The Senate

Standing Committee for the Scrutiny of Bills

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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

Comment bills

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

Australian Education Amendment (Direct Measure of Income) Bill 2020

Purpose	This bill seeks to amend the *Australian Education Act 2013* to introduce a new direct measure of income methodology for calculating a school community's capacity to contribute financially to a non-government school. The bill also enables adjustments to be made to the transition pathways of non-government schools to a nationally consistent Commonwealth share of the Schooling Resource Standard
Portfolio	Education
Introduced	House of Representatives on 26 February 2020

Significant matters in delegated legislation[1]

1.2 Item 25 of Schedule 1 to the bill seeks to amend the *Australian Education Act 2013* to insert proposed section 35C, which provides that the regulations may prescribe a percentage, or a method to work out a percentage, for a non-government school for a transition year for the school that is the Commonwealth share for the school for the transition year.

1.3 The committee's view is that significant matters, such as the calculation of the Commonwealth share of funding for transitioning non-government schools, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> It has been decided to move the provisions relating to the determination of Commonwealth shares for non-government schools during their transition years from Part 3 of the Act to the Regulation. Section 35C thus provides that the Regulation may prescribe a percentage, or a method to work out a percentage, for a non-government school for a transition year

1 Schedule 1, item 25, proposed section 35C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

> for the school, that is the *Commonwealth share* for the school for the transition year. The rationale for this approach is to provide flexibility to adjust transitional arrangements in response to future changes in the circumstances in the non-government sector, and mitigate potential unintended consequences arising from the refinement of the [direct measure of income] methodology. It is also considered appropriate given the regulations made for this purpose will be time-limited in nature with starting Commonwealth shares to be reset in 2020, 2021 and again in 2022, and all non-government schools expected to transition to the consistent Commonwealth share by 2029.[2]

1.4 The committee notes the explanation that the calculation measures are designed to be transitionary and notes that the regulations will be subject to parliamentary disallowance. However, the committee also 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. As the detail of delegated legislation is generally not publicly available when Parliament is considering a bill, this considerably limits the ability of the Parliament to have appropriate oversight over whether any method for the calculation of the Commonwealth share of funding for transitioning non-government schools is appropriate.

1.5 The committee draws the matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation for information.

1.6 In light of the detailed information provided in the explanatory memorandum and the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

2 Explanatory memorandum, p. 20.

Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020

Purpose	This bill seeks to makes changes to Additional Child Care Subsidy (child wellbeing) and to the calculation method used when an individual whose relationship status changes throughout the year meets the Child Care Subsidy (CCS) reconciliation conditions
Portfolio	Education
Introduced	House of Representatives on 26 February 2020

Retrospective commencement—Schedule 1[3]

1.7 Item 7 of Schedule 1 to the bill seeks to amend subparagraphs 197G(1)(b)(ii) and (iii) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act). Section 197G of the Administration Act allows the Secretary to vary the approval of an approved provider to remove an approved child care service from the provider's approval if:

- the service fails to provide child care for a continuous period of three months; and
- none of the circumstance in paragraph 197G(1)(b) apply.

1.8 The amendment to subparagraph 197G(1)(b)(ii) provides that a determination made under section 195C (that the service need not operate for a period) must apply *only to the service* that the Secretary is considering removing from the provider's approval, and not to *all the provider's services* as set out in the existing provision. The amendment to subparagraph 197G(1)(b)(iii) provides that the Secretary must be satisfied that because of special circumstances, the provider's approval should not be *varied*, rather than *cancelled* as set out in the existing provision).

1.9 Clause 2 of the bill provides that item 7 of Schedule 1 commences immediately after Schedule 2 to the *Family Assistance Legislation Amendment (Building on the Child Care Package) Act 2019*, which commenced on 13 December 2019.

1.10 In relation to item 7 of Schedule 1 to the bill, the explanatory memorandum states that:

3 Schedule 1, items 7 and 8. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

> This amendment commences immediately after the two subparagraphs it amends took effect. This retrospective commencement is appropriate given that this amendment is necessary to allow section 197G to operate effectively and fairly for both the Australian Government and approved providers. This amendment also gives effect to the original policy intention of the measure when paragraph 197G(1)(b) was amended under *Family Assistance Legislation Amendment (Building on the Child Care Package) Act 2019*.[4]

1.11 Item 8 of Schedule 1 to the bill seeks to specify that a civil penalty of 50 penalty units applies to offences under subsection 204K(6) of the Administration Act. Clause 2 of the bill provides that item 8 of Schedule 1 to the bill commences immediately after Part 1 of Schedule 1 to the *Family Assistance Legislation Amendment (Building on the Child Care Package) Act 2019*, which commenced on 16 December 2019.

1.12 In relation to item 8 of Schedule 1 to the bill, the explanatory memorandum states that:

> This amendment commences immediately after it was inadvertently repealed to ensure that there is no gap in the period of time that the civil penalty applies to subsection 204K(6). This retrospective commencement is appropriate given that the amendment reinstates what was previously in the legislation and was unintentionally repealed. It also ensures that there is certainty for the Australian Government, approved providers and individuals about the amount of civil penalty that would apply if subsections 204K(1) or (3) were contravened. This is important given that section 204K imposes requirements on approved providers to give notice to appropriate State and Territory support agencies where a child is at risk of serious abuse or neglect.

1.13 The committee has a long-standing scrutiny concern about provisions that commence retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.14 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. From a scrutiny perspective, the committee does not consider that the information provided in the explanatory memorandum fully justifies why items 7 and 8 of Schedule 1 to the bill apply retrospectively.

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4 Explanatory memorandum, p. 18.

1.15 The committee requests the minister's more detailed advice regarding why it is necessary and appropriate for the measures in items 7 and 8 of Schedule 1 to commence retrospectively.

