The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 11 of 2020

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Membership of the committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator Dean Smith (Deputy Chair)	LP, Western Australia
Senator the Hon Kim Carr	ALP, Victoria
Senator Perin Davey	NATS, New South Wales
Senator Janet Rice	AG, Victoria
Senator Paul Scarr	LP, Queensland

Secretariat

Mr Glenn Ryall, Secretary

Ms Alexandra Logan, Principal Research Officer

Ms Hannah Wilkins, Senior Research Officer

Ms Georgia Fletcher, Legislative Research Officer

Committee legal adviser

Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au

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

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.

Civil Aviation Amendment (Unmanned Aircraft Levy Collection and Payment) Bill 2020

Purpose	This bill seeks to amend the *Civil Aviation Act 1998* to establish arrangements for the Civil Aviation Safety Authority to collect an unmanned aircraft levy
Portfolio	Infrastructure, Transport, Regional Development and Communications
Introduced	House of Representative on 27 August 2020

Significant matters in delegated legislation[1]

1.2 Proposed paragraph 98(3)(w) of the *Civil Aviation Act 1988* provides that the circumstances in which the proposed unmanned aircraft levy is payable, and the collection of levy payments, are to be prescribed by regulations.

1.3 The committee has consistently drawn attention to framework bills which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as details of the operation of a levy scheme, should be in the primary legislation unless a sound justification for the use of delegated legislation is provided.

1.4 In this instance, the explanatory memorandum states:

> This item inserts paragraph 98(3)(w) into section 98 of the *Civil Aviation Act 1988*, which provides for when the Governor-General may make regulations. The effect of inserting paragraph 98(3)(w) is that the Governor-General may make regulations for or in relation to the

1 Schedule 1, item 4, proposed paragraph 98(3)(w). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

circumstances in which unmanned aircraft levy is payable and the collection of unmanned aircraft levy.[2]

1.5 The committee is concerned that the explanatory memorandum fails to justify why it is necessary and appropriate to leave virtually all of the details of the operation of the proposed unmanned aircraft levy scheme to delegated legislation.

1.6 From a scrutiny perspective, the committee considers that at least broad guidance in relation to the circumstances in which unmanned aircraft levy will payable and collected should be included on the face of the primary legislation.

1.7 The committee therefore requests the minister's advice as to:

- **why it is necessary and appropriate to leave the circumstances in which the proposed unmanned aircraft levy is payable, and the collection of the levy payments, to delegated legislation; and**
- **whether the bill can be amended to prescribe at least broad guidance in relation to these matters on the face of the primary legislation.**

2 Explanatory memorandum, p. 3.

Civil Aviation (Unmanned Aircraft Levy) Bill 2020

Purpose	This bill seeks to amend the *Civil Aviation Act 1998* to establish the legal mechanism that will be utilised to impose a levy for future cost recovery arrangements for regulatory services for remotely piloted aircraft operators
Portfolio	Infrastructure, Transport, Regional Development and Communications
Introduced	House of Representatives on 27 August 2020

Charges in delegated legislation[3]

1.8 Clause 5 of the bill provides the power to impose a levy on the registration of unmanned aircraft and applications for permission to operate unmanned aircraft (remotely piloted aircraft). Clause 6 of the bill permits the amount of the levy to be prescribed by regulations. There is a cap of $300 on the amount of levy (proposed paragraph 6(2)(a)) and the levy amount can be set at nil (proposed paragraph 6(2)(b)).

1.9 In relation to clause 6 of the bill the explanatory memorandum states:

> This section provides that amount of the unmanned aircraft levy is the amount prescribed by the Levy Regulations. It further provides that the levy amount prescribed must not be more than $300 and may be a nil amount.[4]

1.10 One of the most fundamental functions of the Parliament is to impose taxation (including levies). The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The committee therefore considers that it is more appropriate for the rate of levies and charges to be prescribed in primary legislation.

1.11 In this instance, the explanatory memorandum does not provide a justification as to why it is necessary or appropriate for the rate of the levy to be left to delegated legislation, although it does state that the purpose of the levy is for cost recovery. While the committee acknowledges this, and welcomes the inclusion of a cap on the levy on the face of the bill, the committee considers that further guidance in relation to the method of calculation of the charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny. For example, the primary legislation could specify that the purpose of the levy is for cost recovery.

