The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 17 of 2020

2 December 2020

ISSN 2207-2004 (print)
ISSN 2207-2012 (online)

This document was prepared by the Senate Standing Committee for the Scrutiny of Bills and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Current members

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

Secretariat

Mr Glenn Ryall, Secretary

Ms Eloise Menzies, Principal Research Officer

Ms Hannah Wilkins, Senior Research Officer

Ms Georgia Fletcher, Legislative Research Officer

Committee legal adviser

Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_scrutiny

Contents

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.

Climate Change (National Framework for Adaptation and Mitigation) Bill 2020

Purpose	This bill seeks to establish a national climate change adaptation and mitigation framework and establish the Climate Change Commission
Sponsor	Ms Zali Steggall OAM MP
Introduced	House of Representatives on 9 November 2020

Significant matters in non-legislative plan[1]

1.2 Clause 30 of the bill provides that the minister must prepare an emissions reduction plan setting out the policies and strategies for meeting each emissions budget. Subclause 30(3) provides for a range of matters that the plan must address including sector-specific policies to reduce emissions and removals of greenhouse gases and policies, strategies and proposals for the deployment and development of low emissions technologies, amongst other matters. An emissions budget is the amount of emissions for an emissions budget period expressed as a net amount of carbon dioxide equivalent.[2]

1.3 The emissions reduction plan is not a legislative instrument. The bill provides that the emissions reduction plan must be tabled in the Parliament within 15 sitting days of each House after the plan is completed and be published on the Commission's website as soon as practicable after it is first tabled.[3]

1.4 The committee considers that not providing for the emissions reduction plan in a legislative instrument means that there would be little opportunity for Parliament to effectively scrutinise and have ultimate control over the plan. The committee notes that the plan would be tabled in the Parliament which would

1 Clause 30. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Subclause 26(2).

3 Subclause 30(5).

provide an opportunity for debate but that no other parliamentary oversight would be available. In addition, the committee notes that the emissions reduction plan is of relevance to the emissions budget which provides for the amount of emissions per budget period. The committee considers that the emissions budget is a significant matter and the factors of relevance to the budget, including the emissions reduction plan, should therefore be subject to the full range of parliamentary scrutiny and oversight mechanisms.

1.5 In this regard, the committee notes that the explanatory memorandum provides no justification as to why it is necessary and appropriate to exclude the emissions reduction plan from parliamentary disallowance.

1.6 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the bill providing for the minister to make an emissions reduction plan other than by disallowable legislative instrument.

Corporations Amendment (Corporate Insolvency Reforms) Bill 2020

Purpose	This bill seeks to implement government insolvency reforms intended to reduce the cost of external administration for small businesses and the compliance burden for insolvency practitioners
Portfolio	Treasury
Introduced	House of Representatives on 12 November 2020

Reverse evidential burden of proof

Strict liability offences[4]

1.7 Item 1 of Schedule 1 seeks to insert proposed section 453F into the *Corporations Act 2001* (the Act). Proposed subsection 453F(1) requires directors of a company under restructuring to help the restructuring practitioner. Directors must, at the times and in the manner reasonably required by the restructuring practitioner, attend on the practitioner,[5] give the practitioner information about the company's business, property, affairs and financial circumstances,[6] and allow the practitioner to inspect and copy the company's books.[7]

1.8 Failure to comply with proposed subsection 453F(1) is a strict liability offence[8] with a maximum civil penalty of 120 penalty units.[9] The offence does not apply if a person has a reasonable excuse.[10] The defendant bears the evidential burden of proof in relation to whether they have a reasonable excuse.

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

---

4 Schedule 1, item 1, proposed section 453F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

5 Proposed paragraph 453F(1)(a).

6 Proposed paragraph 453F(1)(b).

7 Proposed paragraph 453F(1)(c).

8 Proposed subsection 453F(3).

9 Proposed subsection 453F(2).

10 Proposed subsection 453(4).

1.10 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed section 453F has not been addressed in the explanatory materials, which only state that 'in considering the imposition of this offence, regard has been had to the Guide to Framing Commonwealth Offences'.[11]

1.11 In addition, the committee notes that the *Guide to Framing Commonwealth Offences* states that 'an offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences'.[12] In this regard the committee notes that no explanation has been provided in the explanatory memorandum as to why the offence-specific defence of a reasonable excuse is appropriate in relation to proposed section 453F. The explanatory memorandum does not set out whether the general defences in the Criminal Code including duress, mistake or ignorance of fact, intervening conduct or event, and lawful authority, are open to a defendant. Nor does it set out whether consideration was given to designing a more specific defence for proposed section 453F.

1.12 Further, under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[13] In this regard the explanatory memorandum explains:

> The imposition of an offence is appropriate in this instance as a failure of the directors of a company to attend on and provide the specified information to the small business restructuring practitioner may prevent the practitioner from making an accurate declaration to creditors in relation to a proposed plan. Strict liability offences are appropriate in

11 Explanatory memorandum, p. 25.

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

13 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

these circumstance, as it is necessary to strongly deter misconduct that can have serious detriment for creditors.[14]

1.13 As the explanatory materials do not sufficiently address these issues, the committee requests the Treasurer's advice as to:

- **why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in proposed subsection 453F(4), and whether general defences in the Criminal Code apply to an offence under proposed section 435F or regard was given to providing for a more specific defence than that of a reasonable excuse; and**
- **the justification for providing, in proposed subsection 453F(3), that the offence is an offence of strict liability.**

1.14 The committee's consideration of the above issues will be assisted by the Treasurer explicitly addressing relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[15]

Reverse evidential burden of proof[16]

1.15 Item 1 of schedule 1 seeks to insert proposed section 453L into the Act. Proposed subsection 453L(1) provides that a person who is a director of a company contravenes this section if the company is under restructuring and the company purports to enter into a transaction or dealing affecting the property of the company and the director approves that action.[17] It is also a contravention for a director of a company under restructuring to purport to enter into a transaction or dealing affecting the property of the company on behalf of the company.

1.16 Proposed subsections 453L(2) and (3) provide for specific circumstances in which there will not be a contravention of proposed section 453L. These proposed subsections appear to provide offence-specific defences which appear to reverse the evidential burden of proof.

1.17 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require

---

14 Explanatory memorandum p. 25.

15 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22-25 and 50-52.

16 Schedule 1, item 1, proposed subsections 453L(2) and (3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

17 Proposed subsection 453L(1).

a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.18 In this instance it appears the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter). However, the committee expects any such reversal of the evidential burden of proof to be justified. In this instance, neither the bill nor explanatory memorandum confirms whether the offence-specific defences in proposed subsections 453L(2) and (3) reverse the evidential burden of proof.

1.19 As neither the bill nor the explanatory materials address this issue, the committee requests the Treasurer's advice as to whether proposed subsections 453L(2) and (3) provide for offence-specific defences which reverse the evidential burden of proof, and if so, why this is necessary and appropriate. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[18]

Reverse evidential burden of proof[19]

1.20 Item 1 of Schedule 1 seeks to insert proposed section 456B into the *Corporations Act 2001*. Proposed subsection 456B(1) provides that a person must not consent to be appointed nor act as restructuring practitioner for a company or for a restructuring plan. Proposed subsection 456B(3) provides that an offence based on proposed subsection 456B(1) is a strict liability offence.

1.21 Proposed subsection 456B(2) provides an offence-specific defence for persons who are registered liquidators. The defendant bears the evidential burden of proof in relation to this matter.

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

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

---

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

19 Schedule 1 item 1 proposed section 456B. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

> Strict liability offences reduce non-compliance, which bolsters the integrity of the new debt restructuring process. The reversal of the evidential burden of proof is appropriate in this instance as the information – relating to the defendant's registration as a liquidator – is peculiarly within the knowledge of the defendant. Further, the reversal of the evidential burden is proportionate as record keeping in this instance does not unduly burden the defendant.
>
> In considering the imposition of this offence, regard has been had to the Guide to Framing Commonwealth Offences.[20]

1.24 The committee does not consider whether a defendant is registered as a liquidator to be peculiarly within the knowledge of the defendant. The committee notes that it appears liquidators must register with the Australian Securities and Investments Commission (ASIC), who maintain a publicly available list of registered liquidators on their website.[21]

1.25 In light of this the committee requests the Treasurer's advice as to:

- **why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed section 456B; and**
- **how the fact that a person is a registered liquidator is peculiarly within the knowledge of the defendant in light of the fact that this information appears to be publicly available on the ASIC website.**

1.26 The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[22]

Significant matters in delegated legislation[23]

1.27 The bill seeks to insert a range of powers to prescribe matters in delegated legislation into the Act.

---

20 Explanatory memorandum, p. 20.

21 See ASIC's list of registered liquidators accessible at https://asic.gov.au/for-finance-professionals/registered-liquidators/.

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

23 A range of items in schedule 1, 2 and 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

1.28 Schedule 1 to the bill seeks to insert:

- proposed paragraph 453A(b) in relation to when restructuring begins and ends;
- proposed section 453C in relation to eligibility criteria for restructuring;
- proposed section 453E in relation to functions, duties and powers of the restructuring practitioner;
- proposed subsection 453L(4) in relation to conducting the business of the company during restructuring;
- proposed section 454N in relation to a stay on enforcing rights merely because the company is restructuring;
- proposed subsection 455A(3) in relation to proposing a restructuring plan;
- proposed section 455B in relation to restructuring plans (including proposed subsection 455B(8) in relation to information (including personal information) that must be given in relation to a restructuring plan);
- proposed section 456G in relation to rights, obligations and liabilities of a company and its officers in relation to the restructuring practitioner;
- proposed section 458B in relation to powers of the Court; and
- proposed section 588GAAB in relation to safe harbour for companies under restructuring.

1.29 Schedule 2 to the bill seeks to insert:

- proposed section 588GAAC in relation to temporary relief for companies looking for a restructuring practitioner.

1.30 Schedule 3 to the Bill seeks to insert:

- proposed section 500AC in relation to when a liquidator must cease to follow the simplified liquidation process; and
- proposed subsections 500AE(1) and (3) in relation to the simplified liquidation process.

1.31 The committee's view is that matters which may be significant to the operation of a legislative scheme should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. 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. In this regard, the committee notes that while some of these matters have been addressed in the explanatory memorandum the information provided is generally insufficient to justify the prescription of so many delegated legislation making powers.