1.16 The committee's consideration of this matter would be assisted if the advice contained information regarding:

- **in relation to item 7—whether there will be a detrimental effect for any providers, and if so the extent of that detriment and the number of providers affected; and**
- **in relation to item 8—whether any providers may have reasonably relied on the removal of the civil penalty amount and how many providers may be subject to the penalty retrospectively.**

Retrospective application—Schedule 2[5]

1.17 Schedule 2 to the bill seeks to make amendments to how Child Care Subsidy (CCS) entitlements are reviewed when an individual who is a member of a couple for some but not all of the CCS fortnights in an income year meets the CCS reconciliation conditions. Item 2 of Schedule 2 provides that these amendments will apply in relation to reviews, at CCS reconciliation, of child care decisions made in relation to sessions of care provided in CCS fortnights starting in the 2019-2020 income year. The explanatory memorandum states:

> This enables the fairer, amended entitlement methodology, to be applied in respect of CCS payable for sessions of care provided in the 2019-2020 financial year…[6]

1.18 As noted above, the committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.19 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. The committee does not consider that the explanatory memorandum provides an adequate justification for the retrospective application of the proposed amendments in Schedule 2 to the bill.

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

6 Explanatory memorandum, p. 23.

1.20 The committee requests the minister's more detailed advice regarding why it is necessary and appropriate for the amendments in Schedule 2 to apply retrospectively. The committee's consideration of the matter would be assisted if the advice addresses whether the amendments will have a detrimental effect on any individuals, and if so, the number of individuals that may be affected.

Foreign Acquisitions and Takeovers Amendment (Strategic Assets) Bill 2020

Purpose	This bill seeks to amend several acts in order to keep assets of strategic economic or strategic defensive significance under the ownership and control of Australia
Sponsor	Hon Bob Katter MP
Introduced	House of Representatives on 24 February 2020

Significant matters in delegated legislation[7]

1.21 The bill seeks to ban the acquisition by a foreign person or entity of a 10 percent or greater interest in Australian land, water or other assets determined to be of strategic economic or strategic defensive significance to Australia. Proposed subsection 2A(3) provides that the regulations must provide for the establishment of a Foreign Ownership Assessment Board (FOAB) to determine whether an asset is of strategic importance to Australia for the purposes of proposed subsection 2A(1). The regulations must also provide for the FOAB to constitute a Board chosen by a majority of the Senate and that any determination of the FOAB will be reviewable by an appeals tribunal.

1.22 The committee's view is that significant matters, such as the establishment and operation of a FOAB, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no explanation as to why this matter is left to delegated legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing the proposed changes in the form of an amending bill.

1.23 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing delegated legislation to provide for the establishment and operation of a Foreign Ownership Assessment Board.

7 Schedule 1, item 1A, proposed paragraph 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

Health Insurance Amendment (General Practitioners and Quality Assurance) Bill 2020

Purpose	This bill seeks to modify Medicare administrative processes for recognition as a specialist general practitioner for Medicare purposes under the *Health Insurance Act 1973* and to align Medicare eligibility for GPs with the National Registration and Accreditation Scheme registration requirements. The bill also seeks to remove references to repealed legislation, and to repeal the *Health Practitioner Regulation (Consequential Amendments) Act 2010*
Portfolio	Health
Introduced	House of Representatives on 27 February 2020

Retrospective validation[8]

1.24 Item 1 of Schedule 2 to the bill seeks to amend subsection 124W(1) of the *Heath Insurance Act 1973* to replace the reference to the former *Health Care (Appropriation) Act 1998* with a reference to the *Federal Financial Relations Act 2009* in the definition of quality assurance activity. Item 2 of Schedule 2 seeks to retrospectively validate declarations made by the minister under section 124X made on or after 1 July 2009 where at the time the declaration was made, the activity was a quality assurance activity within the meaning of the amended subsection 124W(1).

1.25 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.26 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum states:

> This item is retrospective in its application because the delay in amending item 1 to reference the correct legislation is an administrative delay. Participants of the [Qualified Privilege Scheme] believe in good faith that their declarations are valid and it was the Commonwealth's intention that

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

they be so. There has been no breach of privacy in relation to public disclosure in the period on or after 1 July 2009.[9]

1.27 While noting this explanation, it remains unclear to the committee whether the retrospective validation of declarations will, or may, have a detrimental effect on any persons.

1.28 The committee requests the minister's more detailed advice as to the necessity and appropriateness of retrospectively validating declarations made by the minister under section 124X, including a more detailed explanation regarding whether there will, or may, be a detrimental effect to any involved parties.

9 Explanatory memorandum, p. 14.

Liability for Climate Change Damage (Make the Polluters Pay) Bill 2020

Purpose	This bill seeks to make fossil fuel companies liable for climate change damage, giving victims of climate change, such as the recent bushfire survivors, the right to bring an action against thermal coal, oil and gas companies for climate change damage
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 24 February 2020

Retrospective application[10]

1.29 The bill seeks to allow persons to bring an action against a major emitter for climate change damage suffered by the person. Clause 2 of the bill provides that the bill will commence from 1 July 2019.

1.30 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.31 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum notes the retrospective commencement and states that it ensures that 'the victims of the 2019-20 bushfires are able to utilise the Act.'[11]

1.32 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for the bill to commence retrospectively from 1 July 2019.

10 Clause 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

11 Explanatory memorandum, p. 2.

Representation Amendment (6 Regions Per State, 2 Senators Per Region) Bill 2020

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1983* and the *Representation Act 1983* to provide that each State be divided into six divisions for elections to the Senate
Sponsor	Hon Barnaby Joyce MP
Introduced	House of Representatives on 24 February 2020

Significant matters in delegated legislation[12]

1.33 Item 3 of Schedule 1 to the bill seeks to amend the *Representation Act 1983* to provide that the minister must, by legislative instrument, determine six divisions for each state for elections to the Senate. The number of Senators for each division of a state must be two, chosen by the people of the divisions voting as six separate electorates.

1.34 The committee's consistent scrutiny view is that significant matters, such as the determination of electoral boundaries, should not be set out in delegated legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that no explanation for the use of delegated legislation is provided in this instance.

