The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 16 of 2020

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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 Federal Integrity Commission Bill 2020

Purpose	This bill seeks to establish the Australian Federal Integrity Commission, a new independent body with appropriate powers of assessment, investigation and referral to enable clear, proportionate and practical responses to allegations of serious and/or systemic corruption issues at the federal level
Sponsor	Dr Helen Haines MP
Introduced	House of Representatives on 26 October 2020

1.2 The Australian Federal Integrity Commission Bill 2020 is substantially similar to both the National Integrity Bill 2018 introduced by Ms Cathy McGowan MP into the House of Representatives on 26 November 2018 and the National Integrity Bill (No. 2) introduced by Senator Waters in the Senate on 29 November 2018. The committee considered the two similar bills together in *Scrutiny Digest 15 of 2018* and raised a number of scrutiny concerns in relation to the bills.[1]

1.3 The committee retains its scrutiny concerns outlined in *Scrutiny Digest 15 of 2018* in relation to the current bill. The committee provides additional scrutiny comments in relation to the arrest and search warrant powers, and the abrogation of legal professional privilege, to be considered in replacement of those concerns as outlined in *Scrutiny Digest 15 of 2018*.

Arrest and search warrants[2]

1.4 In *Scrutiny Digest 15 of 2018* the committee raised concerns about the arrest and search warrant powers of the bill.[3] The committee reiterates its scrutiny

1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 29–43.

2 Clause 109 and 110; and proposed Division 3 of Part 6. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

3 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 33–36.

concerns in relation to the relevant clauses of the current bill, with some modifications from the committee's original comments where the clauses of the 2020 bill differ from the 2018 bill.

1.5 Clause 109 of the bill provides that an authorised officer may apply to a judge for a warrant to arrest a person, if the authorised officer believes on reasonable grounds that:

- the person has been ordered to deliver their passport to the Commissioner, and is likely to leave Australia for the purposes of avoiding giving evidence at a hearing before the Commissioner;
- the person has been served with a summons under clause 87, and has absconded, is likely to abscond, or is otherwise attempting, or is likely to attempt, to evade service of the summons; or
- the person has committed an offence under subclause 97(1) (which relates to failures to attend hearings, produce evidence or answer questions), or is likely to commit such an offence.

1.6 Clause 110 provides that, for the purposes of executing an arrest warrant, the authorised officer may (among other matters) break into and enter relevant premises. This power is subject to a number of limitations, including a prohibition on entering premises during night hours, a requirement to inform the person of the reasons for the arrest, and a prohibition on subjecting the arrestee to greater indignity than is reasonable and necessary in the circumstances.

1.7 Proposed Division 3 of Part 6 further provides that an authorised officer may apply for a number of different kinds of search warrant. These include warrants to search premises and to conduct an ordinary search or frisk search of a person.[4] Under such warrants, an authorised officer would be permitted to (among other matters) search premises, vehicles and vessels for evidential material, seize such things as are considered relevant to the investigation, and conduct search and frisk procedures.[5] These powers are subject to the limitation that a search warrant may not authorise a strip search or a search of a person's body cavities.[6]

1.8 Clause 149 provides for the appointment of authorised officers. Under that clause, the Commissioner would be able to appoint as an authorised officer a member of the Australian Federal Police (AFP) or a staff member of the Australian Federal Integrity Commission that the Commissioner considers to have suitable qualifications or experience based on official industry standards for police training and competency. The committee raised concerns in relation to the lack of a

4 Clause 117.

5 Clauses 121 and 122.

6 Clause 123.

requirement for authorised officers to have specified qualifications or experiences in relation to the 2018 bill, and welcomes the inclusion of further specificity in the current bill.[7]

1.9 Although it may be possible to identify circumstances in which it would be appropriate for a person exercising powers under a warrant *not* to be an AFP officer (for example, if they were a former officer or a member of a State or Territory police force), the committee is concerned that the bill would permit a range of persons who are not police officer to exercise 'police powers'—such as powers to arrest and to conduct personal searches. The explanatory memorandum notes that it is essential that authorised officers are 'experienced, diligent and trustworthy' because they will be exercising power of search and arrest.[8] While, as noted above, the committee welcomes the inclusion of further specificity as to the qualifications or experience non-AFP authorised offices must possess, the explanatory memorandum does not explain why it is necessary or appropriate to allow these powers to be exercised by persons who are not police officers.

1.10 The committee further notes that the *Guide to Framing Commonwealth Offences* indicates that any new powers to search persons require a strong justification.[9] While noting that there may be some circumstances in which the granting of new powers to search persons can be justified, the committee would expect an explanation as to why these powers are considered necessary and appropriate to be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no such explanation, merely restating the operation and effect of the relevant provisions.[10]

1.11 Clause 126 further provides that, in executing a search warrant, an authorised officer may obtain such assistance, and use such force against persons and things, that is necessary and reasonable in the circumstances. Where a person assisting an authorised officer is also an authorised officer or a police constable, that person would be permitted to use such force against persons and things as is reasonable and necessary in the circumstances. Otherwise, the person assisting would be permitted only to use such force against things (not persons). The committee notes that the bill clarifies that an assisting officer who is not an authorised officer or a member or special member of the AFP must have the appropriate skills and qualifications to assist in executing the warrant in an ethical

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 33–36.

8 Explanatory memorandum, p. 51.

9 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 102–103.

10 Explanatory memorandum, pp. 45–46.

and proper manner.[11] The committee raised concerns in relation to the lack of a requirement for assisting officers to have suitable qualifications and experiences in relation to the 2018 bill, and welcomes the inclusion of this requirement in the current bill.[12]

1.12 The committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion in a bill of any use of force power for the execution of warrants should only be allowed where a need for such powers can be identified. In this regard, it states that a use of force power should be accompanied by an explanation and justification in the explanatory materials, as well as a discussion of proposed accompanying safeguards that the agency intends to implement.[13] In this instance, the explanatory memorandum states that:

> An Authorised or Assisting Officer may obtain the assistance necessary and use a reasonable amount of force whilst executing a warrant. A person who is not an Authorised Officer or a constable may take part in searching or arresting any person. The Authorised Officer is given the discretion to use the necessary force needed which allows for the Authorised Officer to protect him or herself and others assisting in the execution of a warrant. The requirement of having only Authorised Officers or a constable taking part in searches and arrests is to ensure that these procedures are carried out by only those who have been provided with training and fulfilled the requirements to ensure that care, professionalism and due diligence are present.[14]

1.13 However, the explanatory memorandum does not appear to explain the circumstances in which it may be necessary to use force (for example, by providing relevant examples). Moreover, it does not appear to discuss any specific safeguards with respect to the use of force.

1.14 The committee further notes that the explanatory memorandum does not explain why it is considered necessary and appropriate for an authorised officer to obtain assistance, nor does it provide any examples of the persons who may be called on to assist or the circumstances in which assistance may be necessary. The committee also notes that the bill does not appear to place any limits on the persons who may assist authorised officers in executing powers under a warrant, other than the requirement in clause 8 that an assisting officer have 'the appropriate skills and qualifications to assist in executing the warrant in an ethical and proper manner'.

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11 Clause 8, definition of 'assisting officer'.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 33–36.

13 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 80.

14 Explanatory memorandum, p. 46.

1.15 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing persons other than police officers to execute search warrants, which include powers to use force and to conduct personal searches.

Legal professional privilege[15]

1.16 In *Scrutiny Digest 15 of 2018* the committee raised concerns about the abrogation of legal professional privilege in the bill.[16] The committee reiterates its scrutiny concerns in relation to the relevant clauses of the current bill, with some modifications from the committee's original comments where the clauses of the 2020 bill differ from the 2018 bill.

1.17 Clause 103 of the bill provides that a person must not refuse or fail to answer a question at a hearing that the Federal Integrity Commissioner requires the person to answer on the ground that the answer or part thereof would disclose a communication subject to legal professional privilege. This does not apply to communications made for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public or private hearing before the Federal Integrity Commission, as per subclause 103(2). Clause 104 provides for the same in relation to a requirement to produce a document or thing. A person would commit an offence of strict liability if they refuse or fail to answer a question, or to produce a document or thing, in relation to which the person has been served with a summons to attend a hearing or produce a document.[17]

1.18 Clauses 103 and 104 differ from the relevant clauses of the 2018 bill (clauses 99 and 100) as they provide for the exception in relation to communications or documents made for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public or private hearing before the Federal Integrity Commission. The 2018 bill also provided that the Commissioner could hear a claim as to whether such information should be protected by legal professional privilege and make a ruling that such information was protected.

1.19 The provisions would appear to abrogate legal professional privilege. As recognised by the High Court,[18] legal professional privilege is not merely a rule of

15 Clauses 103 and 104. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

16 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 37–38.

17 Clause 105.

18 See e.g. *Baker v Campbell* (1983) 153 CLR 52.

substantive law but an important common law right which is fundamental to the administration of justice. The committee therefore considers that privilege should only be abrogated or modified in exceptional circumstances. Where a bill seeks to abrogate legal professional privilege, the committee would expect a sound justification for any such abrogation to be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no such justification—merely restating the operation and effect of the relevant provisions.[19]

1.20 Additionally, the committee considers that, where legal professional privilege is abrogated, 'use' and 'derivative use' immunities should ordinarily apply to documents or communications revealing the content of legal advice, in order to minimise harm to the administration of justice and to individual rights. Use immunities are provided in subclauses 84(3) and 106(4) in relation to the information, answers to questions, documents and things given pursuant to a notice or a summons. However, the bill does not contain 'derivative use' immunities. The explanatory memorandum provides no explanation as to why such immunities have not been included.

1.21 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of abrogating legal professional privilege.

19 Explanatory memorandum, pp. 38–39.

Commonwealth Parliamentary Standards Bill 2020

Purpose	This bill seeks to strengthen public confidence in the Commonwealth Parliament by creating a statutory code of conduct for parliamentarians and their staff, a statutory basis for existing parliamentarians' registers of interests, and creating the roles of Parliamentary Integrity Adviser and Parliamentary Standards Commissioner
Sponsor	Dr Helen Haines MP
Introduced	House of Representatives on 26 October 2020

1.22 This bill is similar to a bill that was introduced in the House of Representatives on 3 December 2018.[20] The committee commented on the bill in *Scrutiny Digest 1 of 2019*.

1.23 The committee draws senators' attention to its comments in relation to the earlier version of this bill.[21]

20 National Integrity (Parliamentary Standards) Bill 2018. The bill was introduced by the former Member for Indi, Ms Cathy McGowan MP, and lapsed on 11 April 2019 at the dissolution of the 45th Parliament.

21 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2019*, pp. 11–16.

Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020

Purpose	This bill is part of a package which seeks to amend the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* in order to strengthen and simplify the foreign investment framework, while continuing to offset the cost of the package by simplifying existing fee arrangements
Portfolio	Treasury
Introduced	House of Representatives on 28 October 2020

Significant matters in delegated legislation[22]

1.24 Item 7 of Schedule 1 seeks to replace existing Part 2 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (the Act) in relation to the imposition and amounts of fees payable under Part 6 and 6A of the Act, which are imposed as taxes.[23] The fee amount will be set in accordance with regulations made under proposed subsection 6(1). The regulations may specify an amount or method for determining an amount,[24] including different amounts or methods for different kinds of fees, different kinds of persons liable to pay a kind of fee or different kinds of circumstances giving rise to the liability to pay a kind of fee.[25] A fee imposed under proposed section 6 of the Act by regulations cannot exceed $1 million.[26]

1.25 One of the most fundamental functions of the Parliament is to impose taxation.[27] 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. Therefore, where a fee is imposed as a tax, the committee considers that guidance in relation to the level of a charge should be included on the face of the primary legislation.

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22 Schedule 1, item 7, proposed sections 5 and 6. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

23 Proposed section 5.

24 Proposed paragraph 6(2)(a).

25 Proposed paragraph 6(2)(b).

26 Proposed subsection 6(3).

27 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

1.26 In this regard, the committee welcomes the inclusion in proposed subsection 6(3) of a cap on the amount of the fees that may be charged under the regulations. However, the committee considers that guidance in relation to the method of calculation of fees under proposed section 6 should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.27 The committee requests the Treasurer's advice as to whether guidance in relation to the method of calculation of the fees in proposed section 6, which are imposed as taxes, can be included on the face of the bill.