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3 Part 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv)

4 Explanatory memorandum, p. 1.

1.12 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the amount of unmanned aircraft levy to be prescribed in delegated legislation, as opposed to being prescribed on the face of the bill.

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

Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020

Purpose	This bill seeks to establish the Grid Reliability Fund Special Account to appropriate $1 billion for the Clean Energy Finance Corporation in order to invest in additional energy generation, storage, transmission and distribution infrastructure and grid stabilising technologies
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 27 August 2020

Significant matters in non-disallowable delegated legislation[5]

1.14 The bill seeks to establish the Grid Reliability Fund, a $1 billion fund administered by the Clean Energy Finance Corporation. Item 32 of the bill seeks to insert proposed section 58A into the *Clean Energy Finance Corporation Act 2012* to define the grid reliability fund investments which can be funded from the Grid Reliability Fund Special Account. Any investment must meet the criteria set out in the Investment Mandate relating to its role in supporting the security or reliability of the energy system in Australia. While the Investment Mandate is a legislative instrument, it is not subject to disallowance. The explanatory memorandum states:

> It is intended that the Investment Mandate will provide detailed criteria for what will constitute supporting the reliability or security of the electricity grid and what investments should be prioritised.[6]

1.15 The committee's view is that significant matters, such as the criteria for which investments can be funded from the Grid Reliability Fund, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee is particularly concerned that details of the investment criteria for the Fund are being left to non-disallowable delegated legislation and will therefore not be subject to effective parliamentary oversight. The committee notes that no justification for the use of a non-disallowable legislative instrument is provided in the explanatory memorandum.

1.16 The committee requests the minister's more detailed advice regarding:

5 Schedule 1, item 32, proposed section 58A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

6 Explanatory memorandum, p. 10.

- **why it is considered appropriate to leave criteria for which investments can be funded from the Grid Reliability Fund to non-disallowable delegated legislation; and**
- **whether the bill could be amended to:**
  - **set out the criteria that an investment must meet relating to 'its role in supporting the security or reliability of the energy system' on the face of the primary legislation, rather than leaving these criteria to be set out in non-disallowable delegated legislation; or**
  - **at least provide that directions by the minister setting out these criteria (i.e. the Investment Mandate) are subject to the usual disallowance process.**

Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020

Purpose	Schedule 1 to this bill seeks to extend the current time limit on payment rules authorised by the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, and amends tax secrecy provisions to allow the disclosure of protected information relating to the JobKeeper scheme to Australian government agencies for administrative purposes Schedule 2 to this bill seeks to temporarily extend the operation of the JobKeeper scheme by providing employers with continued flexibility to assist employees to remain in employment and connected to their workplaces
Portfolio	Treasury
Introduced	House of Representatives on 26 August 2020

Broad delegation of legislative power

Significant matters in delegated legislation[7]

1.17 The bill seeks to extend the current time limit on delegated legislation made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act). In essence, this change facilitates the JobKeeper scheme, which is largely set out in delegated legislation, being extended to 28 March 2021 (currently it is scheduled to cease on 31 December 2020).

1.18 The committee commented on the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 in *Scrutiny Digest 6 of 2020* and *Scrutiny Digest 7 of 2020*.[8] In its comments, the committee noted that, while the JobKeeper scheme is only intended to operate for 10 months, from a scrutiny perspective, some of the matters that are to be provided for in delegated legislation (such as the core eligibility requirements for a payment and the obligations for recipients of payments) should have been included on the face of the primary legislation. The committee reiterates these views in light of the three month extension of the time limit on delegated legislation made under the Act.

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

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2020*, 13 May 2020, pp. 5–7; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2020*, 10 June 2020, pp. 47–49.

1.19 The committee reiterates its previous scrutiny concerns regarding the leaving of significant matters relating to the JobKeeper scheme to delegated legislation in circumstances where it is proposed that the operation of the relevant delegated legislation is to be extended by three months.

Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020

Purpose	This bill seeks to amend various Acts to implement the expansion of the Australia Government's Tuition Protection Service to include domestic up-front fee paying higher education students
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 26 August 2020

Significant matters in delegated legislation[9]

1.20 The bill seeks to amend the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) and the *Higher Education Support Act 2003* to implement the expansion of the Australia Government's Tuition Protection Service to include domestic up-front fee paying higher education students. Item 7 of Schedule 1 seeks to insert proposed section 26A into the TEQSA Act. Proposed section 26A provides that a provider must comply with the tuition protection requirements as set out Part 5A of the TEQSA Act and the Up-front Payments Guidelines (the Guidelines).

1.21 Proposed subsection 26A(5) sets out a broad range of matters that can be included in the Guidelines, including when the levy is payable, penalties for late payment of the levy and the review of decisions made under the Guidelines. Proposed subsections 26A(6) and (7) also provide that the Guidelines may make provision for payments made in connection with the tuition protection requirements, as well as recordkeeping requirements. Proposed section 26B provides the Guidelines will be a legislative instrument. A number of other provisions in the bill provide additional matters that can be included in the Guidelines.

1.22 The explanatory memorandum states:

> It is appropriate for the Minister to prescribe administrative details related to tuition protection through the Guidelines in respect to the collection or recovery of the levy and payments made in connection with tuition protection, because it will allow administrative and technical details of the scheme to be adjusted relatively quickly as required (compared to the provisions of primary legislation). For example, it is desirable for the Guidelines to set out details relating to the refund, remission or waiver of the levy, to provide flexibility to respond to unforeseen circumstances such as the economic impact of the COVID-19 pandemic on providers. The Guidelines are a legislative instrument for the purposes of the *Legislation*

9 Schedule 1, item 7, proposed section 26A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

Act 2003 and therefore subject to appropriate parliamentary scrutiny and disallowance processes.[10]

1.23 The committee has consistently raised concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such the details of a scheme to implement tuition protection measures, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided.

1.24 While the committee notes the explanation provided in the explanatory memorandum and acknowledges that some of the matters may be administrative and technical in nature, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for leaving significant matters to delegated legislation. Additionally it is unclear to the committee why it would not be possible to set out at least some high-level requirements in relation to the operation of this scheme in the primary legislation.

1.25 The committee therefore requests the minister's more detailed advice regarding:

- **why it is necessary and appropriate to leave significant elements of the tuition protection scheme to delegated legislation; and**
- **whether the bill could be amended to include at least high-level guidance regarding matters to be contained in the Up-front Payments Guidelines on the face of the primary legislation.**

10 Explanatory memorandum, pp. 18–19.

Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020

Purpose	This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* to facilitate the devolution of environmental approvals to the states and territories, making technical amendments to the existing provisions of the Act relating to bilateral agreements to support the efficient, effective and enduring operation of bilateral agreements
Portfolio	Environment
Introduced	House of Representatives on 27 August 2020

Incorporation as in force from time to time[11]

1.26 Item 9 of Schedule 5 to the bill seeks to insert proposed section 48AA into the *Environment Protection and Biodiversity Conservation Act 1999*. Proposed section 48AA provides that a bilateral agreement may apply, adopt or incorporate an instrument or other writing as in force or existing from time to time even if the instrument or other writing does not yet exist when the agreement is entered into.

1.27 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).

1.28 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

11 Schedule 5, item 9, proposed section 48AA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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.

1.29 The explanatory memorandum states:

> Bilateral agreements may make reference to a range of Commonwealth, State or Territory instruments, policies or other documents including, for example, significant impact guidelines and species survey guidelines. State or Territories may also have policies that are specifically relevant to their assessment and approval processes.
>
> To ensure ongoing continuous improvement and to allow for the maintenance of high standards for environmental approval, the Commonwealth or a State or Territory may update or revise instruments and policies from time to time. The application of the most current instruments and policies reflects the importance of ensuring that environmental assessment and approval decisions are based on the best scientific information available so that actions assessed and approved by the State or Territory under the bilateral agreement will not have unacceptable or unsustainable impacts on matters of national environmental significance.[12]

1.30 While noting this explanation as to the rationale for allowing bilateral agreements to incorporate external documents, the committee notes that it is not clear whether the documents so incorporated will be freely and readily available to all those who wish to access them. The committee's scrutiny concerns are heightened by the potentially significant matters relating to environmental protection that may be incorporated by reference in this instance.

