

The Senate

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Committee for the
Scrutiny of Bills

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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 the Hon Kim Carr	ALP, Victoria
Senator Perin Davey	NATS, New South Wales
Senator Janet Rice	AG, Victoria
Senator Paul Scarr	LP, Queensland

Secretariat

Ms Laura Sweeney, Acting Secretary

Ms Alexandra Logan, Principal Research Officer

Mr Andrew McIntyre, Acting Principal Research Officer

Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate 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

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Introduction

Terms of reference

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

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Commentary on Bills

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

Aged Care Quality and Safety Commission Amendment (Worker Screening Database) Bill 2019

Purpose	This bill seeks amend the <i>Aged Care Quality and Safety Commission Act 2018</i> to establish a database for nationally consistent worker screening for aged care worker screening check
Sponsor	Ms Rebekha Sharkie MP
Introduced	House of Representatives on 22 July 2019

Broad discretionary powers

Significant matters in delegated legislation

Privacy¹

1.2 The bill seeks to amend the *Aged Care Quality and Safety Commission Act 2018* (principal Act) to create a worker screening database to record information regarding persons who have made an application for an aged care worker screening check (screening applicant). Item 4 of the bill seeks to insert new paragraph 61(1)(f) into the principal Act. This would allow the Aged Care Quality and Safety Commissioner (the Commissioner) to disclose protected information, which may include sensitive personal information about screening applicants, to such persons and for such purposes as the Commissioner determines, if the disclosure is necessary for the purposes of establishing, operating or maintaining the aged care worker screening database (the database).

1.3 The committee has previously raised concerns about the privacy implications of the broad, discretionary disclosure powers in the principal Act.² In this context, the committee notes that the principal Act does not require the Commissioner to notify a person before disclosing their personal information under section 61, nor

1 Schedule 1, items 3 and 4. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i), (ii), (iv) and (v).

2 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, pp. 4 – 5.

does it require the Commissioner to give the person a reasonable opportunity to make written comments on the proposed disclosure, and consider any written comments made by that person. In addition, the principal Act does not require the Commissioner to have regard to the potential impact of the disclosure on the relevant person.

1.4 The committee also notes that proposed subsection 54B(8) allows the minister, by legislative instrument, to determine a purpose of the database or determine information to be held in the database. As a result, the committee notes that the purpose of the database and, therefore, the ability of the Commissioner to disclose protected information about screening applicants, will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. The explanatory materials do not appear to address any of these matters, merely restating the terms of the provision.

1.5 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Commissioner to have a broad discretion to disclose protected information regarding screening applicants, noting that this could include sensitive personal information.

Appropriation Bill (No. 1) 2019-2020

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government
Portfolio	Finance
Introduced	House of Representatives on 25 July 2019

Parliamentary scrutiny—ordinary annual services of the government³

1.6 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.7 This bill seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.8 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.⁴

1.9 The Senate Standing Committee on Appropriations and Staffing⁵ has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration for many years.⁶ It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has

3 Various provisions. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

4 See Senate standing order 24(1)(a)(v).

5 Now the Senate Standing Committee on Appropriations, Staffing and Security.

6 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.⁷

1.10 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
- 2) That appropriations for expenditure on:
 - a) the construction of public works and buildings;
 - b) the acquisition of sites and buildings;
 - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
 - d) grants to the states under section 96 of the Constitution;
 - e) new policies not previously authorised by special legislation;
 - f) items regarded as equity injections and loans; and
 - g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

1.11 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.⁸

1.12 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which

7 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

8 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.⁹

1.13 Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.¹⁰

1.14 Based on the Senate resolution of 22 June 2010, it appears that the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2019-2020:

- Agriculture Stewardship Package (\$34 million over four years);¹¹
- Local School Community Fund (\$30.2 million in 2019-20);¹²
- National Centre for Coasts, Environment and Climate (\$25 million over four years).¹³

1.15 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of occasions;¹⁴ however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

9 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

10 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, see *Senate Hansard*, 19 March 2018, pp. 1487-1490.

11 Budget Paper No. 2, 2019-20, p. 46.

12 Budget Paper No. 2, 2019-20, p. 67.

13 Budget Paper No. 2, 2019-20, p. 75.

14 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, pp. 402-406; *Fourth Report of 2015*, pp. 267-271; *Alert Digest No. 6 of 2015*, pp. 6-9; *Fourth Report of 2016*, pp. 249-255; *Alert Digest No. 7 of 2016*, pp. 1-9; *Scrutiny Digest 2 of 2017*, pp. 1-5; *Scrutiny Digest 6 of 2017*, pp. 1-6; *Scrutiny Digest 12 of 2017*, pp. 89-95; *Scrutiny Digest 2 of 2018*, pp. 1-7.

1.16 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.17 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

1.18 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 1) 2019-2020 which should only contain appropriations that are not amendable by the Senate).

Parliamentary scrutiny—appropriations determined by the Finance Minister¹⁵

1.19 Clause 10 seeks to enable the Finance Minister to provide additional funds to entities when he or she is satisfied that there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in Schedule 1. This additional appropriation is referred to as the Advance to the Finance Minister (AFM).

1.20 Subclause 10(2) enables the Finance Minister to make a determination that has the effect of allocating additional amounts, up to a total of \$295 million as specified by subclause 10(3), to the appropriations outlined in Schedule 1 to the Act. Subclause 10(4) provides that a determination under subclause 10(2) is a legislative instrument, which must therefore be registered and tabled in Parliament. However, these determinations are not subject to parliamentary disallowance. The explanatory memorandum suggests that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.¹⁶

1.21 The committee notes that clause 10 (the AFM provision) allows the Finance Minister to allocate additional funds to entities up to a total of \$295 million via non-disallowable delegated legislation and that it therefore delegates significant legislative power to the Executive. While this does not amount to a delegation of the

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

16 Explanatory memorandum, p. 9.

power to create a new appropriation, one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.¹⁷ The AFM provision in this bill leaves the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.22 The committee has examined AFM provisions in previous appropriation bills and sought further information from the Finance Minister about their use.¹⁸ The committee notes that AFM provisions have been used in previous years to allocate additional funds of varying amounts for a wide variety of purposes. Previous examples include \$48.8 million for Mersey Community Hospital and Tasmanian Health Initiatives, \$206.5 million for payments to local governments, and \$6 million for grants to arts and culture bodies.¹⁹ In 2018-19 the AMF provisions were used to allocate funding for:

- an expansion of the Drought Communities Program;²⁰
- the re-opening of the Christmas Island Detention Centre following the passage of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*;²¹ and
- a payment to South Australian Government to assist councils in South Australia to upgrade and maintain their local road network.²²

The committee further notes that this issue also arises in relation to other appropriation bills.²³

1.23 As AFM determinations are not subject to disallowance, the primary accountability mechanism in relation to AFMs (beyond the initial passage of the

17 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [91].

