



DEPARTMENT
OF THE SENATE

Scrutiny NEWS

Scrutiny of Bills Committee

Scrutiny of Delegated Legislation Committee

3 April 2024

Introduction

This newsletter highlights key aspects of the work of the Senate Scrutiny of Bills Committee and the Senate Scrutiny of Delegated Legislation Committee. It has a particular focus on information that may be useful while bills are under consideration and legislative instruments are subject to disallowance and seeks to raise awareness about the committees' scrutiny principles set out in Senate standing orders 23 and 24.

For more detail and discussion of these matters see the committees' [Scrutiny Digests](#) and [Delegated Legislation Monitors](#).

Scrutiny of Bills Committee

Scrutiny Digest 5 of 2024 reports on the committee's consideration of **6** bills which were introduced into the Parliament during recent sitting weeks as well as amendments introduced in relation to **3** bills. It also contains the committee's comments on ministerial responses in relation to **5** bills. The Chair made a [statement](#) corresponding to the tabling of the digest.

Key scrutiny issues: Bills (*Scrutiny Digest 5 of 2024*)

Migration Amendment (Removal and Other Measures) Bill 2024

- *Undue trespass on rights and liberties/significant matters in delegated legislation*: the committee is seeking advice on criminal offence provisions in the bill which may unduly trespass on individual rights and liberties, as well as the ability to expand the scope of persons subject to removal pathway directions by delegated legislation, and draws these scrutiny concerns to the attention of senators.
- *Significant matters in delegated legislation/broad discretionary powers*: the committee is seeking advice on the broad ministerial discretion to designate countries for visa bans via legislative instrument and drew these scrutiny concerns to the attention of senators.
- *Parliamentary scrutiny*: the committee reiterated its consistent scrutiny view that legislation which may trespass on rights and liberties should be subject to a high level of parliamentary scrutiny.

Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024

- Reversal of the evidential burden of proof/strict liability offences/significant matters in delegated legislation: the committee is requesting advice on why key definitions are being left to delegated legislation, and drew senators' attention to numerous offence provisions which are not adequately justified in the explanatory memorandum.
- Broad discretionary power: the committee is requesting advice as to why the secretary is being granted broad discretionary powers to consent to the manufacture, importation or supply of vaping goods, and what conditions such consent will be subject to.
- Enforcement notices/Availability of independent merits review: the committee is requesting advice as to the criteria that will be considered by the secretary when issuing enforcement orders and whether merits review is available.
- Seizure of assets: the committee is requesting advice as to whether assets incidentally seized under warrant will be provided with use and derivative use immunity.
- Delegation of administrative powers and functions: the committee is requesting advice as to the appropriateness of a delegation of administrative powers and functions under the bill.

Other bills commented on (*Scrutiny Digest 5 of 2024*)

- **Administrative Review Tribunal Bill 2024**: the committee requested an addendum to the explanatory memorandum be tabled addressing concerns in relation to procedural fairness, appeal rights, and broad discretionary powers, and drew concerns in relation to procedural fairness and appeal rights to the attention of senators.
- **Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024**: the committee drew senators' attention to scrutiny concerns in relation to procedural fairness, parliamentary scrutiny, modification of the operation of primary legislation by delegated legislation and retrospectivity, and made no further comment in relation to availability of appeal rights and a separate procedural fairness issue. The committee also recommended an amendment to primary law due to ongoing parliamentary scrutiny concerns. The committee also welcomed amendments made to the bill to provide for legal or financial assistance for certain applicants, while retaining concerns about affordability of review decisions for migration cohorts.
- **Australian Research Council Amendment (Review Response) Bill 2023**: the committee noted on an amendment to the bill agreed to in the Senate which required a report to be given to the minister and sought advice as to whether the Act can be amended in future to ensure that the report is also presented to the Parliament.
- **Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023**: the committee drew senators' attention to amendments to the bill which reverse the evidential burden of proof for offence-specific defences.

- **National Cancer Screening Register Amendment Bill 2024:** the committee left to the Senate the appropriateness of the bill’s expansion of the scope of the National Cancer Screening Register noting that the explanatory memorandum does not address the privacy implications of these measures.
 - **Social Services and Other Legislation Amendment (Military Invalidation Payments Means Testing) Bill 2024:** the committee requested an addendum to the explanatory memorandum be tabled addressing concerns in relation to retrospective validation, and drew these concerns to the attention of senators.
 - **Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other measures) Bill 2024:** the committee drew the attention of senators to scrutiny concerns in relation to the modification of primary legislation by delegated legislation, and instruments not subject to an appropriate level of parliamentary oversight.
 - **Treasury Laws Amendment (Foreign Investment) Bill 2024:** the committee received correspondence, and a response from the Treasurer, concerning provisions of the bill that are to be applied retrospectively, and made no further comment in relation to the measures.
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For any comments or questions, please contact:

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Scrutiny of Delegated Legislation Committee

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 4 of 2024*)

Migration (Designated Migration Law—Visa Condition 8208) Determination (LIN 24/009) 2024

- *Automated decision making; conferral of discretionary powers; adequacy of explanatory materials*: the committee is requesting the minister’s advice as to:
 - whether further detail can be provided about the scope and nature of decision-making under the instrument;
 - whether detail can be provided regarding the information which informs the decision made by the computer program;
 - why it is considered necessary and appropriate for the instrument to provide for automated decision-making;
 - what safeguards are in place to ensure that the minister or their delegate exercises their discretionary powers personally and without fetter;

- the mechanisms used to identify and (where identified) correct errors in automated decision-making; and
- how merits review is intended to operate as a safeguard and whether applicants will be provided with a written statement of reasons for relevant decisions.
- The committee also requests the minister's advice as to whether consideration has been given to the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide* in relation to providing for automated decision-making.

Biosecurity (Electronic Decisions) Determination 2023

- *Automated decision making; conferral of discretionary powers*: the committee is requesting the minister's further advice as to whether the explanatory statement can be amended to include the detailed advice provided to the committee regarding the safeguards that apply to automated decisions under the instrument. The committee is also requesting the minister's advice as to specific factors to be taken into account in determining whether a biosecurity officer is satisfied that a decision is not consistent with the objects of the Act or that another decision might be more appropriate under subsection 541A(7) of the Act and whether further detail can be provided regarding the specific mechanisms employed to identify errors, and how and when an audit trail would be generated to identify and rectify such errors.
- *Availability of independent merits review*: the committee is seeking the minister's further advice as to whether the explanatory statement can be amended to include the justification provided to the committee for the exclusion of independent merits review with reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*
- *Consultation with persons affected*: the committee is requesting the minister's further advice as to whether the explanatory statement can be amended to include the advice provided to the committee regarding regular meetings with users and those affected by the instrument, as well as the consultation that was previous undertaken in relation to the relevant computer program.
- *Clarity of drafting*: the committee concludes its examination of the instrument in relation to this issue, noting the minister's undertaking to ensure the amendment of the explanatory statement.

Notices of motion to disallow

The Scrutiny of Delegated Legislation Committee did not give any notices of motion to disallow instruments or withdraw or give notice of its intention to withdraw any instruments.

All legislative instruments subject to a notice of motion for disallowance in either House of the Parliament are listed in the [Disallowance Alert](#).

For any comments or questions, please contact:
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