1.32 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.33 The committee therefore requests the Treasurer's detailed advice as to why it is necessary and appropriate to leave each of the above matters to delegated legislation.

Export Control Amendment (Miscellaneous Measures) Bill 2020

Purpose	This bill seeks to amend the *Export Control Act 2020* to support the implementation of the new export control framework and Australia's agricultural export industry and stakeholders
Portfolio	Agriculture
Introduced	House of Representatives on 11 November 2020

Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)[24]

1.34 Section 386 of the *Export Control Act 2020* (the Act) provides that rules made under the Act may provide for matters in relation to the review of decisions relating to tariff rate quota entitlements. Existing subsection 386(3) of the Act provides the rules may modify the operation of subsection 43(1) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) in relation to the review of such decisions. Items 10, 12 and 13 of Schedule 1 to this bill seek to modify existing subsections 386(1), (2) and (3) of the Act.

1.35 Items 10 and 12 seek to extend the power for the rules to prescribe modifications to the internal review provision in existing subsection 383(4) of the Act to reviewable decisions made in relation to tariff rate quota certificates. Item 13 seeks to provide that the rules may modify the operation of subsection 43(1) of the AAT Act in its application to reviews of decisions relating to tariff rate quota certificates.

1.36 A provision that enables delegated legislation to amend or modify primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by the 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 a Henry VIII clause to be provided in the explanatory memorandum. In this instance, the explanatory memorandum provides no justification as to why it is necessary and appropriate for rules to modify the operation of the Act or the AAT Act. The committee's scrutiny concerns in this regard are heightened by the fact that the

24 Schedule 1, items 10, 12 and 13. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

delegated legislation may make modifications in relation to review of decisions which may affect an individual's right to a fair hearing.

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

- **why it is considered necessary and appropriate to allow delegated legislation to modify the operation of the Act and the AAT Act, and the circumstances in which it is envisaged that these powers are likely to be used; and**
- **whether the modification of the operation of the Act or the AAT Act may trespass on an individual's right to a fair hearing.**

Incorporation of external materials as in force from time to time
Significant matters in non-legislative documents[25]

1.38 Item 14 of Schedule 1 seeks to insert modified paragraph 432(3)(g) and new paragraph 432(3)(h) into existing subsection 432(3) of the Act. Subsection 432(3) provides that the rules prescribed under the Act may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification, a range of specified external documents and materials as in force or existing from time to time.

1.39 Existing paragraph 432(3)(g) provides that the rules may incorporate any matter contained in an instrument or writing that sets out or provides a method for calculating the tariff rate quota for the importation of a kind of goods into a country, and is made by the responsible regulatory authority or body. The bill seeks to modify this paragraph to clarify that the paragraph applies to imports into a country from Australian territory. Proposed paragraph 432(3)(h) would allow the rules to incorporate any matter contained in an agreement between Australia and another country or a body (for example, the European Union) that sets out, or provides a method for calculating, the tariff rate quota for the importation of a kind of goods into a country covered by the agreement from Australian territory.

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

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);

---

25 Schedule 1, item 14, proposed paragraphs 432(3)(g) and (h). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.41 The explanatory memorandum states that the amendment in item 14 would:

> …enable the rules to apply, adopt or incorporate matters contained in instruments that relate to tariff rate quotas, which may not be made by an authority or body responsible for regulating the importation of a kind of goods into that country from Australian territory. An example of an instrument may include a free trade agreement between Australia and another country.[26]

1.42 While noting this advice, the committee's view is that as a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law. In this instance the explanatory memorandum does not identify or explain where the incorporated materials may be accessed, or whether they will be freely available to all members of the public.

1.43 In addition, the committee considers that the bill provides for significant matters to be set out in external materials to be incorporated by reference; however, the explanatory memorandum does not address why it is necessary for these matters to be left to be determined in non-legislative documents.

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

- **whether documents incorporated by reference into the rules will be made freely available to all persons interested in the law; and**
- **why it is considered necessary and appropriate for matters relating to the calculation of tariff rate quotas to be set out in non-legislative documents which may be subject to limited (if any) parliamentary scrutiny.**

26 Explanatory memorandum, p. 6.

Financial Sector Reform (Hayne Royal Commission Response) Bill 2020

Purpose	This bill seeks to implement a number of recommendations of the Financial Services Royal Commission and additional commitments made by the Government to improve consumer protections and strengthen financial regulators
Portfolio	Treasury
Introduced	House of Representatives on 12 November 2020

Significant matters in delegated legislation[27]

1.45 Item 2 of Schedule 5 seeks to repeal and substitute section 992A of the *Corporations Act 2001*. Proposed subsection 992A(1) provides that a person must not offer a financial product for issue or sale to a consumer, or request or invite the consumer to ask for, apply for, or purchase a financial product if the consumer is a retail client and the offer, request or invitation is unsolicited.

1.46 Proposed subsection 992A(2) provides that the offence in proposed subsection 992A(1) does not apply to an offer, request or invitation of a kind prescribed by the regulations.

1.47 The committee's view is that significant matters, such as exceptions to anti-hawking provisions, should be included in primary legislation, unless a sound justification for the use of delegated legislation is provided. In this regard, a legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.48 In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow exceptions to be set out in delegated legislation. However, the explanatory memorandum explains that 'a further exception is also expected to be introduced through the regulations to allow product issuers to contact customers about renewals of contracts that involve the creation of a new financial product, including the renewal of an expired contract'.[28]

1.49 It therefore appears that the government has already formulated, at least in general terms, a further exception from the anti-hawking provisions that it wishes to

27 Schedule 5, item 2, proposed subsections 992A(1) and (2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

28 Explanatory memorandum, p. 107.

set out in regulations. In light of this, the committee considers that it would be appropriate for this exception to be set out on the face of the bill.

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

- **why it is considered necessary and appropriate to leave exceptions to anti-hawking offences to delegated legislation, especially in light of the fact that it appears the government has already formulated one additional exception; and**
- **whether the bill can be amended to include this additional exception on the face of the primary legislation.**

Reverse evidential burden of proof[29]

1.51 Item 5 of Schedule 6 seeks to insert proposed section 114 into the *Insurance Act 1973*. Proposed subsection 114(1) provides that a person commits an offence if:

- the person carries on or is proposing to carry on a business;[30]
- the person uses the word 'insurance' to expressly or impliedly describe a product or service the person supplies or proposes to supply while carrying out the business;[31]
- the product or service is not insurance;[32] and
- it is likely in all the circumstances that the product or service could be mistakenly believed to be insurance.[33]

1.52 Proposed subsection 114(2) provides for a similar offence in relation to the use of the term 'insurer', where the product or service offered is not insurance or would breach specified requirements in proposed subsection 114(3) of the bill. The offences in proposed subsections 114(1) and (2) carry maximum penalties of 50 penalty units for an individual and 500 penalty units for a corporation[34] and are strict liability offences.[35]

---

29 Schedule 6, item 5, proposed section 114. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

30 Proposed paragraph 114(1)(a).

31 Proposed paragraph 114(1)(b).

32 Proposed paragraph 114(1)(c).

33 Proposed paragraph 114(1)(d).

34 Proposed subsections 114(1) and (2).

35 Proposed subsection 114(8).

1.53 Proposed subsection 114(4) provide offence-specific defences to proposed subsections 114(1) and (2). This subsection provides that a person does not commit an offence if the person is a government entity or is covered by a determination made by legislative instrument by ASIC under proposed subsection 114(6). A product or service of a kind specified by the regulations, or that is State insurance within the meaning of paragraph 51(xiv) of the Constitution not extending beyond the limits of the State, are also exempt from the offences in proposed subsections 114(1) and (2).

1.54 In raising these offence-specific defences the defendant will bear the evidential burden of proof.[36] At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

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

1.56 The committee notes that the *Guide to Framing Commonwealth Offences*[37] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[38]

1.57 In this regard the explanatory memorandum states:

> A reversal of the evidential burden is justified where the matters are peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.
>
> The reversal of the evidential burden in this instance is limited to reliance on an exception.

---

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

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

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

> In respect of coverage by a determination and a product or service being of a kind in the regulations, key information about a product or service a person provides and whether it is covered by a determination or the regulations, would reside with the person and would be peculiarly within the knowledge of the person.
>
> While it is not expected that the prosecution would commence proceedings against a person covered by a determination or the regulations, it would not be burdensome for the person to produce information about the person's organisation and the products or services they provide.
>
> In contrast, obtaining information about an organisation's ownership structure or its products or services, and whether they are covered by an exception, may require the prosecution to undertake difficult and costly investigative exercises to obtain evidence or review a large volume of information which would be readily accessible to the organisation itself. Overall, it would be significantly more difficult, costly and (often) redundant for the prosecution to have to disprove each of the matters in proposed section 114(4) of the *Insurance Act 1973* than it would be for the defendant to provide or point to evidence that suggests a reasonable possibility that a matter exists.[39]

1.58 In light of the information provided in the explanatory memorandum, the committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of using offence-specific defences (which reverse the evidential burden of proof) in this instance.

Significant matters in non-disallowable delegated legislation[40]

1.59 Item 1 of Schedule 9 seeks to insert proposed section 5 into the *Superannuation Industry (Supervision) Act 1993* (the Act) in relation to the functions, powers and duties of the Australian Prudential Regulation Authority (APRA) or the Australian Securities and Investments Commission (ASIC). Proposed subsection 5(9) provides that the minister may give ASIC or APRA directions about the performance or exercise of their functions or powers under the Act by legislative instrument.

1.60 The committee's view is that significant matters such as measures relating to the performance of APRA and ASIC powers and functions should be included in primary legislation, unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

---

39 Explanatory memorandum pp. 127-8, paragraphs 6.32 – 6.36.

40 Schedule 9, item 1, proposed subsection 5(9). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

> Currently, in section 6(3) of the SIS Act, the Minister may give APRA or ASIC directions about the performance or exercise of its functions or powers under the SIS Act. Schedule 9 amends this direction rule so that the Minister must use a legislative instrument to direct APRA or ASIC.
>
> This change updates the existing requirement that the Minister publish such directions in the Gazette, and is consistent with other amendments in respect of directions to APRA under the APRA Act introduced through miscellaneous amendments in items 155 and 156 of Schedule 3 to the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*. Legislative instruments that are directions to agencies (as well as instruments relating to superannuation) are exempt from disallowance and do not sunset under the Legislation (Exemption and Other Matters) Regulation 2015.