1.35 Additionally, the committee has significant scrutiny concerns regarding allowing the minister, who is a member of the executive branch of government, to determine electoral boundaries for Senate elections. In this regard, the committee notes that there are no safeguards in the bill to ensure that divisions within a state are fairly and impartially created, for example by providing that electoral divisions are to be determined by the Australian Electoral Commission.

1.36 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the minister to determine Senate electoral divisions by legislative instrument.

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

Therapeutic Goods Amendment (2020 Measures No. 1) Bill 2020

Purpose	This bill seeks to amend the *Therapeutic Goods Act 1989* to: • align certain device-related definitions with the equivalent definition in the European Union; • enable the Secretary to provide early scientific advice to a sponsor about the safety, quality or efficacy of a registrable medicine before they apply for marketing approval; • introduce a data protection regime for assessed listed medicines; and • make minor amendments and corrections
Portfolio	Health
Introduced	House of Representatives on 4 March 2020

Incorporation of external materials existing from time to time[13]

1.37 An applicant for marketing approval for a kind of medical device must certify that their kind of device complies with the essential principles set out in Schedule 1 to the Therapeutic Goods (Medical Devices) Regulations 2002. These essential principles comprise minimum benchmarks of safety and performance for medical devices.

1.38 The purpose of a medical device standards order made under section 41CB of the *Therapeutic Goods Act 1989* is to provide medical device manufacturers and sponsors with a flexible option of demonstrating that their kind of device complies with the essential principles, or with particular parts of the essential principles, through the use of relevant international benchmarks. If a device manufacturer or sponsor can demonstrate that their device complies with the order, then the device will be taken to comply with the essential principles specified in the order.

1.39 Proposed subsections 41CB(3) and 41DC(4) in this bill provide that an order made under existing subsection 41CB(1) or 41DC(1), may apply, adopt or incorporate (with or without modification) any matter contained in an instrument or other writing as in force or existing from time to time. The explanatory memorandum states:

13 Schedule 1, items 24 and 25, proposed subsections 41CB(3) and 41DC(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

> In relation to the adoption of other instruments in these orders from time to time, this is designed principally to ensure the currency of these orders, and to support their consistency with requirements for medical device manufacturers and sponsors in major international jurisdictions like the EU and the US (noting in particular that most medical devices supplied in Australia are manufactured overseas).
>
> Without the ability for the Minister to adopt such instruments as in force from time to time, the value of these orders as flexible, optional compliance mechanisms for manufacturers and sponsors may erode quite quickly over time, as their elements fall out of step with later editions of the instruments.[14]

1.40 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).

1.41 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. In this instance, the explanatory memorandum states:

> In relation to accessing the instruments and other writings that may be adopted, in some instances these may be available for free, for example if they are European regulations, but in other instances they may not – for example standards published by International Organisation for Standardization.
>
> However, it is anticipated that the persons most affected by the adoption of such instruments – manufacturers and sponsors of medical devices – would be in possession of these documents in order to manufacture their

14 Explanatory memorandum, p. 9.

products (including in relation to the manufacture of devices that are also supplied in other countries).[15]

1.42 The committee also notes the information in the explanatory memorandum that a copy of any incorporated standard will be available for viewing at the department's office and consultation would be undertaken prior to any incorporation.[16]

1.43 Noting the detailed explanation provided in the explanatory memorandum, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the incorporation of materials as in force from time to time in this instance.

1.44 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

15 Explanatory memorandum, p. 9.

16 Explanatory memorandum, p. 10.

Bills with no committee comment

1.45 The committee has no comment in relation to the following bills which were introduced into the Parliament between 24 – 27 February 2020:

- Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 1) Bill 2020
- Australian Capital Territory (Self-Government) Amendment (ACT Integrity Commission Powers) Bill 2020
- Banking Amendment (Deposits) Bill 2020
- Climate Emergency Declaration Bill 2020
- Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020
- National Greenhouse and Energy Reporting Amendment (Transparency in Carbon Emissions Accounting) Bill 2020

Commentary on amendments and explanatory materials

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019

1.46 On 24 February 2020, the Minister for Youth and Sport (Senator Colbeck) tabled an addendum to the explanatory memorandum, and the bill was read a third time.

1.47 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[17]

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

- Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020.[18]

17 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2019*, 13 November 2019, pp. 10 – 11 and *Scrutiny Digest 10 of 2019*, 5 December 2019, pp. 41 – 44.

18 On 26 February 2020, the Senate agreed to one Opposition amendment to the bill. On 27 February 2020 the Senate agreed to one further Opposition amendment, and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

2.1 This chapter considers the responses of ministers to matters previously raised by the committee.

Agriculture Legislation Amendment (Streamlining Administration) Bill 2019

Purpose	This bill seeks to amend laws relating to biosecurity and imported food to provide for streamlined administration through automated decision-making, and for related purposes
Portfolio	Agriculture
Introduced	Senate on 2 December 2019
Bill status	Before the House of Representatives

Computerised decision-making
Significant matters in delegated legislation

2.2 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to the necessity and appropriateness of allowing the Director of Biosecurity to arrange for automated decision-making for certain decisions, the compatibility of automated decision-making with administrative law requirements, and the appropriateness of amending the bill to limit the use of automated decision-making to decisions made under specific provisions listed in the primary legislation.[1]

Minister's response[2]

2.3 The minister advised:

> **Why it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under each of the provisions listed in proposed paragraphs 541A(9)(a), (e) and (f)**

1 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 1-4.

2 The minister responded to the committee's comments in a letter dated 25 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

It is considered necessary and appropriate to permit the Director of Biosecurity (DoB) to arrange for the use of computer programs for decisions made under each of the provisions listed in proposed paragraphs 541A(9)(a), (e) and (f) of the Bill to enable the use of current technologies to effectively and efficiently enforce biosecurity controls over vast cargo volumes that may pose a high biosecurity risk to Australia.