18 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 95–8; and *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 5-7.

19 For further examples see Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 97–8. For a comprehensive list of AFMs made between the 2006-07 and 2017-18 financial years, see Appendix 1 to Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017.

20 *Advance to the Finance Minister Determination (No. 1 of 2018-2019)* [F2018L01816].

21 *Advance to the Finance Minister Determination (No. 2 of 2018-2019)* [F2019L00577].

22 *Advance to the Finance Minister Determination (No. 3 of 2018-2019)* [F2019L00852].

23 For example, see clause 12 of Appropriation Bill (No. 2) 2019-2020 (the total amount that can be determined under this AFM provision is \$380 million).

authorising provision in the regular appropriation bills) is an annual report tabled in Parliament on the use of the AFM. These reports are considered in the Senate,²⁴ and are published on the Department of Finance website.²⁵ The committee draws these reports to the attention of Senators.

1.24 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Finance Minister to determine the purposes for which significant additional funds may be allocated in a legislative instrument not subject to disallowance.

24 *Journals of the Senate*, 3 April 2019, p. 4847. See also Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans*, Department of the Senate, 14th Edition, 2016, pp. 395-396.

25 See https://www.finance.gov.au/publications/advance_to_the_finance_minister/.

Appropriation Bill (No. 2) 2019-2020

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure
Portfolio	Finance
Introduced	House of Representatives on 25 July 2019

Parliamentary scrutiny—section 96 grants to the states²⁶

1.25 Clause 16 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'.

1.26 Clause 16 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;²⁷ and
- the amounts and timing of those payments.²⁸

1.27 Subclause 16(4) provides that determinations made under subclause 16(2) are not legislative instruments. The explanatory memorandum states that this is:

because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.²⁹

1.28 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.³⁰

26 Clause 16 and Schedules 1 and 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

27 Paragraph 16(2)(a).

28 Paragraph 16(2)(b).

29 Explanatory memorandum, p. 12.

30 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511-516; *Ninth Report of 2015*, pp. 611-614; *Fifth Report of 2016*, pp. 352-357; *Eighth Report of 2016*, pp. 457-460; *Scrutiny Digest 3 of 2017*, pp. 51-54; *Scrutiny Digest 6 of 2017*, pp. 7-10; *Scrutiny Digest 12 of 2017*, pp. 99-104; *Scrutiny Digest 2 of 2018*, pp. 8-11; *Scrutiny Digest 6 of 2018*, pp. 9-12.

1.29 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution. While the Parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.30 The committee notes that important progress has been made to improve the provision of information regarding section 96 grants to the states since the 2017-18 budget, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.³¹ These improvements include the addition of an Appendix E to Budget Paper No. 3,³² which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them, and a new mandatory requirement for the inclusion of further information in portfolio budget statements where departments and agencies are seeking appropriations for payments to the states, territories and local governments.³³

1.31 The committee also notes that Appendix E to Budget Paper No. 3 for the 2018-19 budget incorporates certain additional changes on which the committee sought the minister's advice in *Scrutiny Digest 6 of 2017*,³⁴ and that the mandatory requirement for the inclusion of additional information in portfolio budget statements appears to have been met by those agencies seeking appropriations for payments to the states, territories and local government in this bill.³⁵ The committee considers that these measures improve the ability of the Parliament to scrutinise the executive's use of the delegated power to make grants to the states and to determine terms and conditions attaching to them under section 96 of the Constitution.

1.32 The committee again thanks the minister for responding constructively to its proposals regarding the provision of additional information about the making of

31 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp. 7-10; and *Eighth Report of 2016*, pp. 457-460.

32 Appendix E of Budget Paper No. 3, https://budget.gov.au/2019-20/content/bp3/download/bp3_appendix_e_online.pdf

33 See Department of Finance, *Guide to Preparing the 2018-19 Portfolio Budget Statements*, pp. 24-25, <https://www.finance.gov.au/sites/default/files/guidance-portfolio-budget-statements-19-20.pdf>.

34 Senate Standing Committee for the Scrutiny of Bill, *Scrutiny Digest 6 of 2017*, 14 June 2017, pp. 7-10.

35 The committee discussed the partial compliance with the requirement to provide additional information in portfolio budget statements for the 2017-18 budget in its *Scrutiny Digest 6 of 2017*, 14 June 2017, pp. 7-10, and *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 99-104.

grants to the states under section 96 of the Constitution, and looks forward to these measures continuing for future appropriation bills.

1.33 The committee otherwise leaves to the Senate as a whole the appropriateness of the delegation of legislative power in clause 16, which allows the minister to determine conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

Parliamentary scrutiny—debit limits³⁶

1.34 Clause 13 of the bill specifies 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.

1.35 The explanatory memorandum notes that Parliament may approve annual debit limits for general purpose financial assistance or national partnership payments to the states.³⁷

1.36 The explanatory memorandum explains the purpose of setting these debit limits:

Specifying a debit limit in clause 13 is an effective mechanism to manage expenditure of public money as the official or Minister making a payment of public money cannot do so without this authority. The purpose of doing so is to provide Parliament with a transparent mechanism by which it may review the rate at which amounts are committed for expenditure.³⁸

1.37 This bill, along with *Supply Act (No. 2) 2019-2020*, proposes the following debit limits for 2019-20:

- General purpose financial assistance to the states—\$5 billion;³⁹ and
- National partnership payments to the states—\$25 billion.⁴⁰

1.38 In relation to the \$25 billion debit limit for national partnership payments, the committee notes that the budget papers state that it is expected that national partnership payments will be \$11.5 billion in 2019-20.⁴¹ Therefore the debit limit

36 Clause 13. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

37 See sections 9 and 16 of the *Federal Financial Relations Act 2009*.

38 Explanatory memorandum, p. 10.

39 Subclause 13(1).

40 Subclause 13(2).

41 *Federal Financial Relations: Budget Paper No. 3 2019-20*, p. 3.

proposed in this bill would allow an additional \$13.5 billion in national partnership payments to be made without the need to seek further parliamentary approval. It is not clear what the expected level of expenditure is in relation to general purpose financial assistance.