1.61 The committee notes this explanation and welcomes that the directions are being included in legislative instruments which, from a scrutiny perspective, is an improvement from the directions being published in the Gazette. However, while the directions will now be subject to tabling in the Parliament, the committee is nonetheless concerned that the directions will be exempt from disallowance and sunsetting.

1.62 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues current arrangements does not, of itself, provide an adequate justification.

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

- **why it is considered necessary and appropriate to leave directions about the performance or exercise of APRA or ASIC's powers or functions to delegated legislation which is exempt from disallowance and sunsetting; and**
- **whether the bill can be amended to:**
  - **provide that these directions are subject to disallowance and sunsetting; and**
  - **provide at least high-level guidance regarding what may be included in the directions on the face of the primary legislation.**

Significant matters in delegated legislation[41]

1.64 Item 43 of Schedule 9 seeks to insert proposed section 766H into the *Corporations Act 2001*. Proposed subsection 766H(1) provides that a person provides a 'superannuation trustee service' if they operate a registrable superannuation entity as trustee. Proposed paragraph 766H(2)(b) provides that regulations made for the purposes of that paragraph may prescribe conduct of a kind that does not constitute the provision of a superannuation trustee service. Schedule 9 to the bill specifies that a person who provides a superannuation trustee service is providing a financial service for the purpose of the consumer protection provisions of the *Australian Securities and Investment Commission Act 2001* (the ASIC Act).[42]

1.65 The committee's view is that significant matters, such as the conduct which is not considered to provide a superannuation trustee service and is therefore not covered by the consumer protection provisions of the ASIC Act, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides little justification as to why it is necessary to allow such significant matters to be set out in delegated legislation, except to explain the operation of the provision.

1.66 In this regard, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to leave the kinds of conduct which do not constitute the provision of a superannuation trustee service to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.**

---

41 Schedule 9, item 43, proposed subsection 766H(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

42 Explanatory memorandum, p. 189.

Privacy
Significant matters in delegated legislation[43]

1.68 Item 5 of Schedule 11 seeks to insert proposed section 912DAD into the *Corporations Act 2001*. This provision specifies information that ASIC must publish each financial year in relation to self-reported breaches and likely breaches of core obligations of licensees under paragraphs 912D(1)(a) and (b). Proposed subsection 912DAD(2) provides that the information published by ASIC must include any information prescribed by the regulations, including personal information within the meaning of the *Privacy Act 1988* in relation to a financial services licensee who is an individual.

1.69 In addition, proposed subsection 50D(2) provides for a similar power to publish personal information in relation to significant breaches and potential breaches of proposed paragraphs 50A(1)(a) and (b).

1.70 The committee's view is that significant matters, such as the type of personal information that may be published online by ASIC, should be in the primary legislation, unless a sound justification for the use of delegated legislation is provided. In this regard, the explanatory memorandum states:

> The information published by ASIC must include any information prescribed by the regulations, which may include personal information under the *Privacy Act 1988* about a credit licensee who is an individual. This regulation-making power may be exercised to allow ASIC to publish the names of credit licensees where the licence is held in the name of an individual, as this would constitute personal information under the *Privacy Act 1988*. This will allow ASIC to publish breach report data at the licensee-level consistently and ensures licensees who hold a licence in the name of an individual are not excluded from ASIC's publication.[44]

1.71 The explanatory memorandum explains that the personal information in the breach report data ASIC must publish is limited to the name of an individual who holds a credit license in their name. While acknowledging this explanation, the committee notes that there is nothing on the face of the bill which would prevent further sensitive or personal information about persons being prescribed and then published by ASIC under this provision. As a result, the potential disclosure of personal information regarding such credit licensees will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

---

43 Schedule 11, item 5, proposed subsection 912DAD(2) and item 15 proposed subsection 50D(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

44 Explanatory memorandum p. 258.

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

- **why it is considered necessary and appropriate to leave significant matters, such as what personal information can be published by ASIC online, to delegated legislation, noting the potential impact on a person's privacy; and**
- **whether the bill can be amended to set out the information that can be published by ASIC online on the face of the primary legislation.**

Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Bill 2020

Purpose	This bill seeks to allow for the extension of temporary Coronavirus supplements, and to modify provisions and discretionary powers in relation to the Government's legislative framework responding to the COVID-19 pandemic
Portfolio	Social Services
Introduced	House of Representatives on 12 November 2020

Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)

Retrospective application

Significant matters in delegated legislation[45]

1.73 Item 44 of Schedule 1 seeks to insert proposed section 1262 into the *Social Security Act 1991* to provide that the minister may, by legislative instrument, determine modifications to specified provisions of the social security law. These specified provisions of the social security law include special COVID-19 qualification rules for youth allowance and jobseeker payments and waiting periods for specified persons for JobKeeper payments, among others.[46] The minister must be satisfied that the modifications are in response to circumstances relating to COVID-19.[47]

1.74 Proposed subsection 1262(5) provides that a determination made under proposed subsection 1262(1) may provide that a person is taken to have done a specified thing on a day before the determination commences.

1.75 Proposed section 1263 provides that a determination made under proposed subsection 1262(1) may only remain in force until 31 March 2021, or 16 April 2021 for determinations which amend nil-rate provisions.

1.76 A provision that enables delegated legislation to amend or modify primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override 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

45 Schedule 1 item 44 proposed section 1262. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

46 See pages 8-9 of the explanatory memorandum for an overview of the relevant provisions of the social security law which the minister may modify under the bill.

47 Proposed subsection 1262(3).

the Executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.77 The committee's view is that significant matters, such as modifications to the social security law to address the consequences of a national pandemic, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Proposed section 1262 would allow modifications to be made to primary legislation in the absence of the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.78 In addition, 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. 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.

1.79 In relation to the above scrutiny concerns, the committee notes that the explanatory memorandum provides little justification for the powers in proposed section 1262 of the bill beyond a description of the operation of the provision. The explanatory memorandum provides no justification as to why it is necessary and appropriate for the minister to modify the operation of social security law by delegated legislation, except to note that the bill 'allows the Minister to make temporary and targeted modifications to specified provisions of the social security law, to respond to COVID-19'.[48] The retrospective application provided for by proposed subsection 1262(5) is also not justified in the explanatory memorandum.

1.80 In light of the above scrutiny concerns, the committee request's the minister's advice as to:

- **why it is considered necessary and appropriate for proposed section 1262 to provide for the modification of primary legislation by delegated legislation, particularly in circumstances where regular parliamentary sittings have recommenced; and**
- **why it is considered necessary and appropriate to specify that a determination may provide that a person is taken to have done a specified thing on a day before the determination commences, including whether any persons are likely to be adversely affected by this provision and the extent to which their interests are likely to be affected.**

48 Explanatory memorandum, p. 8.

Bills with no committee comment

1.81 The committee has no comment in relation to the following bills which were introduced into the Parliament between 9 – 12 November 2020:

- Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020
- Corporations (Fees) Amendment (Hayne Royal Commission Response) Bill 2020
- Education Services for Overseas Students Amendment (Refunds of Charges and Other Measures) Bill 2020
- Migration Amendment (New Maritime Crew Visas) Bill 2020
- Social Security (Administration) Amendment (Protecting Consumers from Predatory Leasing Practices) Bill 2020
- Treasury Laws Amendment (2020 Measures No. 5) Bill 2020
- VET Student Payment Arrangements (Miscellaneous Amendments) Bill 2020

Commentary on amendments and explanatory materials

Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019

1.82 On 11 November 2020, the House of Representatives, the Minister for Decentralisation and Regional Education (Mr Gee) presented an addendum to the explanatory memorandum, and the bill was read a third time.

1.83 The committee thanks the minister for tabling this addendum which appears to address the committee's scrutiny concerns relating to information on the use of offence-specific defences.

Native Title Legislation Amendment Bill 2020

1.84 On 10 November 2020, the House of Representatives agreed to two Government amendments, the Assistant Minister for Community Housing, Homelessness and Community Services (Mr Howarth) presented a supplementary explanatory memorandum and an addendum to the explanatory memorandum, and the bill was read a third time.

1.85 The committee thanks the minister for tabling this addendum which appears to address the committee's scrutiny concerns relating to retrospective validation of section 31 agreements.

Recycling and Waste Reduction Bill 2020

1.86 On 9 November 2020, the Minister for Aged Care and Senior Australians (Senator Colbeck) tabled a revised explanatory memorandum, and the second reading was moved.

1.87 The committee thanks the minister for tabling this revised explanatory memorandum which appears to address the committee's scrutiny concerns relating to the reversal of the evidential burden of proof, strict liability, immunity from civil liability and computerised decision making, and the inclusion of significant matters in delegated legislation.

Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020

1.88 On 9 November 2020, the Assistant Minister for Community Housing, Homelessness and Community Services (Mr Howarth) presented an addendum to the explanatory memorandum. On 10 November 2020, the bill was read a third time.

1.89 The committee thanks the minister for tabling this addendum which appears to address the committee's scrutiny concerns relating to the inclusion of significant matters in delegated legislation.

1.90 The committee makes no comment on amendments made or explanatory material relating to the following bills:

- Australia's Foreign Relations (State and Territory Arrangements) Bill 2020;[49]
- Economic Recovery package (JobMaker Hiring Credit) Amendment Bill 2020;[50]
- Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2020;[51]
- Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020;[52]
- National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020;[53]
- Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020.[54]

---

49 On 11 November 2020, the House of Representatives agreed to three government amendments, the Assistant Minister for Road Safety and Freight Transport (Mr Buchholz) presented a supplementary explanatory memorandum and the bill was read a third time.

50 On 10 November 2020, the Senate agree to one Australian Greens/Opposition amendment and one Opposition amendment, it agreed to the report from the Committee of the Whole debate, and the bill was read a third time. On 11 November 2020 the House of Representatives disagreed to the Senate amendments, the Senate Committee of the Whole resolved not to insist on the amendments, and the report from the committee was adopted by the Senate.

51 On 9 November 2020, the House of Representatives agreed to two Government amendments, the Assistant Minister for Defence (Mr Hawke) presented a supplementary explanatory memorandum, and the bill was read a third time. On 11 November 2020 in the Senate, the Assistant minister for Finance, Charities and Electoral Matters (Senator Seselja) tabled a revised explanatory memorandum, and the debate was adjourned till the next day of sitting.