Foreign Investment Reform (Protecting Australia's National Security) Bill 2020

Purpose	This bill is part of a package which seeks to amend the *Foreign Acquisitions and Takeovers Fees Imposition Act* 2015 in order to strengthen and simplify the foreign investment framework
Portfolio	Treasury
Introduced	House of Representatives on 28 October 2020

Significant matters in delegated legislation[28]

Definition of 'national security business' and 'national security land'

1.28 The bill provides that a notifiable national security action must be notified to the Treasurer. The definition of a notifiable national security action involves the concepts of 'national security business' and 'national security land'.[29] A notifiable national security action is an action or a proposed action by a foreign person that is to:

- acquire a direct interest in a national security business;
- acquire a direct interest in an entity that carries on a national security business;
- start a national security business;
- acquire an interest in Australian land that at the time of the acquisition was national security land; or
- acquire a legal or equitable interest in an exploration tenement over Australian land that at the time of the acquisition is national security land.[30]

1.29 Item 18 of Schedule 1 seeks to insert into section 4 of the *Foreign Acquisitions and Takeovers Act 1975* (the Act) that the definitions of 'national security business' and 'national security land' will be prescribed by regulations.

28 Schedule 1 item 204 proposed subsection 122(4), schedule 1 item 18 proposed definitions of 'national security business' and 'national security land, schedule 1 item 72 proposed subsection 55B(3) and section 55G and schedule 1 item 80 proposed section 63. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

29 Schedule 1, item 72, proposed section 55B.

30 Explanatory memorandum, p . 16.

1.30 The committee's view is that significant matters, such as the definitions central to the operation and application of the law, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.31 The explanatory memorandum provides some guidance on what these definitions may encompass:

> The FATR will define national security businesses to capture endeavours that if disrupted or carried out in a particular way, could create national security risks. This means that national security risks may arise if national security businesses are controlled or influenced by persons acting not in Australia's interests. For this reason it is important to enable the Treasurer the ability to review investments in such businesses by foreign investors.
>
> Generally, national security businesses will be, are involved in or connected with critical infrastructure, defence, or the national intelligence community or their supply chains. Because of the broad range of factors that can contribute to national security concerns and the wide range of potentially significant enterprises, the definition includes activities that are not usually considered to be businesses. An endeavour may be a national security business as long as it is carried on wholly or partly in Australia, regardless of whether it is carried on in anticipation of profit or gain, and regardless of whether it is carried on by the Commonwealth, a state, a territory, a local governing body, or an entity wholly owned by them…
>
> The FATR will also define national security land with reference to whether the land is defence premises or a national intelligence agency has an interest in the land.
>
> The definitions of 'national security business' and 'national security land' will operate to require endeavours that are sufficiently likely to give rise to national security concerns to be notified to the Treasurer for review.[31]

1.32 In this instance, the explanatory memorandum does not justify why it is necessary and appropriate to leave these significant definitions to delegated legislation. From a scrutiny perspective, the committee considers that these definitions are integral to the operation and purpose of the bill and are therefore inappropriate for delegated legislation which is subject to limited parliamentary oversight.

1.33 Taking into account the detail provided in the explanatory memorandum, it appears to the committee that the Treasury has already considered what may be included in the definitions of these concepts, and may potentially have definitions of the concepts prepared. The committee therefore considers that there may be scope to amend the bill either include these definitions or, at a minimum, high-level guidance.

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31 Explanatory memorandum, pp. 16–17.

1.34 The committee's scrutiny concerns are heightened in this instance by the fact that the definitions left to delegated legislation are of relevance to criminal offences, including offences which attract a maximum penalty of 10 years imprisonment.

1.35 In light of the above, the committee requests the Treasurer's advice as to:

- **why it is considered necessary and appropriate to leave the definitions of 'national security business' and 'national security land' to delegated legislation; and**
- **whether these definitions can instead be included on the face of the bill or, at a minimum, whether the bill can be amended to include at least high-level guidance regarding what may be covered by these definitions on the face of the primary legislation.**

Exemption certificates

1.36 Item 72 of Schedule 1 seeks to insert proposed subsection 55B(3) and section 55G into the Act. Proposed subsection 55B(3) provides that regulations may provide that an action of a specified kind is not a notifiable national security action for the purposes of an exemption certificate in force under regulations for the purposes of section 63. Proposed section 55G mirrors this provision in relation to a reviewable national security action. In relation to this, the explanatory memorandum provides no justification as to why it is necessary and appropriate to leave these significant matters to delegated legislation.

1.37 Furthermore, the committee does not consider that consistency with existing provisions[32] that allow the regulations to provide for these matters in relation to significant actions and notifiable actions is, of itself, a sufficient justification for leaving these matters to delegated legislation in the current bill.

1.38 In light of the above, the committee requests the Treasurer's advice as to:

- **why it is considered necessary and appropriate for delegated legislation to provide for actions of a specified kind to be exempt notifiable national security actions or reviewable national security actions; and**
- **whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.**

Disclosures to Commonwealth ministers and Commonwealth bodies

1.39 Item 204 of Schedule 1 seeks to modify existing section 122 of the Act. Proposed section 122 provides that a person may disclose protected information for the purposes of administering a law.[33] The information may be disclosed to the

32 See existing subsections 45(3) and 49(2).

33 Proposed subsections 122(1) and (2).

minister who administers the law in question[34] or an individual who is either employed by the minister under Part III or Part IV or as a consultant under Part II of the *Members of Parliament (Staff) Act 1984,*[35] or an officer or employee of a Department of State, or an authority or agency of the Commonwealth, administered by the minister.[36] The relevant laws are listed in proposed subsection 122(3) but may also be determined by the Treasurer by legislative instrument as per proposed subsection 122(4).

1.40 The explanatory memorandum provides a limited justification as to why these significant matters are being left to delegated legislation:

> This amendment allows for a more streamlined process and more flexibility, as it ensures information can be shared in a timely manner.[37]

1.41 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.

1.42 In light of the above, the committee requests the Treasurer's advice as to:

- **why it is considered necessary and appropriate to allow delegated legislation to expand the relevant laws in relation to which protected information may be disclosed; and**
- **whether the bill can be amended to include at least high-level guidance as to the categories of laws that may be determined on the face of the primary legislation.**

Broad delegation of administrative power
Broad discretionary power
Privacy[38]

1.43 Item 132 of Schedule 1 seeks to insert proposed section 79R into the Act to provide the Treasurer with the power to give a direction to a person where the Treasurer has reason to believe that the person has engaged or is engaging,[39] or will

34 Proposed paragraph 122(2)(a).

35 Proposed paragraph 122(2)(b).

36 Proposed paragraph 122(2)(c).

37 Explanatory memorandum, p. 60.

38 Schedule 1, item 132, proposed sections 79R and 79V. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (i).

39 Proposed paragraph 79R(1)(a).

engage,[40] in conduct which constitutes a contravention of a provision of the Act. Such a direction may relate to any or all relevant contraventions of the Act[41] and may direct the person to engage in specific conduct to address or prevent the relevant contravention, or prevent a similar or related contravention in any case.[42] In the event that the Treasurer is satisfied that a consequence, or possible consequence, of the contravention is that the composition of senior officers of a corporation is contrary to the national interest the directions may include (but are not limited to):

- ensuring that specified persons cease to be senior officers of the corporation;[43]
- ensuring that specified persons do not become senior officers of the corporation;[44]
- ensuring that specified kinds of person (such as persons who are not Australian citizens, or who are foreign persons) cease to be senior officers of the corporation;[45]
- ensuring that specified kinds of person (such as persons who are not Australian citizens, or who are foreign persons) do not become senior officers of the corporation;[46]and
- ensuring that a specified proportion of the senior officers of the corporation are not specified kinds of person (such as persons who are not Australian citizens, or who are foreign persons).[47]

1.44 Directions made under proposed subsection 79R(3) are not legislative instruments[48] but must generally be published on the department's website.[49] Failing to comply with a direction or interim direction may amount to a criminal offence which may attract up to 10 years imprisonment.[50]

1.45 The committee considers that proposed section 79R gives the Treasurer a broad discretionary power to give directions in circumstances where the Treasurer

40 Proposed paragraph 79R(1)(b).

41 Proposed subsection 79R(2).

42 Proposed subsection 79R(3).

43 Proposed paragraph 79R(7)(a).

44 Proposed paragraph 79R(7)(b).

45 Proposed paragraph 79R(7)(c).

46 Proposed paragraph 79R(7)(d).

47 Proposed paragraph 79R(7)(e).

48 Proposed subsection 79R(9).

49 Proposed subsection 79S(1).

50 Proposed section 88A.

only needs to have 'reason to believe' that a contravention has occurred, is occurring or will occur. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, the explanatory memorandum states:

> The Treasurer's directions are designed to provide a quick and efficient response to the conduct of a person and to require the person to promptly remedy a breach of the FATA. The power supports early regulatory intervention in order to protect further or ongoing harm to the national interest.[51]

1.46 Without further explanation, from a scrutiny perspective, the committee considers that a desire to provide a quick and efficient response to remedy a breach (or a potential future breach) of the Act is not a sufficient justification for providing the Treasurer and their delegates such a broad discretionary power. In relation to safeguards on the power the explanatory memorandum states:

> In order to comply with procedural fairness obligations, it is expected that the Treasurer will give a person an opportunity to make submissions on the matter before the Treasurer makes or varies a direction (other than an interim direction).[52]

1.47 The committee considers that if it is expected that the Treasurer will give a person an opportunity to make submissions before a direction is issued or varied then it would be appropriate for this safeguard should be set out as a requirement the face of the bill. The committee's concerns in this regard are heightened by the fact that the breach of a direction may amount to a criminal offence which may give rise to significant penalties.

1.48 The committee further notes that a direction which is published online may potentially contain sensitive or private information about whom the direction has been published. It could also potentially contain personal information about third persons. However, neither the bill nor the explanatory memorandum outlines the type of information that is likely to be published, who the information may be in relation to, or whether there are any limits or safeguards which apply to protect an individual's right to privacy.

1.49 In addition, the Treasurer can delegate in writing a power to give directions in accordance with section 137 of the Act to the secretary, the Commissioner of Taxation or a person engaged under the *Public Service Act 1999* employed in the Treasury or the ATO.[53]

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51 Explanatory memorandum, p. 108.

52 Explanatory memorandum, p. 110.

53 Proposed subsection 137(8).

1.50 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.51 In this instance the explanatory memorandum provides no justification as to why it is necessary and appropriate for the Treasurer to delegate the power to give directions to any person engaged under the *Public Service Act 1999* employed in the Treasury or the ATO. The explanatory memorandum also does not explain to whom within the Treasury or the ATO it is envisaged these powers may be delegated or whether they will be required to possess relevant skills, qualifications and experience. Again, the committee's concerns in this regard are heightened by the fact that breach of a direction is a criminal offence which may give rise to significant penalties.

1.52 The committee notes that similar issues arise in relation to proposed section 79V which provides that the Treasurer may give interim directions to a person.

1.53 The committee therefore requests the Treasurer's advice as to:

- **why it is considered necessary and appropriate to provide the Treasurer and their delegates with a broad discretionary power to issue directions and interim directions;**
- **the appropriateness of amending the bill to provide that a person must be given an opportunity to respond and make submissions before a direction is made or varied;**
- **whether the threshold for engagement of the power to give a direction or interim direction of 'reason to believe' is a different threshold than 'reasonably believes';**
- **why it is necessary to allow the Treasurer's powers to give directions and interim directions to be delegated to any APS employee at any level within the Treasury or the ATO;**
- **whether the bill can be amended to provide some legislative guidance as to the categories of people to whom the power to give directions and interim directions might be delegated; and**
- **whether any limits or safeguards apply to personal information about individuals which may be published as part of a direction.**

Adequacy of parliamentary oversight

Privacy[54]

1.54 Item 205 of Schedule 1 seeks to insert proposed section 123B into the Act. This proposed section would provide that a person may disclose protected information to a foreign government or a separate government entity in relation to a foreign country or part of a foreign country. The information can only be disclosed by the person in performing their functions, duties or powers under the Act,[55] or if the person is satisfied that the disclosure will assist or enable the foreign government or separate government entity to perform their functions, duties or powers.[56] In addition, the information can only be disclosed where:

- the Treasurer is satisfied that the information relates to a matter in relation to which a national security risk may exist for Australia or the foreign country;[57] and
- the Treasurer is satisfied that the disclosure is not contrary to the national interest;[58] and
- the person is satisfied the information will be used in accordance with an agreement to which proposed subsection 123B(2) applies;[59] and
- the foreign government or separate government entity has undertaken not to use or further disclose the information except in accordance with the agreement or as required or authorised by law.[60]

1.55 The bill provides that the agreement is an agreement in force between the Commonwealth or a Department of State, authority or agency of the Commonwealth, and one or more foreign governments or separate government entities.[61]

1.56 The definition of protected information is provided for in existing section 120 of the Act and generally includes information obtained in accordance with or for the purposes of the Act, with limited exceptions.