1.39 The committee sought the minister's advice in relation to similar provisions in Appropriation Bill (No. 2) 2017-2018 and was informed that setting debit limits at a high level is necessary to ensure that the Commonwealth has appropriate provision to manage variations in expenditure required prior to the passage of further annual appropriation bills, including increases to existing undertakings to the states, and provision for any large-scale natural disasters or other major unexpected events.⁴² While the committee acknowledges this rationale, it considers that setting a debit limit at over twice the anticipated expenditure may undermine the stated intention of the debit limit regime—that is, to provide Parliament with a 'transparent mechanism by which it may review the rate at which amounts are committed for expenditure'.⁴³

1.40 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of setting debit limits for these grant programs well above the expected level of expenditure, noting that this practice appears to undermine the effectiveness of the debit limit regime as a mechanism for ensuring meaningful parliamentary oversight of these grant programs.

42 See *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 104-107.

43 Explanatory memorandum, p. 10.

Combatting Child Sexual Exploitation Legislation Amendment Bill 2019

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

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

Privilege against self-incrimination⁴⁴

1.42 Proposed subsections 273B.5(1) and (2) of the bill seek to create two new offences relating to failures by Commonwealth officers to report child sexual abuse to the Australian Federal Police (AFP), or to the police service of a state or territory, in circumstances in which the officer reasonably believes or reasonably suspects that a person has committed or will commit a child sexual abuse offence.⁴⁵

1.43 Proposed subsection 273B.5(5) provides that an individual is not excused from failing to disclose information relating to a child sexual abuse offence on the basis that to do so might tend to incriminate the individual or otherwise expose the individual to a penalty. That provision overrides the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.⁴⁶

1.44 The committee recognises that there may be certain circumstances in which the privilege against self-incrimination may be overridden. However, abrogating this privilege represents a serious loss of personal liberty. In considering whether it is

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

45 'Commonwealth officer' is defined in proposed section 273B.1, and includes ministers, parliamentary secretaries, APS employees, and a variety of other persons employed by Commonwealth authorities or exercising powers under Commonwealth laws. 'Child sexual abuse offence' is also defined in that section, and includes a Commonwealth child sex offence within the meaning of the *Crimes Act 1914*, or a state or territory registrable child sex offence.

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

appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. As such, it expects the explanatory materials to provide a full justification for abrogating the privilege and explain any safeguards that may apply. In this instance, the committee notes that the explanatory memorandum gives a detailed justification as to why it is necessary to abrogate the privilege:

The Royal Commission identified underreporting as a significant barrier to victims and survivors of child sexual abuse accessing justice. Children are likely to have fewer opportunities and less ability to report the abuse to police or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of persons charged with providing care, supervision or authority. The Royal Commission also identified that, perhaps more so than with other serious criminal offences, those who commit child sexual abuse offences may have multiple victims and may offend against particular victims repeatedly.

These unique circumstances justify overriding the privilege against self-incrimination to achieve the objective of encouraging all Commonwealth officers who provide care, supervision or exercise authority in relation to children to report abuse or take protective actions to protect against abuse. For example, a person should not be excused from this obligation if they are concerned that reporting that an employee was abusing a child will expose that they had not ensured that the employee held a valid working with children check card.⁴⁷

1.45 In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will also consider the extent to which self-incriminating evidence is limited by 'use' or 'derivative use' immunities. A 'use' immunity provides that information or documents produced in response to the statutory requirement (in this case, a requirement to disclose information to police) will not be admissible in evidence against the person that produced it. A 'derivative use' immunity provides that anything obtained as a direct or indirect consequence of the production of the relevant information or documents will also not be admissible in evidence against the person that produced them.

1.46 In this instance, a 'use' immunity is provided in proposed subsection 273B.9(10), which provides that, if an individual engages in protected conduct by disclosing information, the information is not admissible in evidence against the individual in relation to liability in any relevant proceedings. However, a 'derivative use' immunity does not appear to be available. Indeed, proposed subsection 273B.9(11) expressly provides that section 273B.9 does not affect the admissibility of evidence in relevant proceedings of any information obtained as an

47 Explanatory memorandum, p. 31.

indirect consequence of a disclosure that constitutes protected conduct. In relation to this matter, the explanatory memorandum provides that:

Applying a derivative use immunity would defeat the central purpose of the failure to report offence as, where a perpetrator of child sex abuse discloses information to authorities, this would severely undermine the ability of law enforcement to investigate and subsequently prosecute this criminal conduct.

For example, where a person makes such a disclosure, an investigator in a criminal matter relating to the perpetrator of the conduct that was not reported may be required to prove the provenance of all subsequent evidentiary material before it can be admitted. This creates an unworkable position wherein pre-trial arguments could be used to inappropriately undermine and delay the resolution of charges against the accused.

It should be noted that a person will only be compelled to make a disclosure to the police, which are bound by extensive obligations under State, Territory and Commonwealth privacy law. It should also be noted that the offence will not affect the inherent power of the court to manage criminal prosecutions that are brought before it where it finds that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the accused.⁴⁸

1.47 While noting this information, the committee reiterates that the privilege against self-incrimination is an important common law right, and any abrogation of the privilege represents a significant loss to personal liberty. The committee considers that any justification for abrogating the privilege will be more likely to be appropriate if accompanied by both a 'use' and a 'derivative use' immunity. In this respect, the committee notes that not including a 'derivative use' immunity can undermine the effectiveness of a 'use' immunity, as it allows investigators to disregard the usual features of the accusatorial justice system and compel a potential accused to provide information that could be indirectly used to incriminate them.

1.48 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination in circumstances where a 'derivative use' immunity would not be available.

48 Explanatory memorandum, p. 38.

Significant penalties⁴⁹

1.49 Proposed section 273A.1 makes it an offence for a person to possess a doll or other object that resembles a person who is or appears to be under 18 years of age, or resembles part of the body of such a person, in circumstances where a reasonable person would consider it likely that the doll or object is intended to be used by a person to simulate sexual intercourse. The offence would be punishable by up to 15 years imprisonment.