52 On 12 November 2020, the House of Representatives agreed to three Government amendments, the Minister for Energy and Emissions Reduction (Mr Taylor) presented a supplementary explanatory memorandum, and the bill was read a third time.

53 On 9 November 2020, the Minister for Aged Care and Senior Australians (Senator Colbeck) tabled a revised explanatory memorandum, and the second reading was moved. On 12 November 2020, the bill was read a third time.

54 On 11 November 2020, the Assistant Minister for Community Housing, Homelessness and Community Services (Mr Howarth) presented an addendum to the explanatory memorandum. On 12 November 2020, the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

Aged Care Amendment (Aged Care Recipient Classification) Bill 2020

Purpose	This bill seeks to amend the *Aged Care Act 1997* to introduce an additional, discretionary procedure for classification of recipients of residential aged care and some kinds of flexible care
Portfolio	Health
Introduced	House of Representatives on 21 October 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Broad discretionary power[1]

2.2 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave to delegated legislation most of the elements by which a care recipients' care needs are assessed or classified;
- why (at least high-level) rules or guidance about the exercise of the secretary's power cannot be included in the primary legislation; and
- why the bill only provides that the Classification Principles 'may' specify the procedures that the secretary must follow in making an assessment as to the level of care and the appropriate classification level for a care recipient, rather than requiring that the Classification Principles 'must' make provision to guide the exercise of these powers.[2]

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

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 1-3.

Minister's response[3]

2.3 The minister advised:

> The broad context for the bill is that the Government considers reform to the residential care funding arrangements is necessary to put in place a better system for assessing resident care needs for the purposes of funding. The Australian Government is proposing a new classification system, the Australian National Aged Care Classification (AN-ACC) developed by the University of Wollongong (UOW) replace the outdated Aged Care Funding Instrument (ACFI) classification and funding system. Prior to commencement of the AN-ACC model it will be necessary to classify all residents under the AN-ACC model. This is what the legislation enables. During this classification period, which may take up to 12 months, funding would still be assessed and paid under the ACFI model. As a result both the ACFI and AN-ACC classification processes will apply in parallel during this time.
>
> A legislative framework already exists and has been in place for some time, which enables classifications under ACFI. The structure of these provisions is that there is enabling legislation in Part 2.4 of the *Aged Core Act 1997* (Act) supported by more detailed provisions in the Classification Principles. The current bill simply continues and mirrors the same legislative approach and framework with enabling provisions for AN-ACC in the new Part 2.4A of the Act supported by more detailed provisions in the Classification Principles. This is the same legislative approach involving delegated legislation taken to the existing ACFI classification system with matters such as procedures to assess and classify care recipients in the delegated legislation.
>
> As well as ensuring consistency between closely related Parts of the Act, this approach ensures the detail of assessment and classification procedures under both Part 2.4A and Part 2.4 will be published side-by-side in the Classification Principles.
>
> For consistency between Part 2.4A and Part 2.4, Part 2.4A is drafted to mirror the language of Part 2.4 of the Act, that the Classification Principles 'may' specify procedures for assessment and classification of care recipients. I can advise that, consistent with how the current legislation operates, the Principles will specify these procedures for AN-ACC.
>
> The broad procedures involve the use of the AN-ACC assessment tool developed by the UOW, which uses a collection of clinically validated assessment scales to assess and classify residents into one of 13 classes. Information on these procedures is already publicly available in the UOW's

3 The minister responded to the committee's comments in a letter dated 24 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest.

Resource Utilisation and Classification Study (RUCS) at: https://www.health.gov.au/resources/publications/resource-utilisation-and-classification-study-rucs-reports and in the Department's consultation paper at: https://www.health.gov.au/resources/publications/proposal-for-a-new-residential-aged-care-funding-model-consultation-paper.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that during the period in which recipients of aged care are classified under the new model, funding would still be assessed and paid under the previous model, and that as a result the two classification processes will apply in parallel during this time.

2.5 While the committee also notes the minister's advice that the bill continues and mirrors the legislative approach and framework taken to the existing classification system, the committee does not generally consider consistency with existing provisions to be a sufficient justification for leaving significant matters to delegated legislation. Furthermore, while the minister advises that the Classification Principles will specify procedures for assessment and classification of care recipients under the new model, this is not a requirement on the face of the bill.

2.6 The committee reiterates its concerns that significant matters, such as the basis on which care recipients are classified or reclassified for care, should be included in primary legislation.

2.7 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*).

2.8 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 assessment and classification of care recipients, to delegated legislation.

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

Broad delegation of administrative power

Significant matters in delegated legislation[4]

2.10 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary to allow for the delegation of the secretary's function of assessing care recipients;
- why the criteria to whom these powers will be delegated is left to be set out in delegated legislation; and
- whether the bill can be amended to provide some legislative guidance as to the categories of people to whom those powers might be delegated.[5]

Minister's response

2.11 The minister advised:

> Given the need for clinical expertise to undertake the assessments, the UOW recommended assessments be undertaken by registered nurses, occupational therapists or physiotherapists with appropriate aged care experience and independent of providers. In this context it is appropriate that the Secretary's function of assessing care recipients is delegated to these experts. Use of delegated legislation is consistent with the existing legislative framework.
>
> Under existing subsection 96-2(1) of the Act, the Secretary may, in writing, delegate all or any of the powers and functions of the Secretary under the Act, regulations or any Principles made under the Act to a person engaged (whether as an employee or otherwise) by an agency (within the meaning of the *Public Service Act 1999*) or by an authority of the Commonwealth.
>
> Under new subsection 96-2(15) of the Act, the Secretary additionally may, in writing, delegate the Secretary's powers and functions to assess care recipients under AN-ACC to a person who satisfies criteria specified in the Classification Principles for the purposes of the subsection. Delegated legislation also allows flexibility in settling and adjusting criteria, for example to cater for any criteria that may be appropriate in developing COVID-19 situations (e.g. vaccinations) and completion of assessor training modules as they are developed.

Committee comment

2.12 The committee thanks the minister for this response. The committee notes the minister's advice that the function of assessing care recipients should be

4 Schedule 1, item 11. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 3-4.

undertaken by persons with clinical expertise with appropriate aged care experience and who are independent of providers.

2.13 The committee also notes the minister's advice that, with respect to the delegation of the Secretary's powers and functions to assess care recipients under the new assessment model, specifying criteria in delegated legislation allows flexibility in settling and adjusting criteria, including to account for developing COVID-19 situations.

2.14 While noting this advice, the committee reiterates its scrutiny concerns that that the bill will allow the broad delegation of administrative power without any guidance on the face of the bill as to the categories of people to whom those powers might be delegated.

2.15 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*).

2.16 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the broad delegation of the secretary's powers and functions to assess care recipients to a person who satisfies the criteria specified in the Classification Principles.

Computerised decision-making[6]

2.17 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice in relation to what factors are likely to be taken into account in classifying care recipients and how computer programs will be able to appropriately evaluate and weigh such factors.[7]

Minister's response

2.18 The minister advised:

> The factors taken into account in assessing and classifying residents are those set out in the UOW's RUCS reports with the proposed tool also outlined in the Department's consultation papers. Based on detailed statistical regression analysis the RUCS produced a decision rule to place a care recipient into one of the 13 AN-ACC classes such that each class is

6 Schedule 1, item 3, proposed section 29C-8. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 4-5.

> mutually exclusive and contains people with like care needs. The recommended decision rule is in the form of a computerised algorithm that translates the results of an assessment completed using the AN-ACC Assessment Tool into recommended membership of a particular class for the Secretary to approve. Given the procedure does not involve subjective or purely discretionary judgements, but instead involves an objective assessment of a care recipient's needs based on clearly defined criteria and quantifiable factors and scores, it is reasonable that a computer could be programmed to apply the requirements and follow the procedures in the proposed instrument in a logical manner without the risk of introducing errors.

Committee comment

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that the factors taken into account in assessing and classifying residents are those set out in the University of Wollongong's Resource Utilisation and Classification Study reports, and that the proposed tool is outlined in the Department's consultation papers. The minister advises that the procedure does not involve subjective or purely discretionary judgements, but instead involves an objective assessment of a care recipient's needs based on clearly defined criteria and quantifiable factors and scores.

2.20 While noting the minister's advice, the committee reiterates its scrutiny concerns in relation to the power for computerised decision-making in proposed section 29C-8 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 processes—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 decision-maker taking specified matters into account or forming a particular state of mind.

2.21 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*).

2.22 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of permitting the use of

computer programs for making decisions on the classification of aged care recipients.

Privacy[8]

2.23 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to why it is necessary to allow a delegate of the secretary to make a record of, use or disclose identifiable personal information about an aged care recipient for the purposes of monitoring, reporting on, or conducting research into the general quality or safety of aged care, or the level of need in the community. The committee also requested the minister's advice as to the appropriateness of amending the bill to ensure that only de-identifiable information about an aged care recipient is able to be recorded, used or disclosed for this broader purpose.[9]

Minister's response

2.24 The minister advised:

> The committee requests my advice as to why it is necessary to allow a delegate of the Secretary to make a record of, use, or disclose identifiable personal information about an aged care recipient for the purposes of monitoring, reporting on, or conducting research into the general quality or safety of aged care, or the level of need in the community.
>
> The committee also requests my advice as to the appropriateness of amending the bill to ensure that only de-identifiable information about an aged care recipient is able to be recorded, used or disclosed for this broader purpose.
>
> This comment relates to the proposed amendment through the bill of section 86-4 of the Act to extend this section to include assessments made under the new Part 2.4A, and to include the new subsection 86-4(d), allowing use of protected information for monitoring, reporting on, and conducting research into, the quality or safety of aged care.
>
> Using the powers created by the bill to introduce the AN-ACC assessment and classification procedures will create a longitudinal data series recording progression in the state of health of recipients of residential aged care against each of eight clinically validated assessment scales Included in the AN-ACC Assessment Tool. This will be an important data set to aid understanding of frailty issues in the population and policy settings such as comparison of how quickly or slowly the health status of people with like care needs decline.