1.31 Noting the above comments, the committee requests the minister's more detailed advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed section 48AA and, in particular, whether these documents will be made freely available to all persons interested in the law.

12 Explanatory memorandum, p. 19.

Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020

Purpose	This bill seeks to impose the up-front payments tuition protection levy, specify the amounts that are payable by providers and prescribe the levy components and the manner in which, and by whom, they will be determined each year
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 26 August 2020

Charges in delegated legislation[13]

1.32 The bill seeks to impose the up-front payments tuition protection levy. The levy will be credited to the Higher Education Tuition Protection Fund (the Fund), which will be used to support students in the event of default by a higher education provider. Clause 7 of the bill provides that the levy is the sum of the relevant provider's 'administrative fee component', 'risk rated premium component', and 'special tuition protection component'. Methods for calculating each component are also set out in the bill.

1.33 Clause 13 of the bill would require the Higher Education Tuition Protection Director (the Director) to make legislative instruments for the purposes of calculating the special tuition protection and risk rated premium components of the levy. The bill would therefore allow the Director to determine significant elements of the proposed levy scheme by delegated legislation.

1.34 One of the most fundamental functions of the Parliament is to impose taxation (including levies). Consequently, the committee's consistent scrutiny view is that it is for the Parliament, rather than the makers of delegated legislation, to set rates of tax. The committee therefore considers that it is more appropriate for the rate of levies and charges to be prescribed in primary legislation.

1.35 In this instance, the committee notes that the bill provides that a percentage determined by legislative instrument under clause 13 may be zero, and that a risk factor value must be a number between zero and 10. The committee also notes that, in making an instrument under clause 13, the Director must have regard to the advice of the Higher Education Tuition Protection Fund Advisory Board, and must consider the sustainability of the Fund. Before an instrument under clause 13 is made, the Treasurer would also be required to approve the instrument in writing.

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

The explanatory memorandum states that this 'provides an extra measure of scrutiny'.[14]

1.36 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the Higher Education Tuition Protection Director to determine core elements of the up-front payments tuition protection levy in delegated legislation, with only limited guidance as to the amounts of levy that may be imposed.

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

Broad discretionary powers

Significant matters in delegated legislation[15]

1.38 Clause 14 of the bill provides that the Up-front Payments Guidelines may prescribe one or more classes of leviable providers who are exempt from the requirement to pay one or more elements of the up-front payments tuition protection levy.[16]

1.39 The explanatory memorandum states:

> This power to make a rule exempting a class of providers is necessary to provide flexibility and responsiveness in the requirements imposed on providers and the management of the Higher Education Tuition Protection Fund. It means that, if it becomes apparent that it is no longer appropriate for a class of providers to pay a particular component of the levy, for example due to their risk of default, they can be exempted from the requirement to pay one or more of the components.[17]

1.40 The committee considers that this provision provides the minister with a broad discretionary power to exempt providers from the requirement to pay the up-front payments tuition protection levy by legislative instrument in circumstances where there is no guidance on the face of the bill as to when these powers should be exercised. The committee expects that the inclusion of broad discretionary powers, and the inclusion of significant matters in delegated legislation, should be thoroughly justified in the explanatory memorandum.

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14 Explanatory Memorandum, p. 17.

15 Clause 14. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

16 The enabling provision for the Up-front Payments Guidelines is proposed to be inserted into the *Tertiary Education Quality and Standards Agency Act 2011* by the Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020.

17 Explanatory memorandum, p. 18.

1.41 In this instance, the committee does not consider that the explanation provided in the explanatory memorandum adequately justifies the inclusion of a broad rule making power to exempt providers from the payment of the levy. The committee has generally not accepted administrative flexibility alone as a sufficient justification for providing a minister with broad discretionary powers in circumstances where there is no guidance on the face of the bill regarding how the power should be exercised.