1.50 Item 5 of Schedule 2 to the bill provides that proposed section 273A.1 applies in relation to a doll or other object possessed on or after the commencement of the item, irrespective of whether the doll or object was obtained before, on or after that commencement. The commencement provisions in clause 2 make clear that this offence will commence the day after the Act receives royal assent.

1.51 The explanatory memorandum explains that the purpose of Schedule 2 is to criminalise the possession of the proscribed dolls and objects in order to 'reduce the risk that these behaviours may escalate the risk posed to real children',⁵⁰ noting that contemporary research is more frequently referencing this risk.⁵¹ The explanatory memorandum further explains that the penalty that may be imposed:

appropriately reflects the seriousness of the misconduct captured by the offence and is equivalent to the penalties for offences such as possession, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service (section 471.17) or carriage service (section 472.20).⁵²

1.52 The committee appreciates the paramount importance of protecting children from exploitation and abuse, and notes that the penalties that may be imposed under proposed section 273A.1 appear to be consistent with comparable offences in other Commonwealth legislation, which are also subject to significant penalties. Nevertheless, the committee is concerned that the provision seeks to impose significant custodial penalties in relation to the mere possession of the proscribed dolls and objects, and that the offence would apply on the day after the bill receives royal assent.⁵³ This means that persons currently in lawful possession of a proscribed doll or object, who are unaware of the proposal to criminalise this possession, may

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

50 Explanatory memorandum, p. 3.

51 Explanatory memorandum, p. 3.

52 Explanatory memorandum, p. 37. Section references refer to the *Criminal Code Act 1995*.

53 In this respect, clause 2 (commencement) provides that the offence commences immediately after the commencement of schedules 3 to 7, which commence the day after the Act receives the Royal Assent.

immediately commit an offence punishable by up to 15 years imprisonment on the day after the bill receives royal assent. This matter is not addressed in the explanatory materials.

1.53 The committee requests the minister's more detailed advice regarding the justification for applying a significant custodial penalty to the proposed offence of possession of certain dolls and other objects, and making current lawful possession unlawful from the day after the Act receives royal assent.

Reversal of evidential burden of proof⁵⁴

1.54 As outlined at paragraph [1.42] above, proposed subsections 273B.5(1) and (2) seek to create two offences relating to failures by Commonwealth officers to provide information relating to child sexual abuse to the AFP, or to the police service of a state or territory, in certain circumstances. Proposed subsection 273B.5(4) sets out a series of offence-specific defences, which provide that the offences in subsections 273B.5(1) and (2) do not apply if:

- the defendant reasonably believes that the information is already known to the police force or police service of a state or territory, to the AFP, or to a person or body to which the disclosure of the information is required by certain statutory schemes;
- the defendant has already disclosed the information to a person or body for the purposes of such a statutory scheme;
- the defendant reasonably believes the disclosure of the information would put at risk the safety of any person other than the potential offender; or
- the information is in the public domain.

1.55 Further, and as outlined at paragraph [1.49] above, proposed section 273A.1 makes it an offence for a person to possess certain proscribed dolls and objects. Proposed section 273A.2 sets out two offence-specific defences to this offence, which provide that a person is not criminally responsible for the offence if:

- where the person engages in prohibited conduct (that is, possessing a proscribed doll or object), the conduct is of public benefit and does not go beyond what is of public benefit;⁵⁵ or

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

- at the time of the offence, the person was a law enforcement officer or an intelligence or security officer acting in the course of their duties, and the conduct was reasonable for the purposes of performing the duty.⁵⁶

1.56 In both of these instances the evidential burden of proof would be reversed by the use of offence-specific defences.⁵⁷ At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.57 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

1.58 The explanatory memorandum provides a very brief justification for reversing the evidential burden in relation to the defences in proposed subsection 273.B(4), stating that it is appropriate to reverse the burden because:

the information to prove their existence would be 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.⁵⁸

1.59 The explanatory memorandum provides a similarly brief justification for the defences in proposed section 273A.2:

The use of the defence in subsection 471.18(1) is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The Guide refers to the principle that it is legitimate to case a matter as a defence where a matter is peculiarly within the defendant's knowledge and is not available to the prosecution.⁵⁹

55 Proposed subsection 273A.2(1). Proposed subsection 273A.2(2) provides that conduct is of public benefit only if it is necessary for enforcing, monitoring compliance with or investigating a contravention of Commonwealth, state or territory law, for the administration of justice, or for conducting scientific, medical or educational research that has been approved by the minister administering the *Australian Federal Police Act 1979* (AFP Minister).

56 Proposed subsection 273A.2(3).

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

58 Explanatory memorandum, pp. 30-31.

59 Explanatory memorandum, p 38.

1.60 However, it is not apparent to the committee that each of the matters in proposed subsection 273B.5(4) and proposed section 273A.2 would be peculiarly within the knowledge of the defendant. For example, the question of whether information is in the public domain (in proposed paragraph 273B.5(4)(d)) would appear to be *public* knowledge. Moreover, the question of whether particular research has been approved by the AFP Minister (in proposed paragraph 273A.2(2)(d)) would appear to be a matter of which the minister would be particularly apprised.

1.61 The committee requests the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offences, and requests the minister's advice in relation to this matter.

Reversal of legal burden of proof⁶⁰

1.62 Subsections 272.12(1) and 272.13(1) of the *Criminal Code Act 1995*, respectively, currently make it an offence for a person to engage in sexual intercourse or sexual activity outside Australia with a person between the ages of 16 and 18, in circumstances where the alleged offender is in a position of trust or authority in relation to the young person.

1.63 Section 272.17 currently sets out offence-specific defences to these offences, which require the defendant to prove the existence of a genuine, valid marriage. The defences also apply to the offences of engaging in sexual intercourse or sexual activity with a child under the age of 16,⁶¹ and to the offences of procuring or 'grooming' a child to engage in sexual activity outside Australia.⁶²

1.64 Item 1 of Schedule 6 to the bill seeks to repeal section 272.17, and replace it with a new offence-specific defence, which would apply only to the offences in subsections 272.12(1) and 272.13(1) relating to engaging in sexual intercourse or sexual activity with a young person. Proposed section 272.17 would require the defendant to prove that:

- at the time of the sexual intercourse or activity, there existed between the defendant and the young person a marriage that was valid, or recognised as valid, under the law of the place where the marriage was solemnised, the

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

61 Respectively, subsections 272.8(1) and 272.9(1) of the *Criminal Code*.

62 Respectively, subsections 272.14(1) and 272.15(1) of the *Criminal Code*.

place where the intercourse or activity was alleged to have taken place, or the place of the defendant's residence or domicile; and

- when the marriage was solemnised, the marriage was genuine, and the young person had attained the age of 16 years.