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54 Schedule 1, item 205, proposed section 123B. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v) and (i).

55 Proposed subparagraph 123B(1)(a)(i).

56 Proposed subparagraph 123B(1)(a)(ii).

57 Proposed paragraph 123B(1)(b).

58 Proposed paragraph 123B(1)(c).

59 Proposed paragraph 123B(1)(d).

60 Proposed paragraph 123B(1)(e).

61 Proposed subsection 123B(2).

1.57 The committee has scrutiny concerns regarding the broad ability for protected information to be provided to foreign governments. Where a provision has the potential to trespass on personal rights and liberties, including privacy, the committee expects that a sufficient justification for the inclusion of these provisions will be included in the explanatory memorandum. In this instance, the explanatory memorandum provides further detail on the operation of the provision. In relation to the Privacy Act, the explanatory memorandum states that:

> Protected information can include personal information as defined under the *Privacy Act 1988*. The Australian Privacy Principles apply to the disclosures made under section 123B of the FATA. The amendments authorise cross-border disclosure of personal information that complies with Australian Privacy Principle 8.2(c), the disclosure is authorised under law. In addition, personal information disclosed under the amendments must have been obtained in accordance with the FATA, in the performance of the person's functions or duties or exercising of the person's powers under the FATA.[62]

1.58 While the committee acknowledges this explanation, from a scrutiny perspective, the committee does not consider that the information provided constitutes a sufficient justification for provisions that may trespass on personal rights and liberties. The committee considers that, as currently drafted, there are limited safeguards on the face of the bill to ensure that information provided to foreign governments is only done so in appropriate circumstances.

1.59 The committee's concerns are heightened by the lack of parliamentary oversight of any relevant international agreement. Given the significant nature of the disclosure power and the potential trespass on a person's rights and liberties, the committee considers that, at a minimum, the bill should be amended to require that international agreements be subject to parliamentary scrutiny.

1.60 In light of the above, the committee considers that the provisions as currently drafted have the potential to significantly trespass on a person's rights and liberties, particularly in circumstances where access to protected information may be given to foreign jurisdictions whose governance structures are not underpinned by respect for the rule of law and the separation of powers.

1.61 The committee therefore requests the Treasurer's more detailed advice regarding why it is considered necessary and appropriate to allow protected information to be provided to foreign governments in circumstances where limited safeguards are provided on the face of the bill, including to ensure that an international agreement contains sufficient safeguards regarding the circumstances in which protected information can be disclosed.

62 Explanatory memorandum, p. 58.

1.62 The committee also requests the minister's advice as to whether the bill can be amended to:

- **set out minimum protections and safeguards related to privacy that must be included in international agreements; and**
- **specify that international agreements must be tabled in the Parliament.**

Merits review[63]

1.63 Item 207 of Schedule 1 seeks to insert proposed Division 4 of Part 7 into the Act in relation to the review of decisions by the AAT. Proposed section 130G sets out the procedures for review of reviewable decisions made under the bill which alter the standard AAT review processes, including that:

- proceedings are to be held in private;[64]
- the Treasurer can certify that evidence or submissions of either the Treasurer or the relevant national intelligence community should not be disclosed on national security grounds;[65] and
- if such a certificate is given:
  - the applicant must not be present when the relevant evidence or submissions are adduced;[66] and
  - the applicant's representative may only be present when the relevant evidence or submissions are adduced with consent of the Treasurer,[67] and the representative cannot disclose this information to the applicant.[68]

1.64 In addition, proposed subsection 130H(2) provides that the Treasurer may issue a certificate that the disclosure of information with respect to a stated matter or the contents of a document would be contrary to the public interest. Proposed subsection 130K(3) provides that the AAT may direct that findings which were not already disclosed to the applicant are not given to the applicant.

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63 Schedule 1, item 207, proposed Division 4 of Part 7. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

64 Proposed subsection 130G(5).

65 Proposed subsection 130G(8).

66 Proposed paragraph 130G(9)(a).

67 Proposed paragraph 130G(9)(b).

68 Proposed subsection 130G(10).

1.65 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided.

1.66 The committee welcomes the inclusion of provisions which provide for access to the AAT for reviewable decisions made under the bill. However, the committee notes that no justification is provided in the explanatory memorandum as to why limits have been placed on AAT proceedings which may impact an applicant's right to a full and independent merits review, including the right to a fair hearing, and also to subsequent judicial review.

1.67 In light of the above, the committee requests the Treasurer's advice as to how an applicant's right to a fair hearing will be protected in proceedings for merits review before the Administrative Appeals Tribunal.

Retrospective application[69]

1.68 Item 247 of Schedule 1 is a transitional provision which requires a person to pay a fee if and when notifying the Treasurer that they took a notifiable (but not a significant) action between 1 December 2015 and 31 December 2020 inclusive, and did not provide notice under existing section 81 of the Act before the action was taken.

1.69 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.

1.70 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.

1.71 In relation to this the explanatory memorandum states:

> Schedule 1 to the Bill inserts a transitional provision to ensure a fee is payable for retrospective notifications that are notifiable but not significant actions that were taken prior to 1 January 2021. A retrospective notification occurs where the person notifies the Treasurer after the action has been taken. The transitional provision applies to actions taken between 1 December 2015 and the commencement of the Bill. This

69 Schedule 1, item 247. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

ensures a fee is payable for any actions taken, but not notified, during this period.[70]

1.72 The committee notes the justification in the explanatory memorandum that this retrospectivity ensures that a fee is payable for actions which were taken but not notified during the specified period. However, in this instance, the committee considers that the explanatory memorandum lacks sufficient detail and clarity for the committee to ascertain whether any persons are likely to be adversely affected.

1.73 The committee requests the Treasurer's more detailed advice as to whether the retrospective application of the transitional provisions in item 247 of Schedule 1 will have a detrimental effect on any individuals, and if so, the number of individuals that may be affected.

Significant matters in delegated legislation
Broad delegation of powers[71]

1.74 Item 19 of Schedule 2 seeks to insert proposed subsection 99(2BA) into the Act. This would provide that the registrar may delegate in writing their powers and functions under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* as an authorised applicant in relation to the civil penalty provisions of the Act to:

- any person or body to whom they may delegate any of the registrar's other functions under a law of the Commonwealth mentioned in the definition of 'eligible Registrar appointee' in section 4 of the Act;[72] or
- to any person of a kind prescribed by the regulations.[73]

1.75 Item 29 of Schedule 2 seeks to insert proposed subsection 100(4BA) into the Act to allow the delegation of the registrar's powers and functions under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* as the relevant chief executive in relation to the provisions mentioned in existing subsection 100(1), which relate to infringement notices.

1.76 Item 8 of Schedule 3 seeks to insert proposed section 130ZX into the Act. This would provide that the registrar may delegate in writing all or any of their functions or powers, except the power to make a legislative instrument, under 7A of the Act to:

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70 Explanatory memorandum, p. 130.

71 Schedule 2, item 19, proposed subsection 99(2BA), item 29, proposed subsection 100(4BA), and schedule 3, item 8, proposed section 130ZX. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

72 Proposed paragraph 99(2BA)(a).

73 Proposed paragraph 99(2BA)(b).

- any person or body to whom they may delegate any of the registrar's other functions under a law of the Commonwealth mentioned in the definition of 'eligible Registrar appointee' in section 4 of the Act;[74] or
- to any person of a kind prescribed by the regulations.[75]

1.77 In addition, proposed subsection 130ZX(2) provides that a power (except the power to make a legislative instrument) delegated to the registrar under proposed subsection 137(2A)[76] may be subdelegated by the registrar to a person mentioned in paragraphs 130ZX(1)(a) and (b). Proposed subsection 137(2A) relates to delegations of specified Treasurer's powers to the registrar. Any of the powers or functions delegated or subdelegated under this proposed section must be exercised in compliance with any directions of the registrar.[77]

1.78 The definition of an 'eligible registrar appointee' would be inserted into existing section 4 of the Act by item 2 of Schedule 3 and includes an agency within the meaning of the *Public Service Act 1999*, a body (incorporated or not) established for a public purpose by or under a law of the Commonwealth, or a person either holding or performing the duties of an office established by or under a law of the Commonwealth or holding an appointment made under a law of the Commonwealth.

1.79 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.80 In this instance, the explanatory memorandum does not provide a justification as to why it is necessary and appropriate for such a broad range of powers to be delegated by the registrar. There is also no explanation as to why it is necessary and appropriate for there to be such a broad class of delegates with no guidance on either the face of the bill or in the explanatory memorandum as to whom these powers may be delegated nor whether they will possess the necessary qualifications and attributes to perform the delegated powers and functions. The provisions appear to allow the delegation of powers and functions of the registrar

74 Proposed paragraph 130ZX(1)(a).

75 Proposed paragraph 130ZX(1)(b).

76 Schedule 3, item 13 seeks to insert proposed subsection 137(2A) into the Act.

77 Proposed subsection 130ZX(4).

and the Treasurer to APS employees at any level with no guidance as to whether persons preforming delegated functions and exercising delegated powers have the expertise appropriate to the function or power. In addition, the committee is concerned that the registrar can delegate these powers and functions to any person prescribed by regulations.

1.81 The committee's scrutiny concerns in this regard are heightened by the fact that some of the delegated powers and functions relate to civil penalty provisions, infringement notices and powers delegated to the registrar by the Treasurer.

1.82 The committee therefore requests the Treasurer's advice as to:

- **why it is considered necessary and appropriate to allow the registrar to delegate powers and functions under Parts 4 and 5 of the *Regulatory Powers (Standard Provisions) Act 2014* and Part 7A of the Act to the broad class of persons specified by the bill, which appears to include any APS employee at any level as well as any person specified by regulations; and**
- **the appropriateness of amending the bill to provide at least high-level guidance as to the appropriate skills, experience and training required of persons who will exercise these delegated powers and functions.**

Significant penalties[78]

1.83 The bill provides for a range of offences where the maximum terms of imprisonment and monetary penalties have increased from those in relation to the existing offences in the Act. The maximum penalty for some offences is 10 years imprisonment or 15,000 penalty units for individuals and 150,000 penalty units for a corporation, or both. For example, there is a maximum penalty of 10 years imprisonment for a foreign person who fails to give the Treasurer notice before taking a notifiable action or a notifiable security action.[79] The bill also provides for a range of civil penalty provisions with a maximum civil penalty of 2.5 million penalty units, which equates to $525 million.

1.84 The committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum.

1.85 In relation to the criminal offence provisions, the explanatory memorandum states:

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78 Various provisions. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

79 Proposed subsection 84(1).

> Schedule 1 and Schedule 2 to the Bill increases the penalties for certain offences to reflect the seriousness of those offences, and to deter and punish such behaviour as appropriate.
>
> The increases to the maximum penalties applicable to certain offences have been increased to: reflect the seriousness of the offence; act as a deterrent from committing offences; effectively punish those who commit offences; ensure consistency in the penalties for offences compared to other regulators; safeguard Australia's national interest; and maintain the integrity of Australia's foreign investment framework.
>
> Maximum penalties provide a court with guidance on how to punish criminal behaviour. They restrict the court's sentencing discretion as the court is unable to order a penalty in excess of the prescribed maximum penalty. The maximum penalty is generally reserved only for the most egregious cases.[80]

1.86 In relation to the civil penalty provisions, the explanatory memorandum states:

> The Bill increases the financial penalties for breaches of certain civil penalty provisions. The increase in penalty amounts ensures that investors who do not comply with their legal requirements are appropriately penalised, and aligns civil penalty amounts under the FATA with those of other business regulators.[81]

1.87 While the committee acknowledges this explanation, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or…seriousness. This should include a consideration of…other comparable offences in Commonwealth legislation'.[82] This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. In this instance, while the explanatory memorandum explains that the offences and civil penalty provisions have been framed to ensure consistency in the penalties compared to other regulators, the committee notes that specific examples have not been provided.