1.42 The committee therefore requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate to provide the minister with a broad discretionary power to exempt providers from paying aspects of the up-front payments tuition protection levy in delegated legislation; and**
- **whether the bill could be amended to include at least high-level guidance as to the circumstances where it is appropriate to exempt providers from the requirement to pay the levy on the face of the primary legislation.**

Bills with no committee comment

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

- Family Law Amendment (Risk Screening Protections) Bill 2020
- Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Bill 2020
- Interactive Gambling Amendment (Prohibition on Credit Card Use) Bill 2020
- Sport Integrity Australia Amendment (World Anti-Doping Code Review) Bill 2020

Commentary on amendments and explanatory materials

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

1.44 On 24 August 2020, the Minister for Resources, Water and Northern Australia (Mr Pitt) presented a supplementary explanatory memorandum, and the bill was read a third time.

1.45 The committee thanks the minister for providing this supplementary explanatory memorandum which includes key information previously requested by the committee.

Transport Security Amendment (Testing and Training) Bill 2019

1.46 On 24 August 2020, the Senate agreed to seven Government amendments and three Opposition amendments. The Minister for Employment, Skills, Small and Family Business (Senator Cash) tabled a supplementary explanatory memorandum, and the bill was read a third time.

1.47 In *Scrutiny Digest No. 1 of 2020*, the committee raised concerns regarding the lack of definition regarding what constitutes a 'test piece' and the adequacy of parliamentary oversight.

1.48 The committee welcomes the amendments that set out a definition of 'test weapon' on the face of the primary legislation and insert new reporting requirements to provide parliamentary oversight of any exemption of a class of screening officers from one or more training or qualification requirements.

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

- Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019.[18]

18 On 25 August 2020, the Senate agreed to two Government amendments and one Independent amendment. The Assistant Minister for Superannuation, Financial Services and Financial Technology (Senator Hume) presented a supplementary explanatory memorandum, and the bill was reported with amendments.

Chapter 2

Commentary on ministerial responses

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

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Purpose	This bill seeks to amend the *Migration Act 1958* to allow the Minister to determine that a thing is a prohibited thing in relation to immigration detention facilities and detainees. These things may include drugs, mobile phones, SIM cards, and internet-capable devices
Portfolio	Home Affairs
Introduced	House of Representative on 14 May 2020
Bill status	Before the House of Representatives

Personal rights and liberties[1]

2.2 In *Scrutiny Digest 7 of 2020* the committee requested the minister's advice as to why it is necessary and appropriate to broadly extend powers for the search and seizure of items in immigration detention facilities, including by allowing the use of force, noting that doing so may trespass on the personal rights and liberties of all detainees, including those detainees that are not 'higher risk' and have never been convicted of an offence.[2]

Minister's response[3]

2.3 The minister advised:

1 Items 2, 4, 5, 8, 11-14, 19, 21-23, 29-32, 37. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2020*, pp. 16-18.

3 The minister responded to the committee's comments in a letter dated 31 August 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

I consider the safety, security and well-being of all people in immigration detention facilities as well as staff working in Immigration Detention Facilities a high priority.

Controlled drugs are being introduced to detention facilities by visitors, through mail, in person, or by throwing items over the fences of the facilities. Mobile phones have been used to coordinate escape efforts, to bring drugs into detention facilities, and organise criminal activity including the grooming of children by sexual predators. Detainees have also used phones to post photos and videos of staff on social media. These have identified staff and include threatening and defamatory allegations.

The Bill clarifies and enhances the power in the Migration Act to manage the increasing prevalence of illegal and anti-social behaviour in immigration detention facilities. The presence of controlled drugs and other contraband such as mobile phones poses a risk to the health, safety, security and order of the immigration detention network.

I consider that the greater security of the immigration detention facility environment and persons in them that these amendments provide for are necessary to appropriately manage these risks, especially given that current search and seizure powers are limited in their ability to manage these risks. Currently in relation to searches (including strip searches) of persons detained in Australia, the Department can only search for a weapon or other thing capable or being used to inflict bodily injury, or to help the person to escape from immigration detention; not any other things that may facilitate criminal activities.

If the Bill were to pass, the powers would also ensure that authorised officers can also search for and seize things that are concealed with no intention to hide them, or that are visible, in addition to things that are intentionally concealed.

I am not proposing the introduction of a blanket ban on mobile phones in detention. Detainees who are not using their mobile phones for criminal activities or activities that affect the health, safety and security of staff, detainees and the facility would be able to retain their mobile phones under the proposed policy approach.

Across immigration detention facilities, detainees have access to 227 landline phones and 242 computers with internet.