---

8 Schedule 1, items 7–9. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 5-6.

> However, I recognise the benefit of using the new care recipient data for monitoring and research purposes principally lies in pooling care recipient data at the level of a residential care service, or above. The Government is open to amending the existing subsection 86-4(c) and the new subsection 86-4(d) to apply to only de-identified data.

Committee comment

2.25 The committee thanks the minister for this response. The committee notes the minister's advice that the government is open to amending existing paragraph 86-4(c) and proposed paragraph 86-4(d) so that those provisions apply to only de-identified data, recognising that the benefit of using the new care recipient data for monitoring and research purposes principally lies in pooling care recipient data at the level of a residential care service, or above.

2.26 The committee would welcome the government amending the bill as set out in the minister's response, as this would appear to address the committee's scrutiny concerns regarding the use and disclosure of personal information in the bill.

2.27 In light of the information provided, the committee makes no further comment on this matter.

Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020

Purpose	This bill seeks to amend the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* to improve the administration arrangements of paying home care subsidy to approved providers
Portfolio	Health
Introduced	House of Representatives on 21 October 2020
Bill status	Before the House of Representatives

Power for delegated legislation to modify primary legislation (Henry VIII clause) Retrospective application[10]

2.28 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow the rules made under item 16 to modify any Act or instrument; and
- whether the bill can be amended to ensure that any modifications to primary or delegated legislation made by the rules, and the retrospective application of the rules, cannot operate to disadvantage any person.[11]

Minister's response[12]

2.29 The minister advised:

> The purpose of the Bill is to improve the administration arrangements of paying home care subsidy to approved providers on behalf of older Australians.
>
> The Bill will not affect the eligibility of home care recipients for home care subsidy or the amount of home care subsidy that is payable for eligible home care recipients. Sub-Item 16(1) of the Bill permits rules to be made prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals

10 Schedule 1, item 16. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 7-9.

12 The minister responded to the committee's comments in a letter dated 24 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

made by the Bill. Any rules that may be made are therefore constrained to dealing with these matters.

Sub-item 16(3) of the Bill sets out that the rules may provide that, during or in relation to the first 12 months after the commencement of the Item, the Act or any other Act or instrument has effect with any modifications prescribed by the rules.

Given the complexity of the home care payment administration system and the extent of the proposed changes-introduced by the Bill, it Is considered necessary and appropriate to include powers to permit legislative amendments to be made to address any unanticipated consequences as a result of the transition to the new payment administration arrangements.

As set out in the Explanatory Memorandum, sub-item 16(3) of the Bill is intended to deal expeditiously with matters which may unintentionally cause detriment to home care recipients, or home care providers, under the new home care payment administration arrangements.

The power in item 16 is considered necessary to respond to instances where detriment may result to home care recipients or home care providers and it is appropriate to address such detriment before primary legislative amendments to the *Aged Care Act 1997* can be undertaken.

Any rules made under item 16 of the Bill would be of a transitional nature only and relate to the amendments or repeals made by the Bill, or be otherwise relevant to home care subsidy. Further, such rules could only be made during the first 12 months after the commencement of the item.

Rules made under this item would not adversely affect any individuals because they would only be made in circumstances where it was necessary to address detrimental consequences of the Bill. As a result, any rules (if made) would not operate to disadvantage any person.

The absence of item 16 of the Bill may result in vulnerable older Australians being without adequate care for a significant period of time if there was an unintended detrimental consequence of the Bill.

Any subordinate legislation made under item 16 of the Bill would be disallowable under section 42 of the *Legislation Act 2003* and subject to review by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

After consideration of the concerns raised by the Committee, I am satisfied that the approach in item 16 of the Bill is reasonably necessary and appropriate, without any further legislative amendments, for the reasons set out above.

Committee comment

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that rules made under item 16 of the bill would only be made in circumstances where it was necessary to address detrimental consequences of the bill, and that, as a result, such rules would not operate to disadvantage any person. The committee also notes the minister's advice that the rules could only be made during the first 12 months after the commencement of item 16, and would be of a transitional nature only, relating to the amendments or repeals made by the bill, or being otherwise relevant to home care subsidy.

2.31 While noting this advice, the committee reiterates its scrutiny concerns that there is no requirement on the face of the bill that the transitional rules must be beneficial, or that the retrospective application of the transitional rules must only be beneficial.

2.32 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister, namely, that rules made under item 16 of the bill would not operate to disadvantage any person, 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 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing rules made under item 16 of the bill to modify any Act or instrument.

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

Appropriation Bill (No. 1) 2020-2021

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government
Portfolio	Finance
Introduced	House of Representatives on 6 October 2020
Bill status	Passed both Houses on 30 November 2020

Parliamentary scrutiny—appropriations determined by the Finance Minister[13]

2.35 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to as to whether the additional transparency measures applying in relation to Advance to the Finance Minister (AFM) determinations made under the 2020-2021 supply bills will continue in relation to AFM determinations made under this bill and Appropriation Bill (No. 2) 2020-2021.[14]

Minister's response[15]

2.36 The minister advised:

> The AFM is a long-standing provision that has been included in annual Appropriation Acts to accommodate urgent and unforeseen expenditure where the passage of additional Appropriation Acts is either not possible or not practical.
>
> In light of the extraordinary AFM provisions contained in the 2019-20 annual Appropriation Acts and in the 2020-21 Supply Acts, the Government implemented additional transparency measures to ensure the authority delegated by the Parliament to the Minister for Finance was exercised in as transparent a manner as possible. These included a weekly media release by the former Minister for Finance, Senator the Hon Mathias Cormann, on AFM allocation(s) made in 2019-20 and 2020-21, and consultation with the Shadow Minister for Finance, on behalf of the Opposition, for any proposed allocation of AFM of over $1 billion.

---

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

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 13-15.

15 The minister responded to the committee's comments in a letter dated 25 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

> These additional transparency measures have worked well during the period of the extraordinary AFM provisions. It is my intention that they will continue to be applied for any AFM allocations made under Appropriation Bills (Nos. 1 and 2) 2020-2021, once enacted.
>
> These additional transparency measures complement the existing, well-established transparency and accountability arrangements. Under these arrangements, all AFM determinations are registered on the Federal Register of Legislation (FRL), tabled in Parliament and also listed on my department's website. Further, the Minister for Finance tables an Annual Report in Parliament on the use of the AFM during the prior financial year, which is subject to an assurance review by the Australian National Audit Office.

Committee comment

2.37 The committee thanks the minister for this response. The committee welcomes the minister's advice that the additional transparency measures applying in relation to AFM determinations made under the 2020-2021 supply bills, including the issuance of a media release each week that an AFM determination is made,[16] will continue in relation to AFM determinations made under this bill and Appropriation Bill (No. 2) 2020-2021.

2.38 The committee nevertheless draws its general scrutiny concerns about AFM provisions to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Finance Minister to determine the purposes for which up to $4 billion in additional funds may be allocated in legislative instruments not subject to disallowance, particularly in circumstances where the purposes for which the additional funds may be allocated are not limited on the face of the bill to COVID-19 response measures.

2.39 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment on this matter.

16 See https://www.financeminister.gov.au/media-releases/2020.

Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020

Purpose	Schedule 1 to this Bill seeks to amend the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* to facilitate the JobMaker Hiring Credit scheme
Portfolio	Treasury
Introduced	House of Representatives on 7 October 2020
Bill status	Received Royal Assent on 13 November 2020

Significant matters in delegated legislation[17]

2.40 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave virtually all of the details of the operation of this new scheme to delegated legislation; and
- whether the bill can be amended to prescribe at least broad guidance in relation to:
  - which employers will qualify for payment under the scheme;
  - which employees will be eligible employees for the purposes of the scheme;
  - the amount payable and timing of payments; and
  - the obligations for recipients of the payment.[18]

Treasurer's response[19]

2.41 The minister advised:

> **Providing the details of the operation of the new scheme through delegated legislation**
>
> The amendments to the Act introduced by the *Economic Recovery Package (JobMaker Hiring Credit) Amendment Act 2020* extended the period over

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

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 18-19.

19 The minister responded to the committee's comments in a letter dated 25 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

which certain payments can be authorised to 6 October 2022. Such payments must be for the primary purpose of improving employment prospects, or increasing workforce participation, in Australia.

Employment programs of this sort are ordinarily implemented through an appropriation provided to a responsible Department (such as the Department of Education, Skills and Employment). The responsible Department then develops a set of guidelines for providing payments and administers the program using those guidelines. However, as the JobMaker scheme was intended to leverage the ATO and their ability to roll out the program at a greater scale than can typically be done by other agencies, it was sensible to use the existing architecture of broad legislation authorising the payment with the payment conditions specified in the rules. In this sense, the proposed rules establishing the JobMaker scheme will operate in a very similar fashion to the guidelines that typically underpin other employment programs (although in contrast to other programs, the rules and any future amendments will continue to be subject to Parliamentary scrutiny and potential disallowance).

In addition, as the Committee is aware, the *Coronavirus Economic Response Package (Payments and Benefits) 2020* (the Act) was enacted on the basis that the details of any payments authorised under the Act would be provided through a subordinate legislative instrument. This legislative framework means that incorporating the details of the proposed JobMaker scheme directly into the Act would require significant restructuring of both the Act and the provisions that have been drafted to establish the JobMaker scheme. The necessary redrafting exercise would have substantially delayed the time for implementing the amendments to the Act to facilitate the establishment of the JobMaker scheme.

As the first payments under the JobMaker scheme are calculated by reference to the three month period ending on 6 January 2020, it is critical that the rules implementing the scheme be made in a timely manner. This is necessary to provide employers with as much certainty as possible in making recruitment decisions that are covered by the scheme.

The need for timely implementation has also been balanced against the Government's commitment to undertaking public consultation on the new JobMaker scheme. The draft rules establishing the scheme are currently subject to an extensive public consultation process which opened on 30 October 2020 and will conclude on 27 November 2020. I also note that the scheme, in conjunction with other laws, implements Australia's obligations under the *International Labour Organisation – Convention concerning Employment Policy*. That Convention requires consultation with representatives of employers and workers.

Extensive restructuring of the Act to implement the rules would have caused significant delays in releasing the exposure draft provisions of the amending rules for public consultation. This would have limited the period

over which public consultation could have been undertaken, or possibly prevented such consultation from being able to be undertaken at all.