1.88 The committee therefore requests the Treasurer's more detailed advice as to the justification for the significant criminal and civil penalties that may be imposed under the bill, by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.

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80 Explanatory memorandum p. 84.

81 Explanatory memorandum, p 88.

82 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 39

Treasury Laws Amendment (2020 Measures No. 4) Bill 2020

Purpose	Schedule 1 of this bill seeks to amend the income tax law to ensure that no tax is payable on refunds of large-scale generation certificate shortfall charges Schedule 2 of this bill seeks to facilitate the closure of the Superannuation Complaints Tribunal and any associated transitional arrangements Schedule 3 of this bill seeks to enable the government to establish a more effective enforcement regime to encourage greater compliance with the franchising code by increasing the maximum civil pecuniary penalty available for a breach of an industry code, and increasing the civil pecuniary penalties for breaches of the franchising code accordingly Schedule 4 of this bill seeks to extend the operation of a temporary mechanism put in place during the coronavirus pandemic, to respond to the ongoing challenges posed by social distancing measures and restrictions on movement and gathering in Australia and overseas
Portfolio	Treasury
Introduced	House of Representatives on 28 October 2020

Significant matters in delegated legislation[83]

1.89 Item 1 of Schedule 3 seeks to amend existing subsection 51AE(2) of the *Competition and Consumer Act 2010* (the Act) to increase the existing reference to '300 penalty units' to '600 penalty units'. This amendment would allow for any industry code prescribed under Part IVB of the Act to prescribe a maximum civil penalty of up to 600 penalty units.

1.90 The committee's view is that significant matters, such civil penalty provisions with high penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum explains that the changes to penalties for breaching industry codes have been made in response to a report of the Parliamentary Joint Committee on Corporations and Financial Services as part of its inquiry into the

83 Schedule 3, item 1, proposed subsection 51AE(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

operation and effectiveness of the Competition and Consumer (Industry Codes – Franchising) Regulation 2014.[84] The explanatory memorandum explains:

> The amendments in Schedule 3 to the Bill allow for any industry code prescribed under Part IVB of the CCA to prescribe a maximum civil penalty of up to 600 penalty units. This amount is less than the amount recommended in the Committee's final report.
>
> As per the Guide, serious pecuniary penalties are most appropriately placed in primary Acts of Parliament rather than subordinate legislation. The penalties in industry codes are prescribed in regulations. As such, an increase to 600 penalty units balances the recommendations in the Committee's report to significantly increase penalties in industry codes to ensure they are a meaningful deterrent, with the principles set out in the Guide.[85]

1.91 In light of the information provided in the explanatory memorandum, the committee leaves to the Senate as a whole the appropriateness of allowing civil penalty provisions with penalties of up to 600 penalty units to be included in delegated, rather than primary, legislation.

Power for delegated legislation to modify the operation of primary legislation (akin to Henry VIII clause)[86]

1.92 Existing item 1 of Schedule 5 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (the Act) provides that a responsible minister for an Act or a legislative instrument that requires or permits certain matters, such as the giving of information and the signing, production and witnessing of documents, may temporarily vary these requirements or permissions by delegated legislation in response to circumstances relating to COVID-19. These provisions are akin to Henry VIII clauses as they provide for the power for delegated legislation to modify the operation of primary legislation. When the Act was introduced these measures were intended to be temporary and were time-limited to 31 December 2020.[87] The committee commented on these provisions in *Scrutiny Digest 6 of 2020*.[88]

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84 Explanatory memorandum, p. 19.

85 Explanatory memorandum, p. 20.

86 Schedule 4, item 1, proposed subitems (7) and (8) of section 1 of Schedule 5, and item 2, proposed subsections 1, 2 and 3 of Schedule 5, section 1. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

87 Explanatory memorandum to the Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020, p. 69.

88 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2020*, 13 May 2020, pp. 11–12.

1.93 Items 1 and 2 of Schedule 4 to the bill would have the effect of extending these measures in schedule 5 of the Act to either 31 March 2021 or a later date. Proposed subitem 1(7) provides that a determination made under existing subitem 1(2) has no operation after this item is repealed under proposed subitem 1(8). Proposed subitem 1(8) provides that this item is repealed at the end of either 31 March 2021[89] or a later day if so determined under proposed subitem 2(1).[90] Proposed subitems 2(1), (2) and (3) would provide that the designated minister[91] may, by legislative instrument, determine a day for the purposes of paragraph 1(8)(b).[92] Such a determination cannot be made unless the minister is satisfied that it is in response to circumstances relating to COVID-19.[93]

1.94 The committee has significant scrutiny concerns with enabling delegated legislation to override or modify the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. As such, the committee expects a sound justification for the use of such provisions to be provided in the explanatory memorandum.

1.95 In this instance, the explanatory memorandum states:

> Schedule 5 of the Coronavirus (Measures No. 2) Act was implemented to address the difficulties created by the Coronavirus restrictions in meeting information and documentary requirements under Commonwealth legislation.
>
> The social distancing measures and the restrictions on movement and gathering introduced in Australia and overseas in response to the Coronavirus pandemic are expected to continue to cause difficulties with meeting information and documentary requirements under Commonwealth legislation. In recognition of the importance of continued business transactions and government service delivery during the Coronavirus pandemic, the extension of Schedule 5 of the Coronavirus (Measures No. 2) Act, and the mechanism for further extension, provide continued flexibility to enable necessary temporary adjustments to legal obligations.
>
> With the uncertainty surrounding restrictions in response to the Coronavirus pandemic in Australia and overseas, it is prudent to include a mechanism to extend the operation of Schedule 5 of the Coronavirus (Measures No. 2) Act beyond 31 March 2021, should it be required based

89 Proposed paragraph 1(8)(a).

90 Proposed paragraph 1(8)(b).

91 The minister administering the *Electronic Transactions Act 1999* as per proposed subitem 2(3).

92 Proposed subitem 2(1).

93 Proposed subitem 2(2).

> on challenges posed by the Coronavirus circumstances. This mechanism allows for further extensions in response to the Coronavirus, to occur more flexibly and in a timely manner.
>
> …
>
> The extension of Schedule 5 of the Coronavirus (Measures No. 2) Act and the mechanism to extend it further if required is necessary to respond flexibly to the unpresented challenges of the Coronavirus pandemic, particularly the challenges posed by social distancing measures in Australia and overseas.[94]

1.96 While the committee acknowledges this explanation, from a scrutiny perspective, the committee is concerned that proposed item 2 of Schedule 5 would allow the minister to extend the operation of the modification power beyond 31 March 2021, without the need to amend the primary legislation. The committee does not consider that a desire for flexibility is a sufficient justification for such an approach, particularly noting that Parliament has resumed a regular sitting schedule which would enable a bill to extend the operation of the modification provision to be considered by the Parliament in a timely manner.

1.97 In light of the above, the committee requests the Assistant Treasurer's advice as to whether the bill could be amended to remove the ability of the minister to, by legislative instrument, extend the operation of the modification power in Schedule 5 of the Act beyond 31 March 2021.

94 Explanatory memorandum, pp. 67–68.

Bills with no committee comment

1.98 The committee has no comment in relation to the following bills which were introduced into the Parliament between 26 – 29 October 2020:

- Anti-Money Laundering and Counter-Terrorism Financing Amendment (Making Gambling Businesses Accountable) Bill 2020
- Health Insurance Amendment (Compliance Administration) Bill 2020
- Higher Education Support Amendment (Freedom of Speech) Bill 2020
- Immigration (Education) Amendment (Expanding Access to English Tuition) Bill 2020

Commentary on amendments and explanatory materials

1.99 The committee has not considered any amendments or explanatory materials since the tabling of *Scrutiny Digest 15 of 2020*.

Chapter 2

Commentary on ministerial responses

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

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Purpose	This bill seeks to amend the *Criminal Code Act 1995* to establish an extended supervision order scheme for high-risk terrorist offenders. It will enable Supreme Courts to make such an order to prevent the risk that a high-risk terrorist offender poses to the community at the end of their custodial sentence
Portfolio	Attorney-General
Introduced	House of Representatives on 3 September 2020
Bill status	Before the House of Representatives

Trespass on personal rights and liberties—general comment[1]

2.2 In *Scrutiny Digest 14 of 2020* the committee acknowledged that the proposed extended supervision order scheme is less restrictive of liberty than the existing continuing detention order scheme. However, given the severity of conditions that may be imposed on a person subject to an extended supervision order, the committee considered that the extended supervision order scheme may still be characterised as fundamentally inverting basic assumptions of the criminal justice system, including that a person should only be punished for a crime which it has been proved beyond a reasonable doubt that they have committed, not the risk that they may in future commit a crime.

2.3 The committee drew its scrutiny concerns to the attention of senators and left the appropriateness of the proposed extended supervision order scheme to the consideration of the Senate as a whole.[2]

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

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 12-14.

Attorney-General's response[3]

2.4 The Attorney-General advised:

> The imposition of an ESO is not a penalty for criminal offending, as the purpose of an ESO is protective rather than punitive or retributive. While eligibility for a post-sentence order (ESO or CDO) depends on the person having been convicted of a specified terrorism offence, the decision of the court as to whether to impose an ESO is based on an assessment of future risk, rather than as punishment for past conduct. An order could only be made where the court is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence once released in the community following their custodial sentence. Post-sentence orders are thus based on the risk posed by the offender as they are approaching completion of their custodial sentence, rather than at the time of conviction, consistent with their protective rather than punitive purpose. This is in line with similar state schemes which serve to protect the community from high risk violent and sexual offenders.

Committee comment

2.5 The committee thanks the Attorney-General for this additional information. The committee notes the Attorney-General's advice that an extended supervision order is not a penalty for a criminal offence and that an order can only be made where the court is satisfied that an offender poses an unacceptable risk of committing a serious Part 5.3 offence upon release.

2.6 While acknowledging this additional advice, the committee retains its original scrutiny concerns in relation to this matter outlined in *Scrutiny Digest 14 of 2020*.

2.7 The committee acknowledges that the proposed extended supervision order scheme is less restrictive of liberty than the existing continuing detention order scheme. However, given the severity of conditions that may be imposed on a person subject to an extended supervision order, the committee considers that the extended supervision order scheme may still be characterised as fundamentally inverting basic assumptions of the criminal justice system, including that a person should only be punished for a crime which it has been proved beyond a reasonable doubt that they have committed, not the risk that they may in future commit a crime.

2.8 The committee draws its scrutiny concerns to the attention of senators and leaves the appropriateness of the proposed extended supervision order scheme to the consideration of the Senate as a whole.

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3 The Attorney-General responded to the committee's comments in a letter dated 2 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 15 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

Trespass on personal rights and liberties—standard of proof[4]

2.9 In *Scrutiny Digest 14 of 2020* the committee requested the Attorney-General's advice as to whether proposed paragraph 105A.7A(1)(b) can be amended to require the court be satisfied to a 'high degree of probability' (rather than on the 'balance of probabilities') that an offender poses an unacceptable risk of committing a serious Part 5.3 offence before the court may make an extended supervision order.[5]

Attorney-General's response

2.10 The Attorney-General advised:

> The civil standard of proof required for making of an ESO or interim supervision order (ISO) is appropriately set to the 'balance of probabilities' (which is the same standard of proof for making a control order) to reflect the fact that these orders impose restrictions on an individual's personal liberties that fall short of custody. As such, this standard of proof is lower than the current standard of proof required for making a continuing detention order (CDO), which is a high degree of probability. It is also consistent with the standard of proof that ordinarily applies in other civil proceedings.
>
> As the Committee noted, the Independent National Security Legislation Monitor's (INSLM) 2017 report, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, examined the interaction between Divisions 104 and 105A and recommended that Division 105A of the *Criminal Code* be amended to allow State and Territory Supreme Courts to make a CDO or an ESO if satisfied to a high degree of probability that the offender poses an unacceptable risk. Since the INSLM's 2017 Report the Government has further developed the ESO scheme based on experience with the control order and CDO schemes, and the experience of states which have post-sentence orders, including New South Wales' scheme under the *Terrorism (High Risk Offenders) Act 2017* and Victoria's scheme under the *Serious Offenders Act 2018*.