Biosecurity incursions of high risk pests and diseases would have a devastating impact on Australia. The Department of Agriculture, Water and the Environment (department) processes an average of 45,000 commercial cargo referrals each month. It is critical that the department be innovative in identifying efficiencies that can be made in the operation of Australia's biosecurity framework.

There are a large and growing number of pests and diseases that pose a high risk to Australia's biosecurity. This Bill is particularly critical as we are in peak season for one of Australia's high risk pests - Brown Marmorated Stink Bug (BMSB). Intensive resources are also being devoted to stopping African Swine Fever Virus (ASFV) from entering Australia. Other high risk pests and diseases include the Khapra beetle, as well as the continued threat posed by foot and mouth disease.

The volume of work associated with preventing biosecurity incursions of these high risk pests and diseases has increased very rapidly and continues to require considerable amounts of manual effort. Automated decision making will lessen the operational burden in these high risk times, allowing the department to refocus efforts to high priority areas.

The Bill intends to ensure that Australia's biosecurity system remains flexible and adaptable, to effectively respond to evolving biosecurity risks threatening Australia in the current climate of high volumes and high risks. For example, from the 2017-18 BMSB season to the 2018-19 season, BMSB established itself in 24 additional countries around the world. Keeping this high risk pest from entering and establishing in Australia has necessitated flexible and rapid responses to the changing risk profile.

This Bill supports implementation of computerised decisions with appropriate safeguards to provide the department with the flexibility to streamline services, reduce the length of time for decision making in relation to biosecurity matters, reduce costs, and free up resources. There is no intention to make determinations in relation to all 'relevant provisions'. The intention is to develop determinations for decisions under provisions where there is a pressing need or are compelling benefits for using automated decision-making, and importantly where the nature of the decision is suitable for automated decision making.

Specifically, proposed paragraph 514(9)(a) would specify subsections 49(4) and (5) as relevant provisions, which means that the determination made under subsection 541A(2) may enable a computer program to grant pratique to vessels and aircraft entering Australia based on pre-arrival information presented by a vessel master and/or shipping agent. Proposed

subsection 541A(3) provides that the Director of Biosecurity must take reasonable steps to ensure that the decisions made by the operation of a computer program consistent with the objects of the Biosecurity Act. A computer will follow objective specified business rules prior to granting a vessel 'pratique' under section 49(4) of the Biosecurity Act.

Proposed paragraph 541A(9)(e) would specify section 557 as a relevant provision, which means that the determination made under subsection 541A(2) may enable a computer program to provide permission for a person to engage in certain conduct specified in the table at section 557 of the Biosecurity Act. Permission may be given to enable a person to interact with goods, vessels, and other things without being liable to the civil penalty provision that would ordinarily have been applicable. Conduct includes interfering with notices affixed to goods (section 139(3)(b)) or moving goods with notices affixed (section 141(1)(b)) under Chapter 3.

Automated decisions would be suitable for providing permission for such conduct as outlined by section 557, if the conduct relates to provisions that are already subject to automated decision-making themselves, covered by 'relevant provisions' under proposed subsection 514(9). For example, in certain circumstances the department may authorise a person who is not a biosecurity industry participant (such as a transport company) to move goods subject to biosecurity control under section 130 to an approved arrangement of a particular class.

The proposed paragraph 541A(9)(f) would specify subsections sections 600 and 602 as relevant provisions, which means that the determination made under subsection 541A(2) may enable a computer program to withhold goods that are subject to a charge as a result of a cost-recovery charge not being paid under section 598 of the Biosecurity Act. Automated decisions would be appropriate in these circumstances as suitable, objective business rules would enable a computer program to identify whether a debt is owed for failure to pay a cost-recovery charge and provide a written notice under subsection 600(2) of the Biosecurity Act.

Why it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under most provisions of Chapters 3, 4 and 5 of the Biosecurity Act (see proposed paragraphs 541A(9)(b), (c) and (d))

It is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under provisions of Chapters 3, 4 and 5 of the Biosecurity Act (see proposed paragraphs 541A(9)(b), (c) and (d)) to enable the use of current technologies to effectively and efficiently enforce biosecurity controls over vast cargo volumes that may pose a high biosecurity risk to Australia.

Provisions in Chapter 3 (managing biosecurity risks: goods), Chapter 4 (managing biosecurity risks: conveyances) and Chapter 5 (ballast water and sediment) have been included in the Bill as 'relevant provisions' set

out by proposed subsection 541(9) because those chapters are vital to the management of biosecurity risks.

Chapter 3 provides powers for the management of biosecurity risks related to goods, including:

- powers to enable assessment of biosecurity risks associated with goods subject to biosecurity control, such as· providing that a biosecurity officer may issue directions to secure goods (section 124), inspect goods (section 125), require documents to be produced (section 127), and require that goods be moved or not moved (section 128)
- powers to enable management of an unacceptable level of biosecurity risk with goods subject to biosecurity control, such as providing that a biosecurity officer may issue directions to require the goods be moved or left at a specified place (section 132), or for goods to be treated (section 134)
- releasing goods from biosecurity control (section 163), although the Biosecurity Act already provides for this to be automated (subsection 163(1).

Chapter 4 provides powers for the management of biosecurity risks in relation to conveyances, including:

- power to enable assessment of biosecurity risks associated with a conveyance subject to biosecurity control, such as providing that a biosecurity officer may issue directions to secure a conveyance (section 198), require documents to be produced (section 201), and require that a conveyance be moved (section 202)
- powers to enable management of an unacceptable level of biosecurity risk with conveyances subject to biosecurity control such as providing that a biosecurity officer may require a conveyance be moved or not moved (sections 206 and 207), or issue a direction for treatment (section 208).

Chapter 5 provides for the management of biosecurity risks related to the discharge of ballast water and disposal of sediment from international and domestic ships, including powers for the purpose of monitoring compliance with requirements under this chapter, such as securing vessels (section 300B), inspecting and taking samples of ballast water from vessels (section 300C), asking questions about vessels (section 300D), and requiring ballast water records to be produced (section 301).These powers ultimately ensure that biosecurity risks associated with ballast water and sediments are managed appropriately, and that Australia fulfils its international obligations in relation to the management of ballast water and sediments.