Providing the details of the JobMaker scheme in subordinate legislation also allows the Government to respond quickly to address unforeseen issues that may arise over the course of the scheme. I note that in this regard, the Government's ability to amend the rules implementing the JobKeeper scheme has been fundamental to the success of that program. As the Committee is aware, the JobKeeper scheme has now been amended seven times after it was first implemented in April 2020. These changes have been critical in addressing unforeseen issues and ensuring that scheme has continued to operate as intended.

Prescribing certain details in the Act

As the Committee is aware, the Bill has now been enacted. Although it would have been technically possible to make amendments along the line described by the Committee, the Government's preferred approach was, and remains, to provide for such details in the implementing rules for the reasons stated above.

As noted above, the Government is currently undertaking extensive public consultation in relation to the proposed JobMaker scheme. Specifying details of the kind identified by the Committee would have had the effect of 'locking in' particular features of the scheme before feedback was received, and may have prevented important changes being made in response to such feedback. This approach would have undermined the genuine nature of the current consultation process and would have likely reduced the effectiveness of the scheme when it is ultimately implemented.

Similarly, the Government's ability to alter the JobMaker scheme as necessary and appropriate to address unforeseen issues would be significantly constrained by providing the details of the scheme in the Act. As noted above, the ability to respond to such issues has been critical to the ongoing success of the JobKeeper scheme.

Committee comment

2.42 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the proposed rules establishing the JobMaker scheme will operate in a similar fashion to the guidelines that typically underpin other employment programs, while also being subject to parliamentary scrutiny and potential disallowance.

2.43 The committee also notes the Treasurer's advice that draft rules establishing the scheme have been made available for public consultation. The Treasurer advised that specifying details about the scheme in primary legislation, such as those as identified by the committee, may have prevented changes being made in response to feedback from the consultation process.

2.44 The committee further notes the Treasurer's advice regarding the nature of the legislative framework for this scheme, established through the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, including that incorporating the details of the proposed JobMaker scheme directly into the Act would require significant restructuring of both the Act and the provisions that have been drafted to establish the JobMaker scheme. The Treasurer advised that, while it would have been technically possible to make amendments in the manner described by the committee, the government's preferred approach was to provide for such details in the implementing rules.

2.45 In relation to this legislative framework, the committee set out its scrutiny concerns with respect to the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 in *Scrutiny Digest 6 of 2020*, including that, from a scrutiny perspective, the committee considered that some of the matters to be provided for in rules made under the Act (such as the core eligibility requirements for a payment and the obligations for recipients of payments) should have been included on the face of the primary legislation.[20]

2.46 The committee reiterates its view that significant matters, such as the core elements of the new JobMaker Hiring Credit Scheme, should be included in primary legislation.

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

2.48 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment on this matter.

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

Export Market Development Grants Legislation Amendment Bill 2020

Purpose	This bill seeks to establish a grant program which is administered by the Australian Trade and Investment Commission. The grant is provided to Australian small and medium enterprise exporters as a reimbursement for up to 50 per cent of their export-related marketing expenses
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 7 October 2020
Bill status	Before the House of Representatives

Broad delegation of administrative power[21]

2.49 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary to allow for the delegation of any or all of the CEO's functions or powers to officers at any level; and
- whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.[22]

Minister's response[23]

2.50 The minister advised:

> The Committee has requested advice on Item 3 of Schedule 1 of the Bill which revises section 90 of the *Australian Trade and Investment Commission Act 1985* (the Austrade Act), dealing with delegations by the Minister and CEO of the Australian Trade and Investment Commission (Austrade). In particular, the Committee has requested advice as to why it is considered necessary to allow for the delegation of any or all of the CEO of Austrade's functions or powers to officers at any level. The Committee also asks whether it would be appropriate to amend the Bill to provide

21 Schedule 1, item 3, proposed section 90. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 20-21.

23 The minister responded to the committee's comments in a letter dated 25 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

> some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.
>
> In relation to this delegation power, the revised section 90 updates the language, but does not change the substance of the existing power of the CEO in current subsection 90(2) to delegate his or her powers and functions under the Austrade Act to an Austrade staff member.
>
> The substantive change made by the Bill is to add a new delegation power to allow the CEO to delegate any of his or her functions or powers under the EMDG Act to an APS employee in a non-corporate Commonwealth entity. The category of person to whom that power may be delegated is established at APS Executive Level 1 (EL1) or higher. Subsection 90(4) limits the scope of the delegation by requiring that, in performing any delegated power, the delegate must comply with any written directions of the CEO (subsection 90(4)). This change would allow a decision to be made by the Australian Government to use whole of government arrangements to manage EMDG grants. Regardless of where the program administration is undertaken, responsibility for EMDG policy will continue to rest with Austrade, and subsection 90(4) will enable Austrade to effectively exercise this policy responsibility.
>
> I note the Committee's preference to limit delegation powers to Senior Executive Officers. In this instance, enabling delegations to be made to EL1 APS officials and above provides for decision-making at an appropriate level for a grants scheme, and continues current business practices. It ensures the program delegations will be exercised by experienced and qualified APS officers and it aligns with decision-making in other Commonwealth grants programs of similar value, most notably those managed by the Commonwealth's grants hubs, which operate in non-corporate Commonwealth entities.

Committee comment

2.51 The committee thanks the minister for this response. The committee notes the minister's advice that the bill does not change the substance of the existing power of the CEO to delegate his or her powers and functions under the Austrade Act to an Austrade staff member. In relation to delegation to APS employees in a non-corporate Commonwealth entity, the minister advised that enabling delegations to be made to Executive Level 1 APS officials and above provides for decision-making at an appropriate level for a grants scheme, and continues current business practices. The minister also advised that the delegation ensures the program delegations will be exercised by experienced and qualified APS officers and aligns with decision-making in other Commonwealth grants programs of similar value.

2.52 While the committee notes this advice, the committee's scrutiny view is that consistency with existing practice alone is generally not a sufficient justification for the broad delegation of administrative powers without guidance as to the categories

of people to whom those powers might be delegated. It remains unclear to the committee why legislative guidance as to the scope of powers that might be delegated, or further limitations on the categories of people to whom those powers might be delegated cannot be provided for on the face on the bill.

2.53 The committee reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, that a limit is set on the scope and type of powers that may be delegated.

2.54 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the CEO of Austrade to delegate all or any of their functions or powers to staff of the Commission at any level, or to Executive Level 1 or 2 employees in a non-corporate Commonwealth entity.

Significant matters in delegated legislation[24]

2.55 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave most of the elements of the export market development grants scheme to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.[25]

Minister's response

2.56 The minister advised:

> Noting my initial comments that few grants programs are established through legislation, I also advise that the Bill details the core elements of the EMDG program, providing that guidance. For example, while section 15 of the Bill provides for eligible kinds of persons to be prescribed in the rules, this is only to ensure the Minister can include those eligible persons operating outside traditional exporting business structures, such as bodies that represent industry, as well as ensuring new business structures can be added if they arise. Section 15 lists the most of the eligible persons, and captures all of the different legal entities which are envisaged as current exporting businesses operating in Australia.

---

24 Schedule 1, item 4, definition of 'ready to export', Schedule 1, item 5, proposed sections 10, 11, 15–18, and 21. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 21-23.

With the Bill establishing the core principles of the EMDG program, the Bill also provides for the Rules to prescribe a range of matters which operationalise those core principles, including:

(a) the definition of ready to export

(b) the terms and conditions of a grant

(c) requirements in relation to the payment of a grant or instalment

(d) eligible kinds of persons for a grant

(e) conditions for eligible persons

(f) eligible products for a grant

(g) eligible expenses of a person, and

(h) the methods for calculating the amount of a grant.

These matters are purely operational and are not appropriate to be included in primary legislation. Details of each are provided in the following paragraphs.

(a) Definition of ready to export

The term 'export' is defined in the Bill. Understanding a person's readiness to undertake the exporting is an operational matter relating to the grant application assessment processes. It will consider things like training undertaken or plans which will demonstrate an exporter's readiness.

(b) Terms and conditions of a grant

The ability to make Rules in relation to the terms and conditions for grants operationalises the grant agreement. As stated in the Bill's Explanatory Memorandum, the EMDG program will rely on other relevant Commonwealth legal requirements in relation to grant administration where possible, and not seek to duplicate them in the EMDG Act.

This includes the terms and conditions for grant agreements. The EMDG program will rely on the terms and conditions for all Commonwealth grants as provided by the Department of Finance and publicly available through the Department's website. Should the need arise to include a specific term or condition for the EMDG program in the Rules, the Bill provides the power for the Minister to do so.

(c) Requirements in relation to the payment of a grant or instalment

The method for calculating the amount of a grant, also an operational matter, enables the total appropriation for the EMDG program to be managed, along with the upper limits for the different types of grants. In ongoing Commonwealth grant programs the upper limit of a grant is an operational question which can change in response to a variety of factors such as inflation and the cost of doing business overseas. As well as not being appropriate to set out in primary legislation, these factors will vary and including them in primary legislation would require frequent amendments to the Act.

(d) Eligible kinds of persons for a grant

The conditions applicants must also satisfy to be eligible for a grant (section 16) are part of operational detail of the program that underpin program administration. As outlined in the Explanatory Memorandum these may include requirements like having an Australian Business Number, not being under insolvency administration, or not having received an EMDG grant for a total of eight or more years.

(e) Eligible products for a grant

The Bill appropriately outlines the core requirements for eligible products being:

- They must be products in the ordinary sense of the word, i.e. a thing to be sold; and
- They be substantially of Australian origin (subsection 17(3)).

The Rules will prescribe in detail what products are eligible including goods, services and intellectual property, providing a responsive mechanism to evolving products and different ways they can be sold.

(f) Eligible expenses of a person

The Bill appropriately outlines the core requirements for eligible expenses in subsection 18(2), which provides they must be:

(a) Expenses of the eligible person; and

(b) In respect of

a. promotional activities or

b. training activities; and

(c) Undertaken for the purpose of marketing

a. eligible products

b. in foreign countries.

The Rules will provide detail of those requirements, for example, that promotional activities can include activities such as website development, trips overseas by marketing teams, and market research. The Rules also provide a responsive mechanism to prescribe new tools for marketing and promotion as they arise…

I note that in considering framework Bills, the Committee has consistently expressed concern that the detail of the delegated legislation is not available when the Parliament is considering the Bill. I propose that the draft Rules will be publicly released for consultation before the Bill is debated which will assist Parliament when considering the Bill.