Committee comment

2.11 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the civil standard of proof, on the balance of probabilities, is appropriate for an extended supervision order as the

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4 Schedule 1, item 87, proposed paragraph 105A.7A(1)(b). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

orders trespass on individual liberty but fall short of custody. The Attorney-General also advised that since publication of the 2017 Independent National Security Legislation Monitor (INSLM) report the government has further developed the ESO scheme as a result of experiences in New South Wales and Victoria.

2.12 While noting the Attorney-General's advice, the committee reiterates its scrutiny concerns in relation to proposed paragraph 105A.7A(1)(b). The committee considers that the significant impact that an extended supervision order may have on an individual's rights and liberties makes this offence more appropriate for the standard of proof to be amended to a 'high degree of probability'. Although the Attorney-General advised that an extended supervision order falls short of custody, the committee's view is that such an order is sufficiently restrictive of an individual's rights and liberties that it warrants a higher standard of proof than the general civil standard, balance of probabilities. The committee's concerns in this regard are heightened by the fact that the assessment is made in relation to the risk of conduct occurring as opposed to evidence of past conduct.

2.13 In addition, the committee considers that the views of the INSLM remain relevant to extended supervision orders regardless of the scheme having been further developed by the government since the report was published.

2.14 In light of the above information the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed paragraph 105A.7A(1)(b) which provides for the court to be satisfied on the balance of probabilities, as opposed to a high degree of probability, that an offender poses an unacceptable risk of committing a serious Part 5.3 offence before the court may make an extended supervision order.

Procedural fairness—right to a fair hearing[6]

2.15 In *Scrutiny Digest 14 of 2020* the committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of:

- proposed sections 105A.14B–105A.14D which provide that certain information (such as national security information) may be excluded from the copies of applications and materials provided to an offender and their legal representative; and
- the proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* set out in items 189–210 of Schedule 1 which

6 Schedule 1, item 120, proposed sections 105A.14B-105A.14D and items 189-210. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

would allow the court to consider and rely on national security information which is not disclosed to the offender or their legal representative.

2.16 The committee considered that these provisions may negatively impact an offender's ability to effectively contest an application for an extended supervision order that is made against them.[7]

Attorney-General's response

2.17 The Attorney-General advised:

> Proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004*
>
> As the Committee noted, the Bill would amend the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) to extend existing court-only evidence provisions, which currently apply in control order proceedings to protect national security information, to ESO proceedings. These provisions allow the court make special orders to protect national security information in control order proceedings, including an order which would allow the court to consider information where that information has not been disclosed to the respondent or their legal representatives in the control order proceeding (also referred to as 'court-only evidence'). These are exceptional provisions and would only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application.
>
> The Bill also amends the NSI Act to ensure that special advocates, which are available where court-only evidence is considered in control order proceedings, will also be available where court-only evidence is considered in ESO proceedings. As noted in the Explanatory Memorandum to the Bill, a special advocate represents the offender's interests during the parts of a hearing from which the offender and their ordinary legal representative are excluded when the court agrees to consider highly sensitive court-only evidence. The special advocate is able to make arguments to the court querying the need to withhold information from the offender, and can challenge the relevance, reliability and weight accorded to that information. The appointment of a special advocate ensures that the offender will have a reasonable opportunity to present their case and challenge the arguments adduced by the other party.
>
> The appointment of a special advocate is at the discretion of the court, which is best placed to assess whether a special advocate is necessary to assist the court process and safeguard the rights of the offender in proceedings. In some instances, the court may consider itself sufficiently equipped to safeguard the rights of the offender without the appointment

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 15-18.

of a special advocate. It is appropriate that that decision be made on a case by case basis by the court.

As the Committee noted, before making an order to allow for court-only evidence, the court must be satisfied that the offender has been given sufficient information about the allegations on which the request for an order was based to enable effective instructions to be given in relation to those allegations. Whether the offender is provided the 'sufficient information' prior to the special advocate seeing the sensitive national security information will depend on the circumstances of the case. The offender will be given sufficient information about the allegations such that they can instruct their ordinary legal representative, and special advocate in relation to those allegations, prior to the special advocate having seen the sensitive national security information.

Proposed sections 105A.14B, 105A.14C and 105A.14D

Proposed sections 105A.14B, 105A.14C and 105A.14D would provide that the AFP Minister may exclude information from post-sentence order applications or materials where the information is national security information, subject to a claim of public interest immunity, or is terrorism material. These provisions are framed to ensure appropriate protections for information while ensuring the offender's right to a fair hearing.

Under section 105A.14B, the AFP Minister is not required to include any information in the application or material provided to the offender or their legal representative if a Minister is likely to take any actions in relation to the information under the NSI Act, or seek an order of a court preventing or limiting disclosure of the information. There are a number of actions that a Minister can take under the NSI Act to protect sensitive information contained within an application or materials for post-sentence order proceedings. For example, the Attorney-General may issue a civil non-disclosure certificate that provides whether sensitive information in an application may be disclosed, to whom and in what form. The NSI Act enables the Attorney-General to provide the document to the offender with the information redacted, and provide summaries of the information or statements of facts that it would be likely to prove.

In all cases, it will ultimately be a matter for the court to determine how information is to be protected in proceedings, balancing the need to protect sensitive information with the need to protect the offender's right to a fair hearing. Furthermore, as noted in the Explanatory Memorandum, except where court-only evidence is used (as discussed above), the material in the relevant application that is ultimately provided to the offender is the same material that the court may consider when determining whether to make or vary a post-sentence order in relation to the offender. For example, if a court orders that sensitive material be redacted or withheld and a summary or statement of facts be provided instead, then the summary or statement of facts will stand in place of the original sensitive material in the substantive proceedings. A court could

then only have regard to the summary or statement of facts during the substantive proceedings, and would have no further regard to the original sensitive material.

Section 105A.14C outlines the obligations of the AFP Minister where information has been excluded from an application on the basis of public interest immunity. If the court upholds the public interest immunity claim and information is excluded from the application on that basis, it cannot be relied upon by either party or the court for the purposes of the proceeding.

Section 105A.14D enables the Minister to apply to the court for an order in relation to the manner in which 'terrorism material' is to be dealt with as part of providing it as part of an application. 'Terrorism material' is material that advocates support for engaging in any terrorist acts or violent extremism, relates to planning or preparing for, or engaging in, any terrorist acts or violent extremism, or advocates joining or associating with a terrorist organisation. Under section 105A.14D, the court may make an order in relation to the manner in which such material is to be dealt with, including that it be provided to the offender's legal representative or be available for inspection by the offender at specified premises. This measure ensures that materials of this nature cannot be disseminated further or used in any way that would pose a risk to the community.

Committee comment

2.18 The committee thanks the Attorney-General for this additional information. The committee notes the Attorney-General's advice that the court-only evidence provisions are exceptional and will only be used in exceptional circumstances where absolutely necessary. The Attorney-General also advised that special advocates for court-only evidence proceedings will provide offenders with a reasonable opportunity to present their case, and that the court is best placed to determine whether a special advocate is necessary on a case-by-case basis.

2.19 The Attorney-General also advised that information the AFP Minister seeks to exclude under proposed sections 105A.14B–105A.14D on either national security grounds, on the basis of public interest immunity, or as terrorism material, will ultimately be a matter for the court to determine. The Attorney-General further advised that where sensitive information is redacted then the redacted or summary version must be relied upon in substantive proceedings, and no regard can be made to the original sensitive materials.

2.20 While acknowledging this additional advice, the committee retains its original scrutiny concerns in relation to this matter outlined in *Scrutiny Digest 14 of 2020.*

2.21 In relation to the amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004*, the provisions provide for the court to make orders in relation to the court's consideration of evidence which has not been provided to

the respondent or their legal representative. The committee considers that the further information provided by the Attorney-General that court-only evidence orders are considered exceptional measures and will only be used in exceptional circumstances should be included in guidance on the face of the bill. The committee's preference would be for this approach to be set out on the face of the bill to provide high level guidance as to when court-only evidence orders may be used in applications for extended supervision orders. The committee considers that this would provide an important safeguard on the use of court-only evidence orders with the aim of ensuring that they are only employed when absolutely necessary, given that the provisions undermine the right to a fair hearing. The inclusion of high level guidance on the face of the bill would allow the courts to have regard to the government's position that such orders should only be used in exceptional circumstances where absolutely necessary when making a decision.

2.22 In light of the information provided by the Attorney-General, and with reference to the committee's ongoing scrutiny concerns in relation to this matter outlined in *Scrutiny Digest 14 of 2020*, the committee requests the Attorney-General's further advice as to whether the bill can be amended to provide high level guidance that the court-only evidence provisions in items 189–210 of Schedule 1 may only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application.

Trespass on personal rights and liberties—expansion of monitoring and surveillance powers[8]

2.23 In *Scrutiny Digest 14 of 2020* the committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of extending significant monitoring and surveillance powers under a number of Acts to persons subject to an extended supervision order, noting that these powers may trespass on a person's rights and liberties.[9]

Attorney-General's response

2.24 The Attorney-General advised:

> The Bill would amend the *Surveillance Devices Act 2004* (SD Act) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to extend the surveillance and monitoring powers which broadly apply to orders made under Division 104 of the Criminal Code to orders made under

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

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 18-20.

Division 105A. The purpose of these amendments is to enhance the ability of law enforcement to protect the community from serious Part 5.3 offences, including by monitoring a person's compliance with, or determining suitability for, a post-sentence order. The scope of these warrants is appropriately limited to offenders who are eligible for, or are subject to, orders made under Division 105A. This means these warrants are only available in relation to terrorist offenders who have been convicted of a specified terrorism offence.

The monitoring and surveillance powers set out in the existing legislation are subject to strict safeguards, limitations and protections, and these arrangements will be extended to post-sentence orders. This includes independent authorisation by eligible judges or nominated Administrative Appeals Tribunal (AAT) members, limits on the duration of surveillance, oversight by the Commonwealth Ombudsman, transparent public reporting and record keeping requirements. In addition, the matters a judge or AAT member must have regard to include the likely value of the information to be obtained under the warrant and the extent of interference with a person's privacy.

The Bill preserves long-standing practices regarding the appropriate decision-maker for intrusive surveillance powers under the TIA Act and SD Act. Under the Bill, these warrants will continue to be issued by independent decision-makers, including AAT members nominated by the Attorney-General. These independent decision-makers play a critical authorisation role in both the TIA Act and SD Act.

The ability for nominated AAT members to authorise the use of these powers is not new. AAT members have played an independent decision-maker role in relation to interception and stored communication warrants under the TIA Act since 1998 and surveillance device warrants in the SD Act since 2004. AAT members undertake this independent decision-maker role in their personal capacity. The skill and experience of AAT members make them ideal candidates to assess applications and make independent decisions which involve balancing of law enforcement or national security interests with affected individuals' privacy and other rights and liberties.

The use of AAT members as independent decision-makers under the TIA and SD Acts is appropriate, necessary and critical to the effective operation of those Acts. In particular, it ensures there is a sufficient pool of decision-makers available to issue warrants sought by law enforcement agencies across Australia.

Committee comment

2.25 The committee thanks the Attorney-General for this additional information. The committee notes the Attorney-General's advice that the monitoring and surveillance powers for post-sentence orders will be subject to strict safeguards, limitations and protections. The Attorney-General also advised that members of the Administrative Appeals Tribunal have the skills and experience to make them ideal

candidates for independent decision making under the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

2.26 While acknowledging this additional advice, the committee retains its original scrutiny concerns in relation to this matter outlined in *Scrutiny Digest 14 of 2020.*

2.27 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of extending significant monitoring and surveillance powers under a number of Acts to persons subject to an extended supervision order, noting that these powers may trespass on a person's rights and liberties.