The types of decision that would be made under those provisions are based on objective information, making it appropriate to provide for automated decision-making for those decisions. The efficient and effective

use of those decision-making powers is vital to protecting Australia's borders from incursion of pests and diseases. With the high volumes of cargo and people entering Australia, and the high biosecurity risks associated with pests and diseases such as BMSB and ASFV, automated decision-making for provisions under Chapters 3, 4 and 5 aimed at assessing and managing biosecurity risk are necessary to ensure that Australia's borders are protected.

It is not intended that decisions that require interpretation or-evaluation of evidence, such as where fact finding or weighing of evidence is required, or that require a high level of discretion, be automated.

Whether the inclusion of subsections 541A(3) or (4) will limit or exclude administrative law requirements which condition the formation of a state of mind, for example the flexibility rule regarding policy or the requirements of legal reasonableness

The inclusion of subsections 541 A(3) or 541 A(4) will not unduly limit or exclude administrative law requirements which condition the formation of a state of mind.

Implementation of automated decision-making under the Biosecurity Act will be guided by the best practice principles developed by the Administrative Review Council outlined in its report *Automated Assistance in Administrative Decision Making: Report to the Attorney-General* (Report No. 46, 2004) (ARC's 2004 Principles).

This will ensure that automated decision making is consistent with the administrative law values of lawfulness, fairness, rationality, transparency and efficiency. These best practice principles in relation to expert systems (automated systems that make or support decisions) include (but are not limited to) the following:

- expert systems that make a decision, as opposed to helping a decision maker make a decision, would generally be suitable only for decisions involving non-discretionary elements
- expert system should not automate the exercise of discretion
- if expert systems are used as an administrative tool to assist in exercising discretion, they should not fetter the decision maker
- the construction of an expert system, and the decision made by or with the assistance of expert systems, must comply with administrative law standards
- expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy.

Automation will enhance the government's ability to maintain biosecurity and food safety while giving faster clearances for large numbers of movements of goods, people, ships and aircraft. While a power to direct a person to take 'specified action' can involve the exercise of discretion to decide what action to 'specify', the discretionary aspects of this decision

will be exercised in the development of business rules that will inform automated systems. Such rules are critical regardless of whether a direction is issued by a biosecurity officer or by application of a computer program, in order to enable responses across thousands of cargo referrals and ensure biosecurity risk is managed.

Discretion is exercised by human control of the business rules and the adaptation of the business rules to respond to new threats or to improve rules for existing threats. In this and similar contexts, it is appropriate to give the sector the predictability and speed of response which can be provided by operation of computer programs and to free up human resources for non-routine issues.

Under the Biosecurity Act, administrative law requirements will also help guide consideration of what decisions are suitable for automation in-line with administrative law requirements. They will ordinarily be decisions where particular facts are reliably established without the need for subjective assessment of complex information so as to come to a particular position.

The types of decisions that are proposed to be implemented by automated decision-making include decisions that require assessment of information provided by applicants and assessments as to whether specified statutory criteria are met. Complex decisions involving consideration of conflicting information from many sources are not proposed to be subject to automated decision-making, to ensure that discretion is fully exercised by a human decision-maker.

The Bill has several safeguards in place to ensure that the correct and most suitable decision is made in accordance with the objectives of the Biosecurity Act. An example of this is proposed subsection 541A(7), which enables a more appropriate decision to be substituted by a biosecurity officer. This allows for a state of mind to be formed and ensures the most appropriate decision can be made.

Computer programs issuing electronic decisions under the Biosecurity Act will be restricted to those contained in a determination made by the Director of Biosecurity, and will be for decisions that involve the identification and, if necessary, the management of biosecurity risk.

This is a technical and scientific process based on objective data and information, for example, what the relevant goods are, what are the associated diseases or pests of concern, whether there are current outbreaks or prevalence of the disease and their locations.

As the Committee identified, this issue also relates to proposed subsections 20A(3) and 20A(4) of the *Imported Food Control Act 1992* (Imported Food Control Act). Similarly, the inclusion of subsections 20A(3) and 20A(4) will not unduly limit or exclude administrative law requirements which condition the formation of a state of mind.

Subsection 20A(1) enables automated decision-making under section 12, subsection 14(1) or subsection 20(2), (3) or (4) of the Imported Food Control Act. Item 11 of the Explanatory Memorandum to the Bill outlines in detail what those provisions set out. Similar to the policy reasoning for amendments to the Biosecurity Act, decisions proposed to be automated do not involve complex facts or exercising higher levels of discretion. For example, section 12 provides for the issue of a food control certificate for examinable food. Examinable food receives a food control certificate whether or not it is required for inspection. Enabling the decision to issue a food control certificate to be made by a computer program allows for greater administrative efficiencies. This will be achieved by issuing automated food control certificates for all food not required to be inspected under the Scheme. Foods that are required to be inspected will continue to receive a food control certificate from an authorised officer, including the flexibility rule regarding policy or the requirements of legal reasonableness.

The appropriateness of amending the bill to limit the use of computerised decision-making to decisions made under specific provisions listed in the primary legislation, rather than by legislative instrument.

The Bill will enable the Director of Biosecurity to determine, by a legislative instrument, which biosecurity officer decisions under the Biosecurity Act may be made by automated systems.

The Department does not intend to automate decisions that require interpretation or evaluation of evidence, such as where fact finding or weighing evidence is required. These would include, for example, directions to order goods for destruction or for a conveyance to be ordered not to enter Australia.

The Committee has noted that any determination of the Director of Biosecurity that seeks to provide for automated decisions will be subject to Parliamentary scrutiny as a disallowable legislative instrument. A determination specifying the decisions subject to automated decision-making will provide a level of flexibility to take into account rapid changes in technology, while striking a balance by ensuring that Parliament retains scrutiny of the determination.