The Bill does not prohibit the possession of goods by detainees or in detention centres. The Bill only creates the category of goods that are prohibited things, which can then, in the exercise of discretion, be searched for and seized by authorised officers. Therefore, there is no prohibition on the possession of prohibited things that applies to all detainees. In the exercise of discretionary search and seizure powers, the focus will be on whether the possession of such a thing by an individual detainee poses any risk.

For the reasons set out above, I do not consider that these amendments will unduly trespass on personal rights and liberties of all detainees.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the bill does not prohibit the possession of goods by detainees or in detention centres and that the bill only creates the category of goods that are prohibited things, which can then, in the exercise of discretion, be searched for and seized by authorised officers. The committee also notes the minister's advice that therefore, there is no prohibition on the possession of prohibited things that applies to all detainees and that in the exercise of discretionary search and seizure powers, the focus will be on whether the possession of such a thing by an individual detainee poses any risk.

2.5 The committee reiterates that the amendments in the bill, in operating to restrict the possessions a detainee may have inside immigration detention facilities and empowering authorised officers to search a detainee without a warrant (including strip searches and searches of a detainee's room and personal effects), may trespass on the detainee's rights and liberties, particularly their right to privacy. While the committee acknowledges the difficulties posed by detainees with serious criminal histories, and appreciates there may be a need to restrict access for high-risk detainees to items that could be used to attempt to commit offences, the committee notes that the proposed amendments in the bill would apply to all immigration detainees equally, irrespective of whether they are considered a high-risk detainee. In this regard, the committee notes that persons detained in immigration detention facilities are detained on the basis that they are non-citizens who do not possess a valid visa and not as punishment for having committed a crime.

2.6 The committee's scrutiny concerns are further heightened, noting the broad discretionary nature of the powers conferred on authorised officers to search for and seize prohibited things and the risk of arbitrariness in how these powers are administered. The committee does not consider that either the explanatory memorandum or the minister's response adequately address these scrutiny concerns.

2.7 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of broadly extending powers for the search and seizure of items in immigration detention facilities, including by allowing the use of force, noting that doing so may trespass on the personal rights and liberties of all detainees, including those detainees that are not 'higher risk' and have never been convicted of an offence.

Significant matters in delegated legislation[4]

2.8 In *Scrutiny Digest 7 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to allow the minister to determine, by legislative instrument, what things are to be prohibited in immigration detention facilities, and whether the bill can be amended to include additional high-level guidance regarding when the power in subsection 251A(2) may be exercised, including providing a definition for 'order of the facility'.[5]

Minister's response

2.9 The minister advised:

> The Bill is designed to mitigate risks across the Immigration Detention Network (IDN) and a legislative instrument is the appropriate means to ensure public accountability, transparency and consistency is maintained across the IDN. It is anticipated that the Bill will maintain and assure the safety of all cohorts within Immigration Detention Facilities.
>
> A significant percentage of the current IDN cohort have criminal histories or have been convicted of criminal offences in Australia and are pending removal from Australia. There is significant risk associated with this cohort. As such, appropriate mitigation strategies need to be implemented to ensure they do not pose a risk to other detainees, staff employed by the Department of Home Affairs (the Department) or themselves.
>
> Specific examples of mobile phones and other things being a risk to the health, safety or security of persons in the facility or to the order of the facility include:
>
> - Four people were arrested at Villawood Immigration Detention Centre as part of a criminal syndicate that NSW Police allege used stolen credit cards to purchase motor vehicles, and also distribute illicit drugs within immigration detention. Mobile phones were used to facilitate the alleged crimes. During a search of the detainees ' rooms, police located an amount of white powder and several mobile phones. During further searches inside the detention centre, police located a small amount of cannabis, methylamphetamine, prescription medication and an improvised weapon.
> - A detainee downloads extremist material on his iPad and is showing it to other detainees. The ABF is powerless to confiscate the detainee's iPad.
> - ABF officers see a visitor hand over a bag containing a white substance to a detainee. The detainee places the bag in his pocket.