1.65 By requiring the defendant to prove the matters in proposed section 272.17, the provision reverses the legal burden of proof.⁶³

1.66 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof, and require a defendant to disprove one or more elements of an offence, interfere with this common law right. The committee would expect any provision that reverses the legal burden of proof to be fully justified in the explanatory materials. Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that placing a legal burden of proof on a defendant should be kept to a minimum and, where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.⁶⁴

1.67 In this instance, the explanatory memorandum states that a legal burden is appropriate 'because the defence relates to a matter that is peculiarly within the defendant's knowledge and not available to the prosecution'.⁶⁵

1.68 Matters such as whether a valid marriage existed between the defendant and the relevant young person would appear to be matters that may be peculiarly within the defendant's knowledge,⁶⁶ and so it may be justified to reverse the *evidential* burden of proof. However, it is not apparent to the committee why it is necessary to reverse the *legal* burden of proof in relation to those matters. The committee notes that no specific justification for reversing the legal burden is included in the explanatory materials.

63 Paragraph 13.4(b) of the *Criminal Code Act 1995* provides that a burden of proof imposed on the defendant is a legal burden if the law expressly requires the defendant to prove the matter.

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

65 Explanatory memorandum, p. 53.

66 In this respect, the committee notes that such matters may be peculiarly within the knowledge of the two parties, and that it may be inappropriate to seek information from the relevant young person (for example, due to risks of re-traumatisation).

1.69 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to reverse the legal burden of proof in this instance and why it is not sufficient to reverse the evidential, rather than legal, burden of proof.

Great Australian Bight Environment Protection Bill 2019

Purpose	This bill seeks to protect the Great Australian Bight from environmental damage resulting from mining activities and to commence the process of World Heritage Listing the Great Australian Bight
Sponsor	Senator Sarah Hanson-Young
Introduced	Senate on 25 July 2019

Broad delegation of administrative powers⁶⁷

1.70 The bill seeks to create a number of new criminal and civil offences for carrying out mining operations in the Great Australian Bight. Clauses 11 and 12 seek to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to the provisions of the bill and offences against the *Crimes Act 1914* or the *Criminal Code* that relate to the bill. These monitoring and investigation powers include coercive powers, such as powers of entry and inspection.⁶⁸

1.71 Subclauses 11(4) and 12(3) seek to allow authorised persons to be assisted by 'other persons' when exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not appear to explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training. The committee has consistently raised scrutiny concerns about provisions which authorise persons to use coercive powers where there is no requirement that the person has the appropriate training or expertise.

1.72 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing 'other persons' to assist authorised officers in exercising potentially coercive or investigatory powers, in circumstances where there is no legislative guidance about the appropriate skills and training required of those 'other persons'.

67 Clauses 11 and 12. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

68 Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* deals with monitoring powers and Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* deals with investigation powers.

National Sports Tribunal Bill 2019

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

1.73 The committee commented on a similar bill in the previous Parliament in [Scrutiny Digest 2 of 2019](#) and reiterates the following concerns in relation to the current bill.

Reversal of evidential burden of proof⁶⁹

1.74 Clause 72 of the bill provides that it is an offence if an entrusted person discloses or otherwise uses protected information, carrying a maximum penalty of two years imprisonment. Subclauses 72(2) to (4) provide a number of exceptions (offence-specific defences) to this offence. These include where the disclosure:

- is for the purposes of the Act, rules, the performance of the functions or powers of the CEO or in a person's capacity as an entrusted person;
- has been consented to by the person to whom the information relates; or
- contains information that has already been lawfully made available to the public.

1.75 In these instances the evidential burden of proof would be reversed by the use of offence-specific defences.⁷⁰ At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.76 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any

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

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

such reversal of the evidential burden of proof to be justified. In this instance, the explanatory memorandum states:

The placement of the evidential burden on the defendant can be justified in this instance because it will not reasonably be possible for a prosecution to disprove every conceivable source of authority in many cases, when that information is within the knowledge of the entrusted person who made the disclosure. In the event that the prosecution was required, in such circumstances, to disprove that the disclosure was unlawful, it would be significantly more difficult and costly for the prosecution to disprove the matter.⁷¹

1.77 The committee notes that the *Guide to Framing Commonwealth Offences*⁷² provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; **and**
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

1.78 In this case, it is not apparent from the explanatory materials that matters such as whether the disclosure was for the purpose of the Act or in accordance with obligations under yet-to-be-made rules, or whether the information has already been lawfully made public, are matters that would be peculiarly within the defendant's knowledge, and difficult or costly for the prosecution to establish.

1.79 The committee requests the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offence, and requests the minister's advice in relation to this matter.

71 Explanatory memorandum, p 47.

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

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

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

Retrospective application⁷³

1.80 Schedule 1 of the bill seeks to amend the *Income Tax Assessment Act 1936* to specify how to work out the market value of certain assets and liabilities at the time a tax exempt entity becomes a non-exempt entity. Schedule 2 of the bill seeks to amend the *Income Tax Assessment Act 1997* to include additional conditions that must be satisfied in order for small business capital gains tax (CGT) concessions to apply.

1.81 The application provision in Schedule 1 provides for the amendments to apply if the transition time is on or after 7:30 pm, by legal time in the Australian

⁷³ Schedule 1, item 5 and Schedule 2, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Capital Territory, on 8 May 2018. The explanatory memorandum states that the amendments apply retrospectively because 'the amendments overcome an integrity concern that allows affected taxpayers to obtain an unintended benefit'.⁷⁴

1.82 The application provision in Schedule 2 provides for the amendments to commence in relation to CGT events happening after 7:30 pm, by legal time in the Australian Capital Territory, on 8 May 2018. The explanatory memorandum states:

Retrospective application is necessary as the amendments are an important integrity measures to prevent inappropriate access to the CGT small business concessions for arrangements undertaken to reduce partner's tax liabilities.⁷⁵

1.83 The committee reiterates its long-standing scrutiny concern that provisions that back-date commencement to the date of the announcement of the bill challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively).