While administrative flexibility is not generally considered by the Committee to be sufficient justification for including significant matters in delegated legislation, the flexibility of Australia's biosecurity system is one of its most important aspects. It must be adaptable, to effectively respond to and manage evolving biosecurity risks threatening Australia. The legislative framework supporting the biosecurity system therefore also needs to be flexible and adaptable. The proposed Bill enables this flexibility and is necessary to ensure that Australia's biosecurity system remains effective in the current climate of high volumes and high risks.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under each of the provisions listed in proposed subsection 541A(9) to enable the use of current technologies to effectively and efficiently enforce biosecurity controls over vast cargo volumes that may pose a high biosecurity risk to Australia.

2.5 The committee also notes the minister's advice that there is no intention to make determinations under proposed subsection 541A(2) so that all 'relevant provisions' listed in proposed subsection 541A(9) may be made by computers. The minister advised that the 'intention is to develop determinations for decisions under provisions where there is a pressing need or are compelling benefits for using automated decision-making, and importantly where the nature of the decision is suitable for automated decision making'. In addition, the minister advised that the department 'does not intend to automate decisions that require interpretation or evaluation of evidence, such as where fact finding or weighing evidence is required'.

2.6 The committee further notes the minister's advice that the inclusion of subsections 541A(3) or 541A(4) will not unduly limit or exclude administrative law requirements which condition the formation of a state of mind, and that implementation of automated decision-making will be guided by the best practice principles developed by the Administrative Review Council outlined in its report *Automated Assistance in Administrative Decision Making*.

2.7 Finally, the committee also notes the minister's advice that providing for a determination to be made which specifies the decisions subject to automated decision-making will provide a level of flexibility to take into account rapid changes in technology, while striking a balance by ensuring that Parliament retains scrutiny of the determination.

2.8 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.9 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation for information.

2.10 In light of the fact that the bill has already passed the Senate, and noting the extensive information provided, the committee makes no further comment on this matter.

Commonwealth Registers Bill 2019

Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019

Purpose	The Commonwealth Registers Bill 2019 seeks to create a set of core provisions related to the administration of business registers in the *Superannuation Industry (Supervision) Act 1993* and the *A New Tax System (Australian Business Number) Act 1999* The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 seeks to provide the legislative framework to the Australian Securities and Investments Commission registers and the Australian Business Register; and the legal framework for the introduction of director identification numbers
Portfolio	Treasury
Introduced	House of Representatives on 4 December 2019
Bill status	Before the Senate

Computerised decision-making[3]

2.11 The committee initially scrutinised this bill in *Scrutiny Digest 1 of 2020* and requested the Assistant Treasurer's advice.[4] The committee considered the Assistant Treasurer's response in *Scrutiny Digest 3 of 2020* and requested the Assistant Treasurer's further advice as to whether it is proposed to bring forward amendments to the bill to limit the types of decisions that can be made by computers; and/or provide that the Registrar must, before determining that a type of decision can be made by computers, be satisfied to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.[5]

3 Clause 11 of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed section 62F item 10, proposed section 1270E; item 18, proposed section 212F. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iii).

4 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 7-14.

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, pp. 21-28.

Assistant Treasurer's response[6]

2.12 The Assistant Treasurer advised:

> I consider that the functions and powers of the registrar are appropriate for assisted decision-making. The Bills allocate 'registry' functions to the new Registrar, whereas 'regulatory' functions remain with existing regulators. Registry provisions tend to relate to the establishment, maintenance and use of registers. The functions of the registrar do not generally rely on complex or discretionary matters and so are well-suited to assisted decision making.
>
> By contrast, 'regulatory' provisions that require more considered decision making or assessment, based on merit remain with existing regulators and are not allocated to the new Registrar under the Bills. These decisions therefore remain outside the scope of the provisions in the Bills for assisted decision-making. They generally relate to monitoring and enforcing the law and licencing and registering market operators and financial service providers.
>
> On this basis, I do not consider amendments to the Bills to place further limits on the provisions that provide for assisted decision making are necessary in this situation.

Committee comment

2.13 The committee thanks the minister for this response. The committee notes the minister's advice that the functions and powers of the Registrar are appropriate for assisted decision-making. The committee also notes the minister's advice that 'regulatory' provisions that require more considered decision making or assessment based on merit remain with existing regulators and are not allocated to the new Registrar under the bills.

2.14 While noting the Assistant Treasurer's advice, from a scrutiny perspective, the committee does not consider that it adequately justifies why it is necessary and appropriate for the bill to permit the Registrar to arrange for the use of computer programs for *any purpose* for which the Registrar may make decisions in the performance or exercise of the Registrar's functions or powers, other than decisions reviewing other decisions, noting the lack of guidance on the face of the bill as to the types of administrative actions that must be taken by a person rather than a computer.

2.15 The committee reiterates its request that the key information provided by the Assistant Treasurer be included in the explanatory memorandum, noting the

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6 The Assistant Treasurer responded to the committee's comments in a letter dated 12 March 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.16 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the use of computer-assisted decision making in circumstances where there is limited guidance on the face of the bill as to the types of decisions that can be made by computers and where there is no requirement that the Registrar must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.

Reversal of evidential burden of proof[7]

2.17 The committee initially scrutinised this bill in *Scrutiny Digest 1 of 2020* and requested the Assistant Treasurer's advice.[8] The committee considered the Assistant Treasurer's response in *Scrutiny Digest 3 of 2020* and requested the Assistant Treasurer's further advice as to the appropriateness of including each of the matters specified in subclause 17(3) of the Registers Bill (and equivalent provisions in the Amendment Bill) as offence-specific defences.[9]

Assistant Treasurer's response

2.18 The minister advised:

> The offences in clause 17 of the Commonwealth Registers Bill 2019, and the equivalent provisions in proposed section 62M of the *Business Names Act 2011*, proposed section 1370L of the *Corporations Act 2001* and proposed section 212M of the *National Consumer Credit Protection Act 2009* are offences related to the protection of confidential information. The misuse of information obtained in the course of a person's employment is sufficiently serious to place an evidential burden of proof on the defendant in relation to the matters listed in subclause 17(3) and equivalent provisions, while the scope of the defences provide appropriate protection for officers undertaking their work in compliance with the law.