Committee comment

2.57 The committee thanks the minister for this response. The committee notes the minister's advice and detailed explanation regarding the operational nature of

the matters to be included in the rules. The committee also acknowledges the minister's proposal that the draft rules will be publicly released for consultation before the bill is debated which will assist Parliament when considering the bill.

2.58 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*).

2.59 In light of the information provided, the committee makes no further comment on this matter.

Merits review[26]

2.60 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to why merits review will not be available in relation to decisions made by the CEO under proposed subsections 102(3) and 102(6), noting that the committee's consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What Decisions Should be Subject to Merit Review?*.[27]

Minister's response

2.61 The minister advised:

> The Committee has requested detailed advice as to why merits review will not be available in relation to decision made by the CEO of Austrade under proposed subsections 102(3) and 102(6), with reference to the Administrative Review Council's (ARC) guidance document, "*What Decisions Should Be Subject to Merit Review?*".
>
> Proposed section 102 provides a power to the CEO to require grantees to provide information or statements within specified timeframes, but not less than 14 days. The failure to respond within those timeframes requires the CEO to decide not to pay the grant or an instalment. There is no provision for merits review of the timeframe decision in proposed section 102.
>
> At Chapter 3 of the ARC's guidance document, the ARC sets out decisions that are generally unsuitable for merits review. At paragraphs 3.8 to 3.12,

---

26 Schedule 1, item 10, proposed subsections 102(3) and 102(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 23-24.

the ARC discusses automatic or mandatory decisions. The decisions contained in subsections 102(3) and 102(6) of the Bill are mandatory decisions. They require the CEO not to pay the grant or instalment if the grantee has failed to provide information or statements requested within a specified timeframe. There is therefore a statutory obligation for the CEO to act in a certain way. Effectively, there are no merits to consider with respect to the decision.

This mandatory decision follows other decisions that have an element of discretion. They include the decision of the CEO to issue a notice requiring the provision of information or statements (subsections 102(1) and 102(4)), and then a decision whether to agree to a later date (paragraph 102(3)(b)) or agree to other arrangements for the provision of the statement (paragraph 102(6)(b)). However, these types of decisions should be regarded as preliminary or procedural decisions, as referred to at paragraphs 4.3 to 4.7 of the ARC's document. They lead to, or facilitate, the making of a substantive decision. The substantive decision is to not pay the grant or an instalment, and if the grantee has provided information or statements within the requested timeframes, the decision not to pay does not automatically follow.

Paragraphs 4.6 and 4.7 of the ARC's document refers to refusals to grant extensions of time. However, this is with reference to statutory deadlines. Proposed section 102 of the Bill does not contain any statutory deadlines. Rather, any deadlines are set by the CEO at the time of issuing the notice. The issue of the notice is a preliminary or procedural step which may or may not lead to the substantive decision.

As referred to by the ARC at paragraph 4.7, a refusal to grant an extension of time (putting aside that the deadlines in proposed section 102 are not statutory), would likely affect a grantee's rights. However, decisions allocating finite resources between competing applicants are also considered unsuitable for merits review (see paragraphs 4.11 to 4.19 of the ARC' s document). Although the decisions in proposed section 102 may relate to the ongoing management of a grant to the extent it may result in the non-payment of an instalment, they also relate to decisions to require further information or statements to inform the decision to pay the grant. In circumstances where there may be a number of entities competing for, or accessing, the same finite pool of funding, it would not be suitable to have a decision not to pay the grant to an applicant who has failed to provide requested information or statements subject to merits review. Other applicants who have complied with requests may have already received the grant, and any latter review decision overturning a refusal decision may not be able to be implemented if the funding resources are already allocated to other applicants.

Committee comment

2.62 The committee thanks the minister for this response. The committee notes the minister's advice that the decisions in proposed section 102 are mandatory decisions, requiring the CEO not to pay the grant or instalment if the grantee has failed to provide information or statements requested within a specified timeframe, and that, effectively there are no merits to consider with respect to the decision.

2.63 The committee further notes the minister's advice that while the decisions in proposed section 102 may relate to the ongoing management of a grant, they also relate to decisions to require further information or statements to inform the decision to pay the grant. The minister advised that, in circumstances where there may be a number of entities competing for, or accessing, the same finite pool of funding, it would not be suitable to have a decision not to pay the grant to an applicant who has failed to provide requested information or statements subject to merits review.

2.64 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*).

2.65 In light of the detailed information provided, the committee makes no further comment on this matter.

National Redress Scheme for Institutional Child Sexual Abuse Amendment (Technical Amendments) Bill 2020

Purpose	This bill seeks to amend the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* to improve the operation of the scheme. The bill seeks to clarify the operation of certain provisions and provide greater administrative efficiency, while continuing to achieve the original policy intent of the scheme
Portfolio	Social Services
Introduced	House of Representatives on 8 October 2020
Bill status	Before the House of Representatives

Reversal of evidential burden of proof[28]

2.66 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[29]

Minister's response[30]

2.67 The minister advised:

> The Bill would insert new section 185A into the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act) to establish an offence of strict liability for using or applying protected names or protected symbols. Offence-specific defences are used in subsections 185A(3), (4) and (5), such that the evidential burden of those defences is borne by the defendant.
>
> Subsection 185A(3) would provide that the offence provision does not apply to the use of a name or symbol by a participating State or participating Territory. Subsection 185A(4) would provide that the offence

28 Schedule 1, item 40, proposed subsections 185A(3)–(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 27-28.

30 The minister responded to the committee's comments in a letter dated 25 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest.

provision does not apply to certain registered trademarks and designs. Subsection 185A(5) would provide that the offence provision does not apply to uses of protected names or protected symbols in good faith at the time the relevant provisions commence, or use by a person who would have been entitled to prevent another person from passing off goods or services as those of the first person, at the time the relevant provisions commence.

Offence-specific defences have been used in the Bill as the matters to be proven in relying on those defences are matters that are peculiarly within the knowledge of the defendant. For example, the National Redress Scheme Operator (Operator) may not know whether certain trademarks or designs are registered, but this is something that a defendant could easily prove. Similarly, whether or not the use of a protected name or symbol was in good faith, or whether the defendant could have taken action against a third party to prevent passing off of goods or services as their own, are not matters that the Operator could ascertain without further investigation. These matters go to the defendant's motivations for using the relevant names or symbols, which would be significantly more difficult for the Operator to disprove than for the defendant to establish.

In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide), the matters set out in the offence-specific defences are not central to the culpability for the offence, and the offence carries a relatively low penalty of 30 penalty units. The Guide recommends a maximum of 60 penalty units for strict liability offences. Further, the offence-specific defences used in the Bill impose an evidential burden on the defendant, which is much easier for a defendant to prove than a legal burden.

Committee comment

2.68 The committee thanks the minister for this response. The committee notes the minister's advice that the matters to be raised in relying on the offence-specific defences are matters that are peculiarly within the knowledge of the defendant, including matters which go to the defendant's motivations for using the relevant names or symbols, which would be significantly more difficult for the Operator to disprove than for the defendant to establish. The committee also notes the minister's advice that the matters set out in the offence-specific defences are not central to the culpability for the offence, and that the offence carries a relatively low penalty of 30 penalty units.

2.69 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*).

2.70 In light of the information provided, the committee makes no further comment on this matter.

Significant matters in delegated legislation[31]

2.71 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to allow other protected names and protected symbols relevant to the commission of a strict liability offence to be set out in delegated legislation.[32]

Minister's response

2.72 The minister advised:

> Proposed new subsection 185A(6) sets out three names protected by the new offence provisions: "National Redress Scheme"; "National Redress Scheme for Institutional Child Sexual Abuse"; and "National Redress Scheme for people who have experienced child sexual abuse". It would also provide that other names may be prescribed by the rules. Similarly, it would provide for the design of any protected symbols to be set out in the rules. The rules, made by the Minister under section 179 of the Act, are a legislative instrument and therefore subject to parliamentary scrutiny and disallowance.
>
> The Bill provides for protected names and protected symbols to be included in delegated legislation in order to provide some flexibility over the life of the Scheme, such that primary legislation amendments would not be required if the government sought to amend the Scheme's logo and branding, or if the Scheme were to become commonly known by another name. The offence itself would remain in the primary legislation, and there is no intention to use the rules to establish new offences.

Committee comment

2.73 The committee thanks the minister for this response. The committee notes the minister's advice that providing for protected names and protected symbols to be included in delegated legislation is intended to provide flexibility over the life of the Scheme, such that primary legislation amendments would not be required if the government sought to amend the Scheme's logo and branding, or if the Scheme were to become commonly known by another name.

2.74 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving

---

31 Schedule 1, item 40, proposed subsection 185A(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, p. 28.

significant matters to delegated legislation. The committee reiterates its view that significant matters, such as protected names and symbols relevant to the commission of a strict liability offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.75 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing protected names and protected symbols relevant to the commission of a strict liability offence to be set out in delegated legislation.

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

Privacy[33]

2.77 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to the type of protected information that is likely to be disclosed under proposed subsection 95(1A), who the protected information is likely to be disclosed to, and any additional safeguards in place to protect individuals' privacy.[34]

Minister's response

2.78 The minister advised:

> The expression "protected information" is defined in section 92 of the Act to include information about individuals and institutions held by the Department of Social Services or Services Australia for the purposes of the Scheme. The Act sets out limited authorisations to use and disclose protected information, with the main authorisation at section 93 being that a person may obtain, make a record of, disclose or use protected information for the purposes of the Scheme, with the express or implied consent of the person or institution to which the information relates, or where the person believes on reasonable grounds that doing so is necessary to prevent or lessen a serious threat to an individual's life, health or safety. Additional authorisations are set out at section 94 to 98 for specific purposes, such as child safety or wellbeing, disclosure of an applicant's information to the applicant's nominee, disclosure to certain agency heads and officeholders, and disclosure where it is necessary in the public interest.
>
> The Bill would insert new subsection 95(1A) into the Act to provide express authorisation for the Operator to disclose protected information about an

33 Schedule 1, item 49, proposed subsections 95(1A) and 95(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

34 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 29-30.

institution not currently participating in the Scheme for the purpose of encouraging the institution to agree to participate in the Scheme.