1.84 In the context of tax law, the committee is concerned that reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law. The explanatory memorandum does not detail whether any person will be detrimentally affected by the amendments having a retrospective application.

1.85 The committee has previously been prepared to accept that some amendments may permissibly have some retrospective effect when the legislation is introduced, if the relevant bill was introduced within six calendar months after the date of that announcement. Where taxation amendments are not brought before the Parliament within six months of being announced, the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 45). In this instance, the committee notes that it has been more than 12 months since the Budget announcement.

1.86 The committee therefore requests the Assistant Treasurer's more detailed advice as to how many individuals will be detrimentally affected by the retrospective application of the legislation, and the extent of their detriment.

1.87 The committee also requests the Assistant Treasurer's advice as to the extent to which the bill as introduced is consistent with the measures announced on 8 May 2018.

74 Explanatory memorandum, p. 23.

75 Explanatory memorandum, p. 31.

Treasury Laws Amendment (Consumer Data Right) Bill 2019

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

1.88 The committee commented on a similar bill in the previous Parliament in [Scrutiny Digest 2 of 2019](#) and reiterates the following concerns in relation to the current bill.

No invalidity clauses⁷⁶

1.89 The bill seeks to introduce a consumer data right (CDR) to provide individuals and businesses with a right to access specified data which relates to them and is held by businesses, and to authorise secure access to this data by accredited third parties. The bill establishes a framework to enable the CDR to be applied to various sectors of the economy over time by allowing the minister, by legislative instrument, to designate a sector of the Australian economy as a sector to which the CDR applies.⁷⁷ Key elements of the CDR framework will be governed by consumer data rules. The consumer data rules are to be made by the Australian Competition and Consumer Commission (the ACCC), and apply to a range of elements of the CDR system, including the disclosure, use, storage and security of CDR data.⁷⁸

1.90 Generally, the committee's view is that significant matters, such as key elements of what sectors the CDR applies to and how the framework will be governed, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.91 In this instance the explanatory memorandum explains that, as it is intended to apply the CDR to sectors of the economy over time, it is necessary to have a

⁷⁶ Schedule 1, item 1, proposed section 56AH and subsections 56BQ(2), 56BS(2) and 56DA(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii), (iv) and (v).

⁷⁷ Explanatory memorandum, p. 11.

⁷⁸ Explanatory memorandum p. 31. See also Schedule 1, item 1, proposed section 56BB.

designation process that is flexible,⁷⁹ and it is important to be able to tailor the consumer data rules to different sectors.⁸⁰ The committee acknowledges the need for flexibility in a context that will be changing and adapting as the CDR is rolled out across various sectors. Proposed sections 56AD, 56AE, 56AF and 56AG impose extensive consultation obligations and matters that must be considered before a sector is designated by the minister. In addition, before the ACCC makes consumer data rules, emergency rules or recognises an external dispute resolution scheme, proposed subsections 56BQ(1), 56BS(1) and 56DA(4) set out consultation requirements that apply. The committee considers that these consultation obligations, and requirements to consider specified matters before instruments are made, assist in justifying including what amounts to significant matters in delegated legislation.

1.92 However, proposed section 56AH and subsections 56BQ(2), 56BS(2) and 56DA(5), provide that a failure to comply with these requirements before an instrument is made does not invalidate that instrument. A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause.

1.93 The committee's view is that where the Parliament delegates its legislative power in relation to significant regulatory schemes it is appropriate that specific consultation requirements (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these requirements is a condition of the validity of the legislative instrument. Providing that the instrument remains valid and enforceable even if there is a failure to comply with these requirements undermines including such obligations in the legislation.

1.94 As for the procedural requirements (aside from consultation) that apply to the minister making a designation instrument, the committee notes that those requirements are intended to provide assurance that certain matters will be taken into account by the minister when making the instrument. The committee's view is that the inclusion of the no-invalidity clause undermines that assurance.

1.95 The explanatory memorandum provides no justification for why a failure to comply with the procedural requirements that apply to the making of a designation instrument should not lead to invalidity. This is also the case in relation to the consultation requirements imposed by proposed section 56DA.

1.96 In relation to proposed section 56BQ, the explanatory memorandum states:

79 Explanatory memorandum, p. 11.

80 Explanatory memorandum p. 32.

A failure to consult will not invalidate the consumer data rules. However, the consumer data rules are disallowable instruments so the Parliament has the capacity to intervene and disallow the rules.⁸¹

1.97 The committee notes this explanation provided in relation to proposed section 56BQ. However, the committee's view is that the instrument being disallowable is not, of itself, a sufficient justification for providing that a failure to comply with consultation requirements should not lead to invalidity. Although the instrument may be disallowable, it may be difficult for parliamentarians to determine whether appropriate consultation has taken place within the timeframe for disallowance.

1.98 In relation to proposed section 56BS, which allows the ACCC to make consumer data rules in an emergency, the committee notes that a failure to consult with the Information Commissioner as required by that section will mean that those rules will cease to be in force 6 months after the day those rules are made.⁸² However, the consultation required by proposed section 56BS is limited to the Information Commissioner and the explanatory memorandum does not make clear why a failure to engage in that limited consultation should not lead to immediate invalidity.

1.99 The committee requests the Treasurer's advice as to the rationale for including a number of no-invalidity clauses in relation to consultation requirements in the bill.