4 Item 2, proposed subsection 251A(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2020*, pp. 18-19.

> The ABF is powerless to search the detainee for the suspected drugs.
>
> - A detainee uploads a photo to social media of a contracted medical officer falsely accusing her of criminal acts. The comments on the post include abusive and violent messages towards the medical officer. The ABF is powerless to remove the detainee's internet enabled devices.
>
> The examples set out above highlight the need for me to have the ability to determine things to be prohibited things where I am satisfied that possession or use of the thing might be a risk to the health, safety or security of persons in an immigration detention facility or to the order of an immigration detention facility. A legislative instrument provides me with greater flexibility and immediacy to determine a thing as prohibited thing as issues are identified and will be done in a considered and responsible way.

Committee comment

2.10 The committee thanks the minister for this response. The committee notes the minister's advice that a legislative instrument is the appropriate means to ensure public accountability, transparency and consistency is maintained across the immigration detention network. The committee also notes the minister's advice that a legislative instrument provides greater flexibility and immediacy to determine a thing as a prohibited thing as issues are identified and will be done in a considered and responsible way.

2.11 The committee reiterates that it expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions. The committee considers that determining what is prohibited in immigration detention facilities delegates important policy decisions, which have not been adequately justified in the minister's response or in the explanatory materials. In this regard, the committee does not generally consider that a desire for administrative flexibility alone justifies the inclusion of such significant policy matters in delegated legislation.

2.12 The committee's scrutiny concerns in this instance are heightened by the potential consequences flowing from declaring an item to be a prohibited item. The committee notes that the bill provides authorised officers with broad coercive powers to search for and seize prohibited items, and that the exercise of the minister's power to determine a prohibited thing may have the effect of expanding the scope of the discretion that an authorised officer may use in exercising these coercive powers.

2.13 Additionally, the committee notes that the minister's advice did not address whether the bill could be amended to include additional high-level guidance regarding when the power in subsection 251A(2) may be exercised, including providing a definition for 'order of the facility'.

2.14 Noting the limited explanation provided in the explanatory materials and the minister's response, 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, by legislative instrument, what things are to be prohibited in immigration detention facilities.

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

Broad discretionary power

Significant matters in non-disallowable delegated legislation[6]

2.16 In *Scrutiny Digest 7 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to provide the minister with broad discretionary powers to require an authorised officer to exercise seizure powers via non-disallowable legislative instrument in circumstances where there is limited guidance on the face of the primary legislation as to when the powers may be exercised.[7]

Minister's response

2.17 The minister advised:

> The exercise of the powers in the Bill by officers will be guided by the Department's operational policy framework. This framework provides detailed guidance on the powers available to officers under the Migration Act 1958 (Migration Act), how and when those powers should be utilised, and record keeping and reporting requirements.
>
> The Bill proposes to provide the power for me to direct officers to seize certain prohibited items from detainees in prescribed circumstances, which will override the exercise of the discretion by authorised officers. It is expected that this power will only be exercised in relation to the most serious circumstances, where there is no question that it is appropriate that things should be seized from detainees. For example, convicted child sex offender who is looking at child abuse material on his phone in plain sight.
>
> A non-disallowable instrument provides my Department with greater flexibility and immediacy to update directions as issues are identified and will be done in a considered and responsible way. The delegation is held at a Ministerial level to provide proper parliamentary scrutiny.

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6 Item 2, proposed subsection 251B(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2020*, pp. 19-20.

Committee comment

2.18 The committee thanks the minister for this response. The committee notes the minister's advice that the exercise of the powers in the bill by officers will be guided by the department's operational policy framework and that the framework provides detailed guidance on the powers available to officers under the *Migration Act 1958*, how and when those powers should be utilised, and record keeping and reporting requirements.

2.19 The committee also notes the minister's advice that a non-disallowable instrument provides the department with greater flexibility and immediacy to update directions as issues are identified and will be done in a considered and responsible way and that the delegation is held at a ministerial level to provide proper parliamentary scrutiny.

2.20 While noting this advice, the committee reiterates its view that the inclusion of broad discretionary powers should be accompanied by a sound justification, especially where that power may trespass on a person's rights and liberties. The committee notes that neither non-legislative operational policy guidance nor the fact that an instrument will be made by a minister allows the Parliament to have any oversight over the exercise of the minister's discretionary power in this instance.