Crimes Legislation Amendment (Economic Disruption) Bill 2020

Purpose	This bill seeks to improve and clarify Commonwealth arrangements targeting the criminal business model, ensuring that law enforcement has suitable tools to detect illicit financial flows through effective information-gathering, confiscate relevant assets and prosecute responsible individuals
Portfolio	Home Affairs
Introduced	House of Representatives on 2 September 2020
Bill status	Before the House of Representatives

Significant penalties[10]

2.28 In *Scrutiny Digest 13 of 2020* the committee requested the minister's more detailed advice as to the justification for the maximum penalties imposed by each of the proposed offences in Schedule 1 to the bill, particularly addressing relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[11]

Minister's response[12]

2.29 The minister advised:

> General justification
>
> Part 3.1.1 of the *Guide to Framing Commonwealth Offences* (the Guide) provides that a high maximum penalty will be justified where there are strong incentives to commit the offence or where the consequences of the commission of the offence are particularly dangerous or damaging.
>
> The high maximum penalties under the proposed offences are necessary to overcome the strong incentives that currently exist to commit money laundering.
>
> Transnational serious and organised crime (TSOC) groups are primarily motivated by profit, and money laundering is an essential component of their criminal business model. These groups are no longer confined to a

10 Schedule 1, items 9, 13, 17, 21, 27, 31, 35 and 62. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 2-3.

12 The minister responded to the committee's comments in a letter dated 2 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 15 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

particular crime-type or association, but have instead evolved into sophisticated multinational businesses, constantly shifting their operations to create, maintain and disguise illicit financial flows. Money laundering enables these groups to disguise illicitly obtained funds behind a veil of legitimacy, allowing them to realise their profits from criminal activity, hide and accumulate wealth, avoid prosecution, evade taxes and fund further criminal activity.

In this profit-focused environment, demand for money laundering services has increased dramatically, creating financial incentives that have fueled the proliferation of global laundering networks. Money laundering remains extremely profitable within the illicit economy, and networks are able to charge high commissions to move money around the world in a manner that is incredibly difficult to trace. Australian law enforcement experience indicates that these commissions are generally five to ten per cent of the value of the money laundered. This is a considerable sum when one considers the total value of money laundered globally, which the United Nations estimates to be 2-5% of global GDP, or approximately $800 billion - $2 trillion in current US dollars [see UNODC - Money Laundering and Globalisation, available on line at https://www.unodc.org/unodc/en/money-laundering/globalization.htmI].

The high maximum penalties imposed under the proposed offences can also be justified as money laundering has a particularly dangerous and damaging impact on society.

Money laundering remains a fundamental enabler of almost all TSOC activity, allowing profits from crime to be realised, concealed and reinvested in further criminal activity, or used to fund corruption and lavish lifestyles. Money laundering systematically devastates the health, wealth and safety of Australia's citizens through the conduct it enables, such as illicit drug trafficking, terrorism, tax evasion, people smuggling, theft, fraud, corruption and child exploitation. The Australian Institute of Criminology estimates that overall TSOC activity costs Australia up to AUD47.4 billion per year.

Money laundering also directly impacts on Australia's economic wellbeing, distorting markets, generating price instability and damaging the credibility of Australia's institutions and economy. These consequences can deter foreign investors and impede economic growth. Money laundering also diminishes the tax revenue collected by the Australian Government, causing indirect harm to millions of Australians that would otherwise benefit from Government programs funded through this revenue.

Penalty benchmarks

As the Committee points out, part 3.2.1 of the Guide states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of a similar seriousness'. The maximum penalties of the proposed

offences in Schedule 1 are consistent with those imposed under the existing money laundering offences in Division 400 of the Criminal Code.

Offences of a similar kind

As outlined in the table below, the maximum penalty of the existing offences (highlighted in blue) and proposed offences (highlighted in green) reflect: the level of awareness a defendant has as to the link between property (which includes money) and criminal activity; the seriousness of their conduct in relation to this property; and the value of the property.

[**Table can be accessed in the full ministerial response published on the committee's website at https://www.aph.gov.au/senate_scrutiny**].

By expanding on the existing penalty structure under Division 400, the proposed offences enable the legislature to be more precise in specifying the penalties it considers to be appropriate for particular conduct. This provides a greater level of certainty, increasing the deterrent effect of these offences, while ensuring that penalties under the proposed offences can be justified by reference to existing offences.

Offences of a similar seriousness

The most serious of the proposed offences under subsections 400.2B(1)(3) involve laundering property valued at $10,000,000 or more and are punishable by a maximum sentence of life imprisonment. This maximum penalty is the most serious that can be imposed under Commonwealth law, and is currently only applied to abhorrent offences such as people smuggling, espionage, large-scale illicit drug trafficking and terrorism.

The proposed offences under subsections 400.2B(1)-(3) are of similar seriousness to existing offences punishable by life imprisonment as the consequences of committing these offences is often just as damaging.

For example, if an offender commits an offence of dealing with an instrument of indictable crime under subsection 400.2B(1) by providing $10,000,000 directly to a drug syndicate, this would enable the syndicate to purchase approximately 33 to 110 kilograms of cocaine. Even on the most conservative estimates, the commission of the money laundering offence will have allowed the syndicate to possess and sell sixteen times the 'commercial quantity' of cocaine required to attract a maximum sentence of life imprisonment [see item 43 of table 1 of Schedule 2 to the Criminal Code Regulations 2019 and section 304.1 of the Criminal Code].

If the drug syndicate provides $10,000,000 of proceeds from the sale of this cocaine to a person, who subsequently commits a proceeds offence under subsection 400.2B(2) or (3) in disguising the illicit origins of these proceeds, this may have concealed multiple offences punishable by life imprisonment from law enforcement. With the proceeds 'cleaned', the drug syndicate could use these proceeds to buy and resell further commercial quantities of cocaine, or to invest in a lavish lifestyle and

thereby incentivise others to engage in drug offending, enabling the cycle of serious offending to continue.

The offences under subsections 400.2B(1)-(3) will only be triggered by the most serious forms of conduct. In order to commit an offence under subsections 400.2B(1)-(3), the property must be proceeds of indictable crime, proceeds of general crime, or the person must intend that the property will become an instrument of crime. A further requirement is that a person must have a high degree of awareness of the link between the property they are dealing with and criminal activity.

A person will only be liable in relation to property (including money) under the offences where they:

- deal with property that is 'proceeds of indictable crime' while believing it to be 'proceeds of indictable crime' (subsection 400.2B(1)) - for example, dealing with $10,000,000 while believing that it was derived from selling illicit drugs; or
- deal with property intending that it will become an instrument of crime (subsection 400.2B(1)) - for example, providing $10,000,000 to a drug syndicate while meaning to ensure that these funds are used to purchase drugs or aware that this will occur in the ordinary course of events; or
- engage in conduct in relation to property that is 'proceeds of general crime' while believing it to be 'proceeds of general crime' and concealing or disguising its origins (subsections 400.2B(2)-(3)) - for example, concealing the origins of $10,000,000 while believing that these funds to be derived from crime generally.

Committee comment

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that the high maximum penalties for the proposed offences are necessary to overcome the strong incentives to commit money laundering, as per the justification in the *Guide to Framing Commonwealth Offences*. The minister also advised that money laundering has a particularly dangerous and damaging impact on society as it enables transnational and serious organised crime groups to fund criminal activities, which also negatively impacts on the economy.

2.31 The minister also provided further detail as to the range of penalties which apply to the offences with reference to existing money laundering offences of a similar seriousness in Division 400 of the Criminal Code. The minister advised that the most serious of the proposed offences under subsections 400.2B(1)-(3) involve laundering to the value of $10 million or more with a maximum penalty of life imprisonment. The minister further advised that life imprisonment is currently only applied to abhorrent offences such as people smuggling and terrorism which the minister considers are of a similar seriousness to the offences under proposed subsections 400.2B(1)-(3).

2.32 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.33 In light of the detailed information provided, the committee leaves to the Senate as a whole the appropriateness of the penalties imposed by each of the proposed offences in Schedule 1 to the bill, including the maximum penalty of life imprisonment for the offences under proposed subsections 4002B(1)-(3).

Reversal of the legal burden of proof[13]

2.34 In *Scrutiny Digest 13 of 2020* the committee requested the minister's advice as to why it is proposed to reverse the legal burden of proof in this instance and why it is not sufficient to reverse the evidential, rather than legal, burden of proof.[14]

Minister's response

2.35 The minister advised:

> The Committee has requested advice as to why the defence at subsection 400.9(5) reverses a legal burden of proof and why it is not sufficient to reverse an evidential burden. Part 4.3.2 of Guide provides that the defendant should generally bear an evidential burden of proof for an offence-specific defence, unless there are good reasons to depart from this position.
>
> Subsection 400.9(5) imposes a legal burden of proof on the defendant, requiring them to establish, on the balance of probabilities, that they had no reasonable grounds for suspecting that money or property was derived or realised, directly or indirectly, from some form of unlawful activity. A legal burden of proof is higher than an evidential burden, which requires a defendant to merely adduce or point to evidence that suggests a reasonable possibility that a particular matter exists or does not exist.
>
> It is necessary to impose a legal rather than evidential burden on the defendant to ensure that the offences can pierce the 'veil of legitimacy' that money laundering networks frequently use to disguise their activities.
>
> These networks often exploit seemingly legitimate banking products; remittance services; front companies; complex financial, legal and administrative arrangements; real estate and other high-value assets;

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13 Schedule 1, item 62, proposed subsections 400.9(1AA) and (1AB). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 5-6.

> gambling activities; and a range of formal and informal nominee arrangements to conceal proceeds of crime and obscure beneficial ownership. This layering activity generates a paper trail that can be used to establish a 'reasonable possibility' of legitimacy that, in many cases, would be sufficient to meet an evidential burden under subsection 400.9(5) and thereby allow these networks to avoid criminal liability.
>
> An evidential burden may be met by pointing to evidence, even slender evidence, adduced as part of the prosecution case. Hence a defendant could discharge an evidential burden by pointing to an answer provided in a police record of interview which suggested that the money or other property was derived from a legitimate business activity. By imposing a legal burden of proof on the defendant, subsection 400.9(5) ensures that courts look beyond this 'reasonable possibility' to properly examine the genesis and operation of structures used to legitimise transactions, reducing the effectiveness of layering activity.

Committee comment

2.36 The committee thanks the minister for this response. The committee notes the minister's advice that a legal burden of proof is higher than an evidential burden and that this higher burden is necessary to ensure that offences can 'pierce the veil of legitimacy' used by money laundering networks to shield their criminal activities.

2.37 The minister also advised that a defendant may be able to discharge an evidential burden of proof by adducing what may be considered slender evidence that the money or property was derived from legitimate business activities, and that a reversal of the legal burden of proof is needed to ensure the courts look beyond this 'reasonable possibility' to properly examine the genesis and operation of structures used to legitimise transactions, reducing the effectiveness of layering activity.

2.38 The *Guide to Framing Commonwealth Offences* recommends that the explanatory materials should justify why a reversed legal burden of proof has been imposed instead of an evidential burden of proof. In this instance, the committee considers that the explanatory memorandum would benefit from the additional detail provided by the minister in his response.

2.39 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.40 In light of the detailed information provided, the committee leaves to the Senate as a whole the appropriateness of reversing the legal burden of proof for the exception to the new offences in proposed subsections 400.9(1AA) and

400.9(1AB) of the Criminal Code, which would require a defendant to prove that they had no reasonable grounds for suspecting some form of unlawful activity.