Delegated legislation not subject to disallowance⁸³

Significant matters in non-statutory standards⁸⁴

1.100 Proposed subsection 56DA(1) provides that the ACCC may recognise an external dispute resolution scheme, by notifiable instrument, for the resolution of certain disputes relating to the CDR scheme. The explanatory memorandum states that the rules may require data holders, accredited data recipients or designated gateways to have internal or external dispute resolution processes, and that there are a variety of dispute resolution schemes available which may be chosen when

81 Explanatory memorandum, p 41.

82 See proposed subsection 56BT(3).

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

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

appropriate, for example existing ombudsman schemes or independent commercial arbitrators.⁸⁵

1.101 The committee notes that 'notifiable' instruments, unlike 'legislative' instruments, are not subject to tabling, parliamentary disallowance or scrutiny by the Senate Standing Committee on Regulations and Ordinances, nor are they subject to sunseting after 10 years.⁸⁶ Notifiable instruments are designed to cover instruments that are not legislative in character.⁸⁷ The *Legislation Act 2003* sets out the general test as to when an instrument will be legislative in character; namely if a provision of the instrument determines the law or alters the content of the law and has the direct or indirect effect of affecting a privilege or interest, imposing an obligation or creating a right or varying or removing an obligation or right.⁸⁸ It is not clear that determining the type of external dispute resolution scheme that will be available in relation to disputes regarding consumer data rights would not be legislative in character. Given the impact on parliamentary scrutiny of not making such an instrument a legislative instrument, the committee would expect the explanatory materials to provide a justification for the use of a notifiable instrument. However, there is no detail in the explanatory memorandum as to why it is proposed that the recognition of the scheme, and the specification of conditions relating to that recognition, is to be done by notifiable instrument, rather than legislative instrument.

1.102 In addition, proposed section 56FA provides that the Data Standards Chair may make data standards, which could relate to the disclosure and the collection, use and deletion of CDR data. Proposed subsection 56FA(4) provides that the data standards are not legislative instruments, and as such will not be subject to any parliamentary control or scrutiny.

1.103 A data standard does not appear to have any legal effect unless the data standard is specified to be a binding data standard. A data standard is a binding standard if the consumer data rules require that the standard specify that it is binding. Proposed sections 56FD and 56FE give legal effect to binding data standards by doing the following:

- proposed section 56FD creates a contract between certain persons in which those persons agree to comply with those standards; and
- proposed section 56FE allows, in relation to a failure by a person to meet an obligation to comply with a binding data standard, that an application may

85 Explanatory memorandum, p 52.

86 See *Legislation Act 2003*.

87 Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate legislation*, p. 19.

88 Subsection 8(4) of the *Legislation Act 2003*.

be made to the Federal Court by the ACCC or a person aggrieved by the failure.

1.104 The explanatory memorandum states that:

The data standards will be largely in the nature of specifications for how information technology solutions must be implemented to ensure safe, efficient, convenient and interoperable systems to share data. They will only describe how the CDR must be implemented in accordance with the rules which will set out the substantive rights and obligations of participants.⁸⁹

1.105 Although the explanatory memorandum explains that the data standards will cover largely technical matters, the committee notes that the power to make such standards is not so limited: the data standards could potentially cover a number of significant matters relating to the management of CDR data. The committee expects that a sound justification be provided for the use of non-disallowable standards, especially where those standards may potentially be addressing significant matters and could affect large classes of persons (as the standards may do as a result of proposed sections 56FD and 56FE). The explanatory memorandum provides no such justification.

1.106 The committee requests the Treasurer's more detailed advice as to why it is considered necessary and appropriate to allow potentially significant matters to be included in instruments or standards that would not be subject to any parliamentary control or scrutiny.

Reversal of evidential burden of proof⁹⁰

1.107 Proposed subsection 56BN(1) makes it an offence for a person to engage in conduct that the person knows is misleading or deceptive and the conduct has the effect of making another person believe a person is a CDR consumer or is acting in accordance with a valid request or consent from a CDR consumer.⁹¹ Proposed subsection 56BN(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the conduct is not misleading or deceptive in a material particular. This reverses the evidential burden of proof in relation to this

89 Explanatory memorandum, p. 48.

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

91 Proposed subsection 56BO(1) provides a civil penalty for the same conduct and proposed subsection 56BO(2) provides the same defence as proposed subsection 56BN(2). The maximum amount of the civil penalty is \$500,000; see Schedule 1, item 21, proposed paragraph 76(1B)(ab).

defence.⁹² The offence, if committed by a body corporate, attracts a maximum fine of \$10,000,000.⁹³ Otherwise, the offence carries a maximum penalty of 5 years imprisonment, a fine of not more than \$500,000, or both.⁹⁴

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

1.109 The committee notes that the *Guide to Framing Commonwealth Offences*⁹⁵ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; **and**
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁹⁶

1.110 The explanatory memorandum states that the reversal of the burden is appropriate as:

Placing the burden on the person seeking to rely on the defence is appropriate as the material will be within the person's knowledge. A person disclosing information will need to meet certain record keeping requirements, and would, for example be able to demonstrate that the correct consent documents had been received and that the recipient was listed on the accreditation register. Being able to produce this material should place no additional burden on the person. Such materials may not be available to the person who is alleging they have been misled or deceived.⁹⁷

1.111 However, the explanation in the explanatory memorandum does not explain how the defendant knowing that the conduct is not misleading or deceptive is a matter that is *peculiarly* within the knowledge of the defendant. In this regard, it appears to the committee that the existence of the correct consent documents,

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

93 Schedule 1, item 1, proposed subsection 56BN(3).

94 Schedule 1, item 1, proposed subsection 56BN(5).

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

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

97 Explanatory memorandum, p 69.

while not available to a person who is alleging they have been misled or deceived, would be accessible to the prosecution. In addition, the committee notes that explanatory memorandum does not address whether it would be significantly more difficult or costly for the prosecution to disprove, as set out in the *Guide to Framing Commonwealth Offences*.

1.112 The committee requests the Treasurer's detailed justification as to the appropriateness of including the specified matters as an offence-specific defence. The committee suggests that it may be appropriate if proposed subsection 56BN(2) was amended to be included as an element of the offence. The committee requests the minister's advice in relation to this matter.

Incorporation of external materials existing from time to time⁹⁸

1.113 Proposed section 56GB provides that certain delegated legislation may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time.

1.114 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.115 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

1.116 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently,

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

the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.⁹⁹ This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

1.117 The explanatory memorandum provides a justification as to why materials need to be incorporated from time to time, stating that it is important to have the flexibility to refer to or incorporate instruments or standards that may exist from time to time, noting that a consumer data rule may seek to refer to a particular standard of the International Organisation for Standardisation (IOS) as part of the criteria to obtain accreditation.¹⁰⁰ However, the committee notes that IOS standards are often only available for purchase and may not be made freely available. The explanatory memorandum does not explain whether any incorporated standards would be made freely available to persons interested in the terms of the law.

1.118 The committee requests the Treasurer's more detailed advice as to whether the relevant IOS standards will be made freely available to all persons interested in the law.