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7 Subclause 17(3) of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed subsection 62M(3); item 10, proposed subsection 1270L(3); item 18, proposed subsection 212M(3); Schedule 2 to the Amendment Bill, item 5, proposed subsection 308-20(2) and 308-40(2) and (3); item 11, proposed subsection 1272C(2) and 1272G(2) and (3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 7-14.

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, pp. 21-28.

> For each of these offences, it is readily and specifically within the knowledge of the defendant who discloses or records information in the course of their official employment to adduce or point to evidence that suggests a reasonable possibility that the record or disclosure of information was authorised in accordance with a matter in subclause 17(3). For example, if there was evidence suggesting that a disclosure occurred with the consent of each person to whom the information relates, a defendant would be more readily able to point to this. Likewise, if there was evidence suggesting that a disclosure was made to another person for use in the course of the performance of the duties of the other person's official employment, in relation to the performance or exercise of the functions or powers of a government entity, this would be more readily accessible to the defendant. It would be much more difficult and costly for a prosecution to disprove that the making of a particular record or disclosure was authorised under subclause 17(3) and its equivalent provisions.
>
> The offence provisions have been drafted to be consistent with existing provisions in Commonwealth law relating to the recording and disclosure of confidential information. This recognises the importance of protecting confidential information and ensuring that people whose work requires them to record and disclose protected information comply with their legal obligations and uphold the protections that are in place for that information.

Committee comment

2.19 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that for the offences related to the protection of confidential information, it is readily and specifically within the knowledge of the defendant who discloses or records information in the course of their official employment to adduce or point to evidence that suggests a reasonable possibility that the record or disclosure of information was authorised in accordance with a matter listed in subclause 17(3).

2.20 The committee also notes the Assistant Treasurer's advice that it would be much more difficult and costly for a prosecution to disprove that the making of a particular record or disclosure was authorised under subclause 17(3) and its equivalent provisions.

2.21 The committee reiterates its view that some of the matters listed in subclause 17(3) do not appear to be *peculiarly* with the knowledge of the defendant. For example, whether a disclosure was the purposes of the registry regime or happens in the course of the performance of a person's official employment, would appear to be matters that the prosecution could readily ascertain. The committee therefore considers that, on the information provided, it is not apparent that all the circumstances identified as an exception to the offences are appropriate for inclusion as offence-specific defences.

2.22 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including each of the matters specified in subclause 17(3) of the Commonwealth Registers Bill 2019 (and equivalent provisions in the Amendment Bill) as offence-specific defences, the effect of which is to reverse the evidential burden of proof.

National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020

Purpose	This bill seeks to amend the *National Vocational Education and Training Regulator Act 2011* to strengthen the governance arrangements in relation to the National VET Regulator, support consistent and effective regulation, and enhance stakeholder engagement in Australia's VET sector
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 13 February 2020
Bill status	Before the House of Representatives

No invalidity clause[10]

2.23 In *Scrutiny Digest 3 of 2020* the committee requested the minister's advice as to the rationale for expanding the existing no-invalidity clause in subsection 157(6) so that failure of the National VET Regulator to comply with the requirements in proposed subsection 157(5A) will not affect the validity of the performance of the Regulator's functions.[11]

Minister's response[12]

2.24 The minister advised:

> The Committee has noted the justification provided in the Explanatory Memorandum in relation to the no invalidity clause in the Bill. The Committee has commented:
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> > While noting this justification, the committee has generally not accepted a desire for administrative certainty, on its own, to be a sufficient justification for the inclusion of clauses.

10 Schedule 1, items 33 and 34, proposed subsections 157(5A) and 157(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, pp. 13-14.

12 The minister responded to the committee's comments in a letter dated 12 March 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

The amendment to subsection 157(6) was inserted as part of the policy settings for the creation of the new independent expert Advisory Council, which will have the function of providing advice to the CEO of ASQA in relation to the Regulator's functions. The Advisory Council is not proposed to be a decision-making body that affects rights of individuals or registered training organisations (RTOs) or otherwise impacts on the regulatory decisions made by the CEO of ASQA. This is made plain by proposed subsection 175(1) (in item 41 of the Bill) which proposes to provide the Advisory Council with a broad advisory role in relation to the Regulator, but expressly provides that the Advisory Council's functions do not include giving advice about or in relation to the registration of a person or body as an NVR RTO. Rather, the Advisory Council's role is to provide a valuable source of strategic advice to the CEO of ASQA and to provide a strong foundation for stakeholder confidence in the Regulator.

Item 34 needs to be considered in the context of Item 33 and existing paragraph 157(5) as amended by Item 32

Item 33 of the Bill proposes to insert a new subsection 157(5A) into the Act. New subsection 157(5A) provides that the National VET Regulator must have regard to any advice provided by the Advisory Council in performing its functions. This provision makes it mandatory for the CEO of ASQA to consider the Advisory Council's advice, including reports. However, the amendment to subsection 157(6) (proposed by item 34 in the Bill) ensures that the decisions of ASQA, including regulatory decisions such as whether to cancel a RTO's registration, will not be invalid merely on the basis that the CEO did not have regard to a relevant Advisory Council report or advice.

Subsection 157(6) is not a new provision and already operates to ensure that a function of the National VET Regulator is not invalid merely because of certain procedural irregularities. It already operates to ensure that failure to apply the 'Risk Assessment Framework' and to have regard to certain reports or information does not affect the validity of the performance of one of the National VET Regulator's functions.