Parliamentary scrutiny—section 96 grants to the states[15]

2.41 In *Scrutiny Digest 13 of 2020* the committee requested the minister's advice as to whether the bill can be amended to:

- include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and
- include a requirement that written agreements with the states and territories about grants of financial assistance relating to crime prevention made under proposed Division 4 of Part 4-3 are:
  - tabled in the Parliament within 15 sitting days after being made; and
  - published on the internet within 30 days after being made.[16]

Minister's response

2.42 The minister advised:

> The advice relates to proposed Division 4 of Part 4-3 (the new funding mechanism) of the *Proceeds of Crime Act 2002* (the POC Act), which would allow the Minister for Home Affairs to provide financial assistance to a State or Territory through the COAG Reform Fund.
>
> *The Committee's proposed amendments would be duplicative*
>
> The amendments suggested by the Committee would duplicate existing limitations imposed by Parliament, existing oversight mechanisms and the existing mechanisms through which the terms and conditions on which financial assistance will be provided are made public in appropriate circumstances.
>
> Under proposed subsection 298A(1) of the POC Act, Parliament limits the Minister to only making a grant of financial assistance to a State or Territory for a narrow range of purposes, including crime prevention, law enforcement, drug treatment and/or drug diversion measures. Where the Minister decides that a grant of financial assistance should be made to a State or Territory, proposed sections 298E and 298F of the POC Act further require the relevant amount to be debited from the Confiscated Assets Account and sent through the COAG Reform Fund to the State or Territory recipient. The new funding mechanism would not circumvent any existing

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15 Schedule 7, item 55. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 7-8.

approval processes required to make payments to States, and large programs of expenditure would still be subject to the budget approval process.

It is also important to note that the new funding mechanism operates as an alternative to the existing mechanism under section 298 of the POC Act, which allows the Minister to approve expenditure to organisations for the same purposes. In practice, the new funding mechanism is only likely to be used in a narrow range of circumstances, usually where a State or Territory is best placed to deliver a particular measure. For example, if the Commonwealth wishes to provide financial assistance to an established State program to deliver grants to schools to improve security infrastructure, the Commonwealth could authorise payments to the State via the COAG Reform Fund.

The new funding mechanism, like the existing mechanisms under section 298, is also limited by the balance of the Confiscated Assets Account pursuant to subsection 80(1) of the *Public Governance Performance and Accountability Act 2013*.

The conditions by which financial assistance is provided will be outlined under National Partnership Agreements with the States, which are subject to well-established transparency and oversight mechanisms. National Partnership Agreements are typically published on the Federal Financial Relations website, although this is not a statutory requirement, and Agreements may also be outlined through an exchange of letters between Ministers.

To effect payment under an Agreement, the relevant State must provide evidence to the Department of Home Affairs that a key milestone has been met. If the Department is satisfied, it will submit a payment request to Treasury, which will then authorise the payment if the payment request complies with the Agreement. This authorisation is formalised in a determination by a Treasury portfolio minister that is subsequently lodged on the Federal Register of Legislation.

Once payment is made to the relevant State or Territory, it will be required to abide by any applicable oversight and transparency mechanisms when delivering the funded program. These mechanisms differ from State to State.

Committee comment

2.43 The committee thanks the minister for this response. The committee notes the minister's advice that the committee's proposal to amend the bill to include high level guidance as to the terms and conditions of a grant of financial assistance, and that written grant agreements be tabled in the parliament, would be a duplication of existing limitations and oversight mechanisms. The minister advised that proposed subsection 298A(1) of the *Proceeds of Crime Act 2002* provides that the minister may

only make financial assistance grants to States and Territories for a narrow range of purposes such as crime prevention and law enforcement.

2.44 In addition, the minister advised that the grant conditions will be outlined under National Partnership Agreements which are subject to established transparency and accountability mechanisms, and which are generally published on the Federal Financial Relations website, although this is not a statutory requirement. The minister further advised that agreements may also be outlined through an exchange of letters between ministers.

2.45 While acknowledging the minister's advice, the committee reiterates that section 96 of the Constitution confers on the Parliament the power to make grants to the states and to determine the terms and conditions attaching to them. Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

2.46 While the committee acknowledges that grants of financial assistance may only be made for a narrow range of purposes as set out in the bill, it remains the case that the bill contains no guidance as to the terms and conditions on which financial assistance may be granted, other than to specify that the terms and conditions must provide for the circumstances in which the grant recipient must repay amounts to the Commonwealth.

2.47 In addition, while the minister advised that agreements are generally published on the Federal Financial Relations website, this is not a statutory requirement and there is no requirement to table the agreements in the Senate. In this regard, the committee notes that the process of tabling documents in the Senate alerts senators to their existence and provides opportunities for debate that are not available where documents are only published online.

2.48 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- **leaving the terms and conditions on which financial assistance to the states relating to crime prevention and law enforcement may be granted to be determined by the executive; and**
- **not including a requirement that agreements between the Commonwealth and the states relating to grants of financial assistance must be published online and tabled in the Parliament.**

Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020

Purpose	This bill seeks to give effect to the Commonwealth Government's decision to implement recommendations arising from the *Review of the Higher Education Quality and Standards Agency Act 2011*, to give effect to an outstanding recommendation from the *Review of the impact of the TEQSA Act on the higher education sector*, and to improve regulation of Australia's higher education sector
Portfolio	Education
Introduced	House of Representatives on 2 September 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation[17]

2.49 In *Scrutiny Digest 13 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the standards making up the Higher Education Standards Framework, and matters relating to how the quality of research undertaken by higher education providers will be assessed, to delegated legislation;
- whether the bill can be amended to include the standards and matters relating to how the quality of research undertaken by higher education providers will be assessed on the face of the primary legislation; and
- whether, if it is not considered appropriate to include the standards and matters relating to the quality of research on the face of the primary legislation, at least high-level guidance in relation to what may be included in the standards made under proposed subsection 58(1) and instruments made under proposed subsection 59A(7) can be set out in the primary legislation.[18]

17 Schedule 1, items 14 and 15, proposed subsection 58(1) and proposed section 59A. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 12-13.

Minister's response[19]

2.50 The minister advised:

1. Should the Threshold Standards remain as a standalone legislative instrument or be incorporated into the TEQSA Act?

The Higher Education Standards Framework should remain in delegated legislation rather than be incorporated into the TEQSA Act.

As I have outlined above, the process that is mandated by the TEQSA Act to make or amend the Threshold Standards is multi-layered. Section 58 of the TEQSA Act requires that the Minister must not make a standard unless:

- a draft of the standard has been developed by the Panel
- the Minister has consulted with each of the following about the draft:
  - the Council consisting of the Ministers for the Commonwealth and each State and Territory responsible for higher education (i.e. the Education Council)
  - if the Minister is not also the Research Minister (i.e. the Minister responsible for the Australian Research Council Act 2001)—the Research Minister
  - TEQSA.
- the Minister has had regard to the draft developed by the Panel, and any advice or recommendations received from the Panel or those other parties.

This process is time consuming but delivers a very important outcome—engagement with and ownership of the standards by higher education stakeholders, including the providers that are subject to regulation against the standards, and by all jurisdictions in the Federation, which have tacitly but not formally delegated administration of higher education policy and funding arrangements to the Commonwealth.

In addition to these process constraints, the requirements for appointing members of the Panel, set out in Subsection 167(2) of the TEQSA Act ensure that, collectively, the Panel's membership has broad knowledge and expertise in both university and non-university higher education delivery and standards development and has regard to the perspectives of different states and territories, students and provider staff. Subsection 168(2) of the TEQSA Act also specifies that 'the Panel must consult interested parties when performing its functions'. This means that the expert advisory body with responsibility for developing any draft new or amended standards is itself broadly representative of sector

19 The minister responded to the committee's comments in a letter dated 26 October 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 15 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

perspectives and must directly engage with those impacted by its work before providing advice to government. This ensures the Panel can give the Government of the day unvarnished independent advice on the best approach. Indeed, the Panel's advice has been relied on repeatedly by the Government not just to guide proposed changes to the Threshold Standards but other matters critical to assuring the quality of Australian higher education.

The primary function for the Threshold Standards is to provide a basis for TEQSA as the independent national regulator, to assure the quality of higher education delivery. These are not the funding rules, which are set out in the *Higher Education Support Act 2003*, but, rather, reflect the shared understanding and agreement of higher education providers and other relevant stakeholders as to what 'quality' means in higher education delivery.

The process and stakeholder input required to amend or create new standards is set out in the TEQSA Act. But while primary legislation can appropriately constrain a delegated legislation-making process, it would be unusual to similarly constrain the power of Parliament to make changes if the Threshold Standards were incorporated directly within the TEQSA Act. This could put at risk the acceptance, ownership and effective consent of those being regulated to the terms on which their operation is permitted.

Quality standards in any field of endeavour are inevitably dynamic and need constant monitoring, review and occasional updating to reflect new learnings, shared experience and evolving good practice. The committee noted that the Threshold Standards have only been amended twice since their creation in 2011. The context and nature of these amendments needs to be acknowledged, however. As noted in Bills Digest No. 14, 2020-21, the initial (2011) Threshold Standards were created out of the National Protocols for Higher Education Approval Processes, agreed by the Commonwealth and state and territory higher education ministers in 2000 and revised in 2007. The changes made since their creation involved minor technical amendments to fix some anomalies in 2013 and a complete rewrite of the entire instrument in 2015, apart from the Provider Category Standards—consideration of which were deferred to a subsequent separate review.

The 2015 Threshold Standards instrument delivered a more streamlined and integrated standards framework that removed a significant amount of duplication and reflected current practice of higher education delivery. It followed an intensive review by the Panel over nearly three years, that involved wide consultation with the higher education sector and other stakeholders, including state and territory governments, including 230 written submissions over the entire period. This review set a high benchmark for future Panel activity. The instrument came into effect from January 2017 and involved significant adjustment by the higher education sector to understand the different approach, and by TEQSA to completely

revise its guidance and support materials. The last three years has seen the new standards bedded down. This includes through providers gradually adopting them as a framework for their internal management and governance which, if pursued in this way, offers the promise of significant reductions in administrative burden associated with regulatory assessments.

Now the Provider Category Standards and criteria for awarding self-accrediting authority have also been comprehensively reviewed by an independent reviewer, with further scrutiny and consultation by the Panel—both of which engaged widely with stakeholders. Professor Coaldrake held a large number of both open and targeted stakeholder meetings and received 67 written submissions to his review. In developing its advice, the Panel held a stakeholder forum with around 250 attendees in November 2019, a webcast and various other stakeholder meetings, received over 40 written responses to a February 2020 consultation paper and consulted extensively with TEQSA. In a very real sense, the PCS Review is the final part of the initial strategic review.

It is not the case that the Standards lack dynamism or change. Far from it. The combination of the initial Panel and subsequent PCS reviews will have seen the Threshold Standards comprehensively analysed and rewritten to reflect contemporary best practice. The capacity for that level of sector input to, ownership and acceptance of the content of the standards would, I feel, be compromised were they to be set in stone by incorporation into primary legislation.

2. Should updated research requirements for Australian University category providers proposed by the PCS Review be included in the Threshold Standards or written into the TEQSA Act?

It is appropriate that the updated research requirements for the Australian University provider category recommended by the PCS Review remain part of the Threshold Standards and not be separately written into the TEQSA Act.

Recommendation 5 of the PCS Review report states:

> 'Along with teaching, the undertaking of research is, and should remain, a defining feature of what it means to be a university in Australia; a threshold benchmark of quality and quantity of research should be included in the Higher Education Provider Category Standards. This threshold benchmark for research quality should be augmented over time.'

Professor Coaldrake proposed that by 2030, universities should be expected to undertake research 'at or above world standard' in at least three or 50 per cent of the broad fields of education it delivers, whichever is greater. Until that level of performance is required, there should be a lower benchmark of at least three or 30 per cent of the broad fields of education the university delivers, whichever is greater.

The Australian Government's response to the review, while recognising that research benchmarks are ideally set at a world-class standard, notes that such benchmarks 'must also recognise work of national standing in Australia-specific fields such as Australian studies and Australian literature'.

While the specific measures for research quality recommended by the PCS Review and Australian Government response are newly defined, the issue they address is not new and has been a core element of the Threshold Standards from their creation in 2011. Both the 2011 and 2015 Threshold Standards instruments specified that the undertaking of research is a fundamental requirement for university status. They outline that an Australian University category provider must, among other things undertake:

> 'research that leads to the creation of new knowledge and original creative endeavour at least in those (at least three) broad fields of study in which Masters Degrees (Research) and Doctoral Degrees (Research) are offered.'

Similar research requirements apply in both the Australian University College and Australian University of Specialisation categories but with progressively lower numbers of fields of study specified.