Broad discretionary power¹⁰¹ Significant matters in delegated legislation¹⁰²

1.119 Proposed section 56GD provides that the ACCC may, by written notice, exempt a person from all or specified provisions of the new consumer data right scheme in proposed Part IVD, any regulations made for the purposes of that Part and the consumer data rules.

1.120 Similarly, proposed section 56GE allows for regulations to be made that would exempt a person, or a class of persons, from the same provisions, or declare that those provisions apply as if specified provisions were omitted, modified or varied.

1.121 Proposed section 56GD would therefore appear to grant a broad discretionary power for the ACCC to exempt persons from the operation of primary and delegated legislation. The explanatory memorandum states that the provisions

99 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

100 Explanatory memorandum, p. 79.

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

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

provide the ACCC with the ability to ensure the new system 'does not operate in unintended or perverse ways in exceptional circumstances' and provides the ACCC with scope to ensure the system 'works in the best way possible for consumers and the designated industry'.¹⁰³

1.122 However, the committee notes that while there is a right for a person to apply to the Administrative Appeals Tribunal (AAT)¹⁰⁴ for review of a decision exempting, or refusing to exempt the person, there is no criteria in the bill setting out the basis on which the ACCC is to exercise this power or any conditions that must be satisfied before such powers are exercised.

1.123 Additionally, proposed section 56GE grants a broad power for the regulations to exempt persons and classes of persons from the operation of primary and delegated legislation and to modify how that legislation is to operate. The committee has concerns about such provisions as provisions of this kind may have the effect of limiting parliamentary scrutiny (as delegated legislation is not subject to the same level of scrutiny as primary legislation). Consequently, the committee expects a sound justification for the use of such provisions. In this instance, the explanatory memorandum states that:

The regulations will only seek to declare that provisions of the [consumer data right] are modified or varied in exceptional circumstances. However, it is important to include the ability to modify the [consumer data right] regime via regulation in order to ensure that the system is dynamic and able to adapt quickly to a changing economy and the varied sectors within it. Regulations are disallowable instruments and the Parliament will have appropriate oversight over any regulation made under the [consumer data right] regime.¹⁰⁵

1.124 The committee notes that the explanatory memorandum does not explain what it meant by 'exceptional circumstances' that would justify making such regulations, nor is such a limitation included on the face of the bill. Nor does the bill set out any matters that the minister must be satisfied of before regulations are made and there is no explanation of why it is necessary to enable the regulations to exempt specified individuals, noting that an exemption provided in the regulations is not subject to the same review rights before the AAT as an exemption made by the ACCC.

1.125 Additionally, where Parliament delegates its legislative power in relation to significant legislative schemes (including the power to modify and exempt entities from the operation of primary legislation), the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the

103 Explanatory memorandum, p. 81.

104 Schedule 1, item 1, proposed subsection 56GD(5).

105 Explanatory memorandum, p. 81.

Legislation Act 2003) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity. The committee notes that no such requirements are currently set out in the bill in relation to proposed section 56GE.

1.126 The committee requests the Treasurer's more detailed advice as to why it is considered necessary and appropriate to allow the ACCC and the regulations to provide exemptions from the operation of the new consumer data right scheme.

Previous comments on reintroduced bills

1.127 The committee has previously commented and reiterates those comments on the following bills which have been reintroduced into the Parliament between 22 – 25 July 2019:

- Future Drought Fund Bill 2019
[Scrutiny Digest 15/18](#) and [Scrutiny Digest 1/19](#)
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendment) Bill 2019
[Scrutiny Digest 5/18](#) and [Scrutiny Digest 6/18](#)
- Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019
[Scrutiny Digest 6/18](#) and [Scrutiny Digest 8/18](#)

Bills with no committee comment

1.128 The committee has no comment in relation to the following bills which were either restored to the *Notice Paper*, introduced or reintroduced into the Parliament between 22 – 25 July 2019:

- Aged Care Amendment (Movement of Provisionally Allocated Places) Bill 2019;
- Aged Care Amendment (Staffing Ratio Disclosure) Bill 2019;
- Appropriation Bill (Parliamentary Departments) Bill (No. 1) 2019-2020;
- Banking Amendment (Rural Finance Reform) Bill 2019;
- Coal-Fired Power Funding Prohibition Bill 2019;
- Environment Protection and Biodiversity Conservation Amendment (Heritage Listing for the Bight) Bill 2019;
- Future Drought Fund (Consequential Amendments) Bill 2019;
- Human Rights (Parliamentary Scrutiny) Amendment (Australian Freedoms) Bill 2019;
- Human Services Amendment (Photographic Identification and Fraud Prevention) Bill 2019;
- Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures) Bill 2019;
- Live Sheep Long Haul Export Prohibition Bill 2019;
- National Disability Insurance Scheme Amendment (Streamlined Governance) Bill 2019;
- National Sports Tribunal (Consequential Amendment and Transitional Provisions) Bill 2019;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2019;
- Plebiscite (Future Migration Level) Bill 2018;
- Royal Commission Amendment (Private Sessions) Bill 2019;
- Social Security (Administration) Amendment (Cashless Welfare) Bill 2019;
- Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Bill 2019;
- Tertiary Education Quality and Standards Agency Amendment Bill 2019; and
- Treasury Laws Amendment (Timor Sea Maritime Boundaries Treaty) Bill 2019.

Commentary on amendments and explanatory materials

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

- Future Drought Fund Bill 2019;¹⁰⁶
- National Rental Affordability Scheme Amendment Bill 2019; and¹⁰⁷
- Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2019.¹⁰⁸

106 On 24 July 2019 the Senate agreed to one Centre Alliance amendment and the bill was read a third time. On the same day the House of Representatives agreed to the Senate amendment and the bill was passed.

107 On 22 July 2019 the Senate agreed to four Opposition amendments and the bill was read a third time.

108 On 25 July 2018 the House of Representatives agreed to one Government amendment, the Assistant Treasurer (Mr Sukkar) presented a supplementary explanatory memorandum and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

2.1 No responses received.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

3.4 The committee draws the following bill to the attention of Senators:

- **Future Drought Fund Bill 2019** — Part 2, Division 2, clauses 13 and 33 (SPECIAL ACCOUNTS: CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*).

Senator Dean Smith
Acting Chair

1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

