (*Scrutiny Digest 15 of 2021*, pp. 17–19);
- Family Assistance Legislation Amendment (Early Childhood Education and Care Coronavirus Response and Other Measures) Bill 2021 (*Scrutiny Digest 4 of 2021*, pp. 5–6);
- Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021 (*Scrutiny Digest 6 of 2021*, pp. 17–18); and
- Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (*Scrutiny Digest 6 of 2021*, pp. 23–24).

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 Federal Integrity Commission Bill 2021 and Australian Federal Integrity Commission Bill 2021 (No. 2) (*Scrutiny Digest 18 of 2021*, pp. 7–9); and
- Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021 (*Scrutiny Digest 14 of 2021*, pp. 5–7).

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.¹

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

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

- Financial Regulator Assessment Authority Bill 2021 (*Scrutiny Digest 8 of 2021*, pp. 19–20);
- Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021 (*Scrutiny Digest 8 of 2021*, pp. 50–53);
- Financial Sector Reform (Hayne Royal Commission Response-Better Advice) Bill 2021 (*Scrutiny Digest 10 of 2021*, pp. 7–9);
- Ransomware Payments Bill 2021 (*Scrutiny Digest 10 of 2021*, pp. 11–12);
- Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 (*Scrutiny Digest 16 of 2021*, pp. 8–9); and
- Health Legislation Amendment (Medicare Compliance and Other Measures) (*Scrutiny Digest 17 of 2021*, pp. 25–26).

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:

- Financial Sector Reform (Hayne Royal Commission Response-Better Advice) Bill 2021 (*Scrutiny Digest 10 of 2021*, pp. 6-7);
- Offshore Electricity Infrastructure Bill 2021 (*Scrutiny Digest 16 of 2021*, pp. 20-22); and
- Offshore Electricity Infrastructure (Consequential Amendments) Bill 2021 (*Scrutiny Digest 17 of 2021*, pp. 33-34).

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).

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

- Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021 (*Scrutiny Digest 12 of 2021*, pp. 1-4); and
- Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020 (*Scrutiny Digest 1 of 2021*, pp. 29-43).

Insufficiently defined administrative powers

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:

- Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Bill 2021 (*Scrutiny Digest 13 of 2021*, pp. 8–9);
- Northern Australia Infrastructure Facility Amendment (Extension and Other Measures) Bill 2021 (*Scrutiny Digest 5 of 2021*, pp. 9–10); and
- Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021 (*Scrutiny Digest 8 of 2021*, pp. 41–43).

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:

- National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 (*Scrutiny Digest 8 of 2021*, pp. 34–36);
- Online Safety Bill 2021 (*Scrutiny Digest 5 of 2021*, pp. 11–14); and
- Religious Discrimination Bill 2021 and Religious Discrimination (Consequential Amendments) Bill 2021 (*Scrutiny Digest 18 of 2021*, pp. 29–30).

Undue dependence on non-reviewable decisions

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:

- Offshore Electricity Infrastructure Bill 2021 (*Scrutiny Digest 16 of 2021*, pp. 30–31); and
- Online Safety Bill 2021 (*Scrutiny Digest 5 of 2021*, pp. 11–12).

Inappropriate delegation of legislative power

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 Amendment (Meetings and Documents) Bill 2021 (*Scrutiny Digest 17 of 2021*, pp. 4–5);
- Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021 (*Scrutiny Digest 10 of 2021*, pp. 1–2); and
- Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2021 (*Scrutiny Digest 10 of 2021*, pp. 4–5).

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 delegated legislation disallowance process.

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

- Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021 (*Scrutiny Digest 6 of 2021*, pp. 6–7);
- Defence Legislation Amendment (Discipline Reform) Bill 2021 (*Scrutiny Digest 13 of 2021*, pp. 4–5);
- Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021 (*Scrutiny Digest 6 of 2021*, pp. 15–17);
- National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (*Scrutiny Digest 17 of 2021*, pp. 27–30);
- Private Health Insurance Legislation Amendment (Age of Dependents) Bill 2021 (*Scrutiny Digest 5 of 2021*, pp. 29–31);
- Social Security Legislation Amendment (Remote Engagement Program) Bill 2021 (*Scrutiny Digest 15 of 2021*, pp. 24–26); and
- Treasury Laws Amendment (Your Future, Your Super) Bill 2021 (*Scrutiny Digest 4 of 2021*, pp. 9–15).

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:

- Fuel Security Bill 2021 (*Scrutiny Digest 8 of 2021*, pp. 27–28);
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 (*Scrutiny Digest 8 of 2021*, pp. 38–39); and
- Offshore Electricity Infrastructure Bill 2021 (*Scrutiny Digest 16 of 2021*, pp. 27–28).

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 disallowable by the Parliament;
- provide that legislative instruments to be made under primary legislation may incorporate rules or standards 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:

- Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021 (*Scrutiny Digest 15 of 2021*, pp. 3–4);
- Biosecurity Amendment (Enhanced Risk Management) Bill 2021 (*Scrutiny Digest 15 of 2021*, pp. 7–11);
- Investment Funds Legislation Amendment Bill 2021 (*Scrutiny Digest 14 of 2021*, pp. 8–10);
- National Health Amendment (Enhancing the Pharmaceutical Benefits Scheme) Bill 2021 (*Scrutiny Digest 17 of 2021*, pp. 31–32);
- Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021 (*Scrutiny Digest 8 of 2021*, pp. 41–44); and

- Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021 (*Scrutiny Digest 8 of 2021*, pp. 55–56).

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:

- Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021 Online Safety Bill 2021 (*Scrutiny Digest 6 of 2021*, pp. 7–8);
- Environment Protection and Biodiversity Conservation Amendments (Standards and Assurance) Bill 2021 (*Scrutiny Digest 5 of 2021*, pp. 4–6);
- Financial Accountability Regime Bill 2021 (*Scrutiny Digest 17 of 2021*, pp. 20–21); and
- Online Safety Bill 2021 (*Scrutiny Digest 5 of 2021*, pp. 24–25).

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.