Over several years, however, TEQSA has identified that the lack of an explicit indication as to the quality of research activity required for registration as a university makes the assessment of whether new applicants or existing providers meet these standards difficult. Currently these judgments are left to TEQSA with no formal guidance as to the approach it should take.

In effect, TEQSA has had to develop its own policy on this, which is outlined in some detail in its application guide for registration in a university category, including:

> 'whether the quality and quantity of research being undertaken meets the expectations of the national and international academic community for an Australian university. In assessing the quality of research, TEQSA will have regard to the assessment model used by the Australian Research Council (ARC) for the most current Excellence in Research for Australia evaluation, including for the quality of research outputs.'

In its submission to the PCS Review, TEQSA recommended that:

> 'Requirements for research included in any future university category should include indications of the quantity and quality of research required and provide support for TEQSA to undertake benchmarking against comparable providers registered in university categories.'

The new benchmarks seek to clarify this measurement by setting principles-based thresholds that can be judged using readily available metrics such as the Excellence in Research for Australia assessments conducted by the ARC. This approach is not dissimilar from the approach TEQSA has articulated in its application guide. If a provider is not currently included in such an assessment framework—e.g. a new applicant for university status—they would need to offer other evidence of a robust and quality research program, exactly as occurs now, drawing on measures such as published and peer-reviewed research papers, etc. Providers will have the added benefit, though, of a clearly articulated benchmark to work towards.

Rather than imposing a new requirement, the research benchmarks clarify the existing requirement. Professor Coaldrake is explicit about this in his final report of the PCS Review, noting:

> 'The research criteria have been revised to provide more guidance and scope for TEQSA regulation including setting requirements for quality and quantity of research.'

The benchmarks proposed by Professor Coaldrake are relatively modest, especially in the first 10 years of operation. On the basis of publicly available Excellence in Research for Australia assessments alone, it is not anticipated that any public university would have difficulty achieving the initial benchmark of research in at least three or 30 per cent of the broad fields of education the university delivers, whichever is greater. No university has indicated that it fears it will not meet the proposed benchmarks. In its advice to the Minister on implementing the PCS Review recommendations, the Higher Education Standards Panel suggested giving effect to Professor Coaldrake's '2030' timeframe for the higher threshold as 'within 10 years after entry to the 'Australian University' category', which would apply a full 10 year transition period to existing providers moving to assessment under the revised Threshold Standards as well as to providers entering the category for the first time in the future.

It should also be noted these benchmarks are about quality rather than quantity or volume. There is nothing inherent in the benchmarks that would disadvantage a smaller institution. The 'research of national standing' benchmark ensures that smaller research programs that focus on issues that respond to important community and national needs but may not be able to be compared with world standard will also be acknowledge, respected and valued.

As a threshold of quality to be achieved, these benchmarks belong most appropriately in the Threshold Standards along with the other defined threshold quality measures across the full range of institutional activity necessary to deliver higher education. It would also be inappropriate to specify this one threshold in the TEQSA Act, while leaving other threshold measures in a legislative instrument—especially considering the related measure in the current Threshold Standards is contained in the legislative

instrument. The same arguments articulated above about the need for sector-engaged development and implementation apply here too. Moving this threshold into the TEQSA Act would reduce the sector's 'ownership' and capacity to influence should it be the subject of future reconsideration.

3. If the Threshold Standards and research requirements remain in a legislative instrument, should the TEQSA Act contain high level guidance on their content?

I do not consider it is necessary to incorporate specific guidance on the content of the Threshold Standards in the TEQSA Act. The process mandated by the TEQSA Act to amend the Threshold Standards means that they cannot change without significant scrutiny by higher education stakeholders, the expert advice of the Higher Education Standards Panel and TEQSA, input from state and territory governments and finally the opportunity for Parliamentary review. As ably demonstrated by the change process currently underway, this means that precedence and consensus play a very significant role in guiding the evolution or replacement of content within the Threshold Standards, to the point that any guidance overlayed by provisions of the TEQSA Act could be seen as stifling the opportunity for reform and innovation. Indeed, amendments in the Bill respond to advice from the Panel and independent review findings that even the very high level guidance previously embedded in the TEQSA Act was unhelpful and should be removed.

The 2011 TEQSA Act effectively included high level guidance on the content of both the 'threshold' and 'other' standards by naming four different types of threshold standards and three types of additional standards. These were:

<u>Threshold standards</u>

- the Provider Registration Standards
- the Provider Category Standards
- the Provider Course Accreditation Standards
- the Qualification Standards.

<u>Other standards</u>

- the Teaching and Learning Standards
- the Information Standards
- the Research Standards.

Even this broad guidance as to the content of the standards proved unhelpful, however. A significant problem found with this approach was that the initial Threshold Standards, being transaction focused and based around different types of regulatory assessments, inevitably led to a great deal of duplication of content within the different types of threshold standards. Many quality issues relevant to provider registration, for

example, are also relevant to course accreditation but were restated in those original standards.

Only the Threshold Standards were ever made. No effort was made to create Teaching and Learning Standards, Information Standards or Research Standards. In fact, the initial Threshold Standards included their own content relating to teaching and learning, information and research. So much so, that specialised standards in those areas were unnecessary and would only have increased the level of duplication across statutes.

Perceptions change over time and the 2012-14 review by the inaugural Higher Education Standards Panel proposed moving to a more integrated standards framework against seven activity domains that largely removed duplication. This new approach is reflected in the 2015 legislative instrument and represented a significant change in approach.

The 2017 Review of the Impact of the TEQSA Act on the Higher Education Sector, undertaken by Deloitte Access Economics, agreed that the different types of standards should be removed from the TEQSA Act to better facilitate adoption of the integrated standards framework recommended by the Panel. Three types of non-threshold standards—Teaching and Learning Standards, Information Standards and Research Standards—were removed in 2019 through the *Tertiary Education Quality and Standards Agency Amendment Act 2019*. The current Bill will remove the four types of Threshold Standards specified Provider Registration Standards, Provider Category Standards, Provider Course Accreditation Standards and Qualification Standards, leaving just one overarching category of 'Threshold Standards'. Provision for a minister to make 'other standards against which the quality of higher education can be assessed' if desired, at Section 58(1)(h), is retained, however. This could include, for example, where the Government wished to describe aspirational standards that recognised quality delivery in a particular area that are above the minimum threshold required for registration.

The experience, so far, with the Higher Education Standards Framework suggests that—at least for these standards—even high level guidance on content can present a barrier to innovation. It would not be useful to include guidance specifying the content of either the Threshold Standards or specific elements within those standards—such as the research benchmarks—in primary legislation, given the evolving nature of stakeholder perspectives and objectives. For the Higher Education Standards Framework, the protections built into the process to amend or create new standards provides adequate protection to ensure the outcome is well considered and sector-appropriate.

Committee comment

2.51 The committee thanks the minister for this response. The committee notes the minister's advice that the Threshold Standards should remain in delegated

legislation due the dynamic nature of the standards and the need for flexibility and in-depth and ongoing consultation.

2.52 The committee also notes the minister's view that the research requirements should remain part of the Threshold Standards as opposed to being incorporated into the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act). The minister advised that moving the research requirements to the TESQA Act would be inconsistent with other threshold measures which are set out in legislative instruments, and that this would also reduce the sector's ownership and influence over the standards in the future.

2.53 In addition, the committee notes the minister's advice that it is not appropriate to incorporate high-level guidance on the content of the Threshold Standards into the TEQSA Act. The minister advised that including high level guidance in the TEQSA Act in the past created barriers to innovation and was unhelpful. The minister also advised that the TEQSA Act requires consultation and scrutiny of amendments to the Threshold Standards, and this plays a significant role to the point that guidance in the TEQSA Act may stifle reform and innovation.

2.54 The committee welcomes the minister's detailed advice however, from a scrutiny perspective, reiterates its concerns that significant matters, such as the standards making up the Higher Education Standards Framework, and matters relating to how the quality of research undertaken by higher education providers will be assessed, should be included on the face of primary legislation.

2.55 The committee considers that the information provided does not wholly support the argument that the standards are more appropriate for delegated legislation. Incorporating the standards into the primary legislation would not prevent changes being made to the standards, while at the same time such an approach would provide a higher level of parliamentary oversight and control as compared to delegated legislation. The minister's advice that a long period of consultation has been undertaken in relation to reviews of the standards shows the significant nature of the standards and their impact on the sector, thus making them more appropriate for the full scope of parliamentary scrutiny via their inclusion in primary legislation.

2.56 Furthermore, it is unclear to the committee why the same level of consultation could not be undertaken prior to introducing primary legislation to amend the standards into the Parliament. In this regard, it would be possible to include a requirement for regular review of the standards on the face of the primary legislation.

2.57 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.58 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant matters, such as the standards making up the Higher Education Standards Framework, and matters relating to how the quality of research undertaken by higher education providers will be assessed, to delegated legislation.

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

Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020

Purpose	This bill seeks to amend the *Radiocommunications Act 1992* to implement recommendations of the 2015 Spectrum Review (the Spectrum Review) and fulfil the Australian Government's commitment to modernise the legislative framework for spectrum management
Portfolio	Communications, Cyber Safety and the Arts
Introduced	House of Representative on 27 August 2020
Bill status	Before the Senate

Computerised decision making[20]

2.60 The committee initially scrutinised this bill in *Scrutiny Digest 12 of 2020* and requested the minister's advice.[21] The committee considered the minister's response in *Scrutiny Digest 14 of 2020* and requested the minister's further advice as to whether the minister proposes to bring forward amendments to the bill to:

- limit the types of decisions that can be made and powers that may be exercised by computers on the face of the primary legislation;
- provide that only decisions and powers prescribed in a legislative instrument may be made or exercised by computers; and/or
- provide that the ACMA must, before determining that a type of decision can be made or power may be exercised 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 or power to be exercised by a computer rather than a person.[22]

2.61 The committee also requested that the minister lodge an addendum to the bill's explanatory memorandum to include information that the minister provided to the committee in his letter of 2 October 2020.

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20 Schedule 8, item 10, proposed section 305A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2020*, pp. 12-14.

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 5-8.

Minister's response[23]

2.62 The minister advised:

> The Committee has requested that an Addendum to the Explanatory Memorandum be tabled, including the key points from the information from my letter of 2 October 2020 concerning interim bans and amnesties, computerised decision making, and the delegation of administrative power to accredited persons. I thank the Committee for its review of these matters and an Addendum to the Explanatory Memorandum will be tabled in the Parliament as soon as possible addressing these matters.
>
> […]
>
> I have given careful consideration to the additional matters raised by the Committee. Noting the matters I raised in my letter of 2 October explaining the rationale for the provision as presented in the Bill, which will be included in the Addendum to the Explanatory Memorandum, I do not intend to bring forward amendments of this kind at this time.

Committee comment

2.63 The committee thanks the minister for this response. The committee welcomes the minister's advice that an addendum to the explanatory memorandum will be tabled, which will include the key informational points from the minister's letter of 2 October 2020 in relation to interim bans and amnesties, computerised decision-making and the delegation of administrative power to accredited persons.

2.64 The committee thanks the minister for tabling the addendum to the explanatory memorandum in the House of Representatives on 11 November 2020.

2.65 The committee also notes the minister's advice that he does not intend to bring forward any amendments to proposed section 305A as requested by the committee. The committee reiterates its scrutiny concerns in relation to the power for computerised decision-making in proposed section 305A of the bill. The committee reiterates that administrative law typically requires decision makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the

23 The minister responded to the committee's comments in a letter dated 29 October 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 15 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

decision-maker taking specified matters into account or forming a particular state of mind.

2.66 The committee acknowledges that there is merit in improving the timeliness and accuracy of decision-making, and notes there are mechanisms in place to ensure that errors made by the operation of a computer program can be quickly corrected. However, from a scrutiny perspective, the committee does not consider that the minister's response has provided an adequate justification for allowing all of the ACMA's administrative functions to be assisted or automated by computer programs (other than decisions reviewing other decisions).

2.67 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of permitting the AMCA to arrange for the use of computer programs for any decisions, powers or obligations it has under the *Radiocommunications Act 1992* and any legislative instruments made under the Act.

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*.