The Explanatory Memorandum of the National Vocational Education and Training Regulator Bill 2010 provided:

> Subclauses 157(4) and (5) respectively provide that, in performing its functions, the NVR must apply the Risk Assessment Framework (see clause 190) and have regard to reports or information it receives about matters relating to this Bill. A failure to do so, however, does not affect the validity of the performance of the function by the NVR (subclause 157(6)).

If subsection 157(6) of the Act had not been extended to new subsection 157(5A) (about having regard to the advice of the Advisory Council), there would be uncertainty about the relationship between the general and strategic advice provided by the new Advisory Council and specific

> regulatory decisions of the National VET Regulator. The effect of the amendments is to ensure that a specific decision of the Regulator is not invalid (made as an error of law) merely by failure to have regard to the advice of the new Council. This amendment is intended to ensure that persons affected by regulatory decisions of the Regulator are provided with certainty as to the mandatory legal test that applies to a particular decision: for example, that a decision to register an RTO is to be made wholly on the basis of the test for registration outlined in Part 2 of the Act.
>
> The policy intent for an Advisory Council is to provide general and strategic advice. It is important that the CEO of ASQA consider, although not necessarily follow, that advice and information in specific circumstances. The National VET Regulator was established as, and will remain, an independent regulator whose decisions are to be informed by advice, but not determined by advice. The amendments proposed by the Bill are intended to reinforce this long-standing status of the National VET Regulator.

Committee comment

2.25 The committee thanks the minister for this response. The committee notes the minister's advice that subsection 157(6) already operates to ensure that other functions of the National VET Regulator are not invalid due to procedural irregularities. The committee further notes the minister's advice that the expansion of the no-invalidity clause in subsection 157(6) to include proposed subsection 157(5A) is intended to provide for greater certainty about the relationship between the advice provided by the new Advisory Council and specific regulatory decisions of the National VET Regulator.

2.26 While noting this advice, the committee reiterates its concern that a desire for administrative certainty, on its own, does not provide sufficient justification for the inclusion of no-invalidity clauses. From a scrutiny perspective, the committee does not consider consistency with the existing operation of subsection 157(6) to be an adequate justification for the expansion of the operation of the provision to proposed subsection 157(5A).

2.27 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the existing no-invalidity clause in subsection 157(6) so that failure of the National VET Regulator to comply with the requirements in proposed subsection 157(5A) will not affect the validity of the performance of the Regulator's functions.

Significant matters in delegated legislation

Privacy[13]

2.28 In *Scrutiny Digest 3 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave the safeguards for the disclosure of information to delegated legislation; and whether the bill can be amended to include high-level guidance regarding the relevant safeguards on the face of the primary legislation, or at a minimum, to provide that the minister *must*, rather than may, make information safeguard rules.[14]

Minister's response

2.29 The minister advised:

> Appropriate levels of safeguards and guidance have been included on the face of primary legislation. For example, subsection 210A(2) in item 2 of Schedule 2 of the Bill ensures that the National Centre for Vocational Education Research (NCVER) only discloses to a person that is engaged by NCVER so as to support NCVER to carry out its research functions. This person would likely be someone that is contracted to NCVER to perform those functions, and would undergo various scrutiny measures to ensure the person engaged has the ability to fulfil the role and meets all requirements under that contract such as suitability checks and privacy considerations. The provision also supports current use of information processes by NCVER, and similarly when an Australian Government department engages a person by contract to carry out duties for that department. NCVER is an APP entity under the *Privacy Act 1988* and must already meet those collection, use or disclosure requirements, in particular under APP 6 – use or disclosure of personal information.
>
> The proposed arrangements under subsection 210A(2) do not increase the risk of inappropriate disclosure of personal information and support NCVER's use of personal information where additional persons are engaged to assist NCVER to perform its functions.
>
> The information safeguard rules add an additional layer of protection to those already included on the face of primary legislation for the specified bodies to satisfy. As the protection of an individual's personal information is a serious matter and if unforeseen issues were to arise, over time and with changing technological capabilities, the information safeguard rules give the Commonwealth Minister the power to respond quickly to emerging issues in a manner appropriate to the new circumstances. I consider this additional protection mechanism to be an important step in

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13 Schedule 2, items 2 and 3, proposed sections 210A, 210B and 214A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i), (iv) and (v).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, pp. 14-15.

> continuing to protect personal information and responding to changing environments.
>
> I plan to draft information safeguard rules for consideration by the Skills Ministerial Council. These rules will list the factors that should be considered before a decision is made by the NCVER or the Secretary to disclose identified personal information. These factors will include the purpose for the request, how the data will be used, and how privacy will be protected. They will also state that identified data should not be disclosed if de-identified or confidentialised data will achieve the relevant purpose.
>
> The Committee also noted that 'a legislative instrument is not subject to the full range of Parliamentary scrutiny'. As outlined in the Explanatory Memorandum to the Bill, NCVER was established in 1981 by Commonwealth, state and territory Ministers responsible for VET. In the making of legislative instruments by the Commonwealth Minister under the *National Vocational Education and Training Regulator Act 2011*, the instruments must be agreed to by the Council of Australian Governments (COAG) Skills Council Ministers as well as undergoing Parliamentary scrutiny.

Committee comment

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that she considers that appropriate safeguards, including the protections set out in the *Privacy Act 1988*, are already included in primary legislation and any safeguards included in delegated legislation would add an additional layer of protection and allow for necessary flexibility to changing circumstances.

2.31 The committee also notes the minister's advice that she intends to draft legislative instruments to set out the relevant safeguards for the disclosure of information, which must be agreed to by the Council of Australian Governments Skills Council Ministers.

2.32 Whilst noting the minister's advice, the committee reiterates its scrutiny concern that the lack of an explicit requirement in the bill that the minister *must* make information safeguard rules, may undermine the protection of individuals' privacy should the minister decide not to make the relevant legislative instruments.

2.33 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving additional safeguards relating to the disclosure of information to be set out in delegated legislation, particularly in circumstances where there is no requirement that the minister *must* make the relevant delegated legislation.

2.34 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation for information.

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 notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Helen Polley
Chair

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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*.