2.21 The committee considers that the minister's response does not address the committee's questions regarding why it is considered necessary and appropriate to provide the minister with a broad discretionary power to require an authorised officer to exercise seizure powers via non-disallowable legislative instrument. As a result, the committee continues to have significant scrutiny concerns regarding proposed section 251B(6).

2.22 Noting the limited explanation provided in the explanatory materials and the minister's response, the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with broad discretionary powers to require an authorised officer to exercise seizure powers via non-disallowable legislative instrument in circumstances where there is limited guidance on the face of the primary legislation as to when the powers may be exercised.

Delegation of administrative powers[8]

2.23 In *Scrutiny Digest 7 of 2020* the committee requested the minister's advice as to:

8 Items 19-23 The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

- who it is intended will be authorised as an 'authorised officer' and an 'authorised officer's assistant' to exercise coercive powers and whether these will include non-government employees;
- why it is necessary to confer coercive powers on 'other persons' to assist an authorised person and how such persons are to be appointed; and
- what training and qualifications will be required of persons conferred with these powers, and why the bill does not provide any legislative guidance about the appropriate training and qualifications required of authorised officers and assistants.[9]

Minister's response

2.24 The minister advised:

> The established authorisation process of authorised officers under section 5 of the Migration Act will continue to ensure that an appropriate level of control is applied to determine who is an authorised officer. Under this section an authorised officer is a person authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of the relevant provision.
>
> The Migration Act already provides for 'other persons' or authorised officers' assistants to perform certain roles. The Bill would provide for additional powers under subsection 252BB that an authorised officer may be assisted by other persons in exercising powers or performing functions or duties. This would be if the assistance is necessary and reasonable and for the purposes of a search under section 252BA or in relation to seizing and retention of things found in the course of a screening process or search under sections 252C, 252CA and 252CB. The assistant must exercise these powers in accordance with any directions given by the authorised officer. By including the wording 'necessary and reasonable' this restricts the use of officers' assistants to situations where such assistance is necessary to ensure the authorised officer can carry out their powers, functions or duties.
>
> The current Facilities and Detainee Services Contract (Serco) requires that training is provided by a Registered Training Organisation and delivered by a level IV accredited trainer, covering the proper exercise of these duties. Persons completing this training are issued with a certificate that demonstrates that the person has the competencies required to exercise the power.
>
> Officers authorised to carry out strip searches of detainees will be subject to satisfying training and qualification requirements in the following areas:
>
> - civil rights and liberties

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2020*, pp. 20-21.

- cultural awareness
- the grounds for conducting a strip search
- the pre-conditions for a strip search
- the role of officers involved in conducting a strip search
- the procedures for conducting a strip search
- the procedures relating to items retained during a strip search.

Officers authorised to use detector dogs for searches will also be required to undergo specific training in relation to handling detector dogs to ensure the dog is prevented from touching any person and is kept under control for the duration of the search.

Committee comment

2.25 The committee thanks the minister for this response. The committee notes the minister's advice that the established authorisation process of authorised officers under section 5 of the *Migration Act 1958* will continue to ensure that an appropriate level of control is applied to determine who is an authorised officer.

2.26 The committee also notes the minister's advice that the current Facilities and Detainee Services Contract (Serco) requires that training is provided by a Registered Training Organisation and delivered by a level IV accredited trainer, covering the proper exercise of coercive powers and that persons completing this training are issued with a certificate that demonstrates that the person has the competencies required to exercise the powers. The committee further notes the minister's advice in relation to training requirements for officers authorised to use detector dogs or to carry out strip searches. However, the committee notes that these requirements do not exist on the face of the bill.

2.27 The committee's reiterates its consistent scrutiny position that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to Framing of Commonwealth Offences*[10] indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given relate to the need to appoint technical specialists in the collection of certain sorts of information.

10 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 73-75.

2.28 Noting the limited explanation provided in the explanatory materials and the minister's response, the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing authorised officers and authorised officer's assistants to exercise coercive powers in circumstances where there is no legislative guidance requiring such persons to have the appropriate qualifications and expertise.

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 will comment on bills which establish or amend standing appropriations or establish, amend or continue in existence special accounts introduced in the sitting period from 24 August – 3 September 2020 in the next Scrutiny Digest.

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*.