In some circumstances a person other than the Operator may have relationship with an institution and/or be able to influence the decision of a particular institution to participate in the Scheme. The new provision would provide greater flexibility for the Operator to engage with other parties, such as Commonwealth Ministers, other Commonwealth departments, States and Territories and peak and governing bodies (for example national sporting organisations) to encourage an institution to participate in the Scheme. While such information can be disclosed for this purpose already, the provision allows the process to be more timely and efficient as Public Interest Certificates will no longer be required.

While participation in the Scheme is voluntary, the Australian Government urges all institutions to make amends for past wrong doings and join the Scheme. The Government expects any institutions that were named in the Royal Commission into Institutional Responses to Child Sexual Abuse, or named in an application for redress, to agree to participate in the Scheme as a matter of priority. Being able to disclose protected information about non-participating institutions is an important step to encouraging those institutions participation in the Scheme.

The types of protected information that might be disclosed under the new provision include the following:

a) the number of applications identifying the institution or a related defunct institution;

b) the extent of any contact between the institution and the Department of Social Services (or Services Australia, which processed applications for redress until February 2020) about the Scheme and, if so, information the institution provided about whether it intends to participate in the Scheme;

c) whether the institution has commenced the administrative process to be declared a participating institution and, if so, how this is progressing;

d) information about the institution that may preclude or delay its participation in the Scheme;

e) any timeframe within which the institution has indicated it intends to agree to participate in the Scheme; and

f) any research conducted by the Department of Social Services or Services Australia in relation to an institution, including in relation to a related defunct institution, that is relevant to encouraging the institution to participate in the scheme.

The information disclosed would be limited, as required by the new provision, to information about the institution. While this disclosure could include incidental personal information (within the meaning of the *Privacy*

> *Act 1988*), for example, where it is necessary to provide the contact details of a person in an institution to another person in order to facilitate contact with the institution, there is no intention or capacity to disclose personal information about any individual redress applicant under the new section 95(1A).
>
> If protected information is disclosed under the new section 95(1A), the recipient is subject to the statutory confidentiality regime in relation to the information that is disclosed. Section 95(2) would permit the recipient to use the information to encourage the relevant institution to participate in the Scheme and the recipient would also be able to use the information within the bounds of the statutory confidentiality framework mentioned above. However, any use or disclosure of the protected information by the recipient in a manner not authorised by the statutory confidentiality framework would engage the offence provisions in sections 99, 100 and 101 of the Act.

Committee comment

2.79 The committee thanks the minister for this response. The committee notes the minister's advice that information disclosed under proposed subsection 95(1A) would be limited to information about the institution, and that there is no intention or capacity to disclose personal information about any individual redress applicant.

2.80 The committee further notes the minister's advice that recipients of protected information disclosed under proposed subsection 95(1A) are subject to the statutory confidentiality regime in relation to the information that is disclosed, and that any use or disclosure of the protected information by the recipient in a manner not authorised by the statutory confidentiality framework would engage relevant offence provisions in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.

2.81 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*).

2.82 In light of the detailed information provided, the committee makes no further comment on this matter.

Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020

Purpose	This bill seeks to remove trial parameters to establish the Cashless Debit Card as an ongoing program and to transition Income Management in the Northern Territory and Cape York Region to the card. It also seeks to make further modifications to the operation of the program
Portfolio	Social Services
Introduced	House of Representatives on 8 October 2020
Bill status	Before the House of Representatives

Insufficiently defined administrative power[35]

2.83 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow any officer or employee of a State or Territory, or of an agency or body of a State or Territory, to request that the secretary reconsider a determination made under existing subsection 124PHA(1) that a person is not a program participant; and
- whether the bill can be amended to limit the categories of State or Territory officers or employees who may make such a request.[36]

Minister's response[37]

2.84 The minister advised:

> Item 32 of the Bill provides that an officer or employee of a State or Territory, or an agency or body of a State or Territory may request that a CDC wellbeing exemption is revoked if it is necessary for the person to be a program participant due to medical or safety reasons that relate to the person or their dependents. However, it does not provide administrative powers to all of this class of persons. Item 32 in fact provides that the

35 Schedule 1, item 32, proposed subsection 124PHA(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 31-32.

37 The minister responded to the committee's comments in a letter dated 26 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

power to revoke the CDC wellbeing exemption is provided to the Secretary of the Department of Social Services.

It is necessary to not limit the categories of State or Territory officers who may make such a request to ensure all qualified persons deemed appropriate to request a reconsideration are able to do so. Limiting the category of persons may cause unintended consequences that a report on the safety or wellbeing of a participant cannot be made. It recognises that where a state or territory officer or employee makes an assessment that not being on the CDC presents a risk to the person, or their dependant, it is important that the Secretary can consider this information in assessing whether being a program participant poses a serious risk to the person.

Committee comment

2.85 The committee thanks the minister for this response. The committee notes the minister's advice that item 32 does not provide administrative powers to the class of persons identified but rather provides that the power to revoke the exemption is provided to the Secretary of the Department of Social Services.

2.86 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*).

2.87 In light of the information provided, the committee makes no further comment on this matter.

Significant matters in delegated legislation[38]

2.88 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to

- why it is considered necessary and appropriate to leave the decision-making principles in relation to whether a person may exit the cashless debit card to delegated legislation; and
- whether the bill can be amended to provide for the decision-making principles (or high-level guidance in relation to the principles) on the face of the primary legislation, or, at a minimum, to provide that the minister 'must',

38 Schedule 1, item 37, proposed subsection 124PHB(7B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

rather than 'may', determine decision-making principles for the purposes of proposed subsection 124PHB(7A).[39]

Minister's response

2.89 The minister advised:

> The Bill provides for decision-making principles relating to whether a person can demonstrate reasonable and responsible management of their affairs to exit the program, to be determined in delegated legislation. Any of these decision-making principles determined will be made under the confines of and be consistent with the primary legislation, that is, they will effectively be limited by the operation of subsection 124PHB(3), which sets out the factors that the Secretary should take into account. These decision-making principles would not introduce new criteria and are intended to provide participants with greater clarity by outlining the factors relating to the considerations that underpin the determination of exit applications. Flexibility in the ability to respond to changing functions and feedback provided will be compromised if these decision-making principles are incorporated in primary legislation. When moving these amendments, consistent with the approach taken for Income Management purposes (for example, refer to *Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020)*, it was not considered appropriate to specify these principles in the legislation itself. It would also not be appropriate to provide the Minister 'must' determine decision-making principles for these purposes, rather than 'may' determine decision-making principles for these purposes, since these powers may not be exercised.

Committee comment

2.90 The committee thanks the minister for this response. The committee notes the minister's advice that the decision-making principles will effectively be limited by the operation of subsection 124PHB(3), which sets out the factors that the secretary should take into account. The committee also notes the minister's advice that the incorporation of the decision-making principles in primary legislation would compromise flexibility in the ability to respond to changing functions and feedback provided.

2.91 The committee further notes the minister's advice that, since these powers may not be exercised, it would not be appropriate to provide that the minister *must* determine decision-making principles for these purposes. However, noting that the decision-making principles are intended to provide clarity to participants, the committee reiterates its scrutiny concern about the lack of an explicit requirement in

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 32-33.

the bill that the minister must determine decision-making principles. The committee considers that this approach may undermine the provision of clarity and certainty on the decision-making principles which underpin exit applications, should the minister decide not to determine the principles in delegated legislation.

2.92 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving decision-making principles in relation to whether a person may exit the cashless debit card to delegated legislation, particularly in circumstances where there is no requirement that the minister *must* make the relevant delegated legislation.

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

Significant matters in non-disallowable instrument – program area determination[40]

2.94 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate for determinations made under proposed subsection 124PD(1A) and existing subsection 124PD(2) to be notifiable instruments which are exempt from parliamentary scrutiny including disallowance; and
- whether the bill can be amended to:
  - set out the definition of 'Cape York area' on the face of the primary legislation or, at a minimum, to provide that determinations made under proposed subsection 124PD(1A) are legislative instruments subject to parliamentary disallowance; and
  - provide that determinations made under existing subsection 124PD(2) (relating to the exclusion of part of an area from the program) are legislative instruments subject to parliamentary disallowance.[41]

Minister's response

2.95 The minister advised:

> The Bill allows the Minister to determine the definition of the 'Cape York area' by the making of a notifiable instrument. This approach seeks to reflect and recognise the jurisdiction of the Family Responsibilities

40 Schedule 1, items 63 and 64, proposed subsections 124PD(1A) and (2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

41 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 34-35.

> Commission and to ensure consistency with geographical boundaries set out under Queensland legislation.
>
> The Bill also allows the Minister to exclude any part of the Northern Territory from the program area by the making of a notifiable instrument, consistent with the pre-existing power under subsection 124PD(2). The exclusion of communities within CDC program areas would only occur following intensive consultation with the communities affected. Such an exclusion would not directly affect any individual's rights or alter the content of the law. Any change to an individual's circumstances will result from the factors determining whether any particular person is a program participant, of which residence in a program area is only one factor.

Committee comment

2.96 The committee thanks the minister for this response. The committee notes the minister's advice that the approach of determining the definition of the 'Cape York area' by notifiable instrument seeks to reflect and recognise the jurisdiction of the Family Responsibilities Commission and to ensure consistency with geographical boundaries set out under Queensland legislation. The committee also notes the minister's advice that the power to exclude any part of the Northern Territory from the program area by notifiable instrument is consistent with a pre-existing power in the Act.

2.97 While noting this explanation, it remains unclear to the committee why instruments determining the definition of 'Cape York area' and excluding part of an area from the program could not be legislative instruments to provide appropriate opportunities for parliamentary scrutiny.

2.98 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that:

- **determinations setting out the definition of 'Cape York area' made under proposed subsection 124PD(1A); and**
- **determinations made under existing subsection 124PD(2) relating to the exclusion of an area from the cashless debit card program**

are to be notifiable instruments which are not subject to parliamentary disallowance.

Broad discretionary power

Significant matters in non-disallowable instruments[42]

2.99 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- how the secretary's powers in subsection 124PJ(3) would be effective to ensure the minister's powers under proposed subsections 124PJ(2A) and (2B) (relating to the percentage of payments that are designated as 'restricted') are exercised appropriately;
- whether (at least high-level) rules or guidance in relation to the exercise of powers under proposed subsections 124PJ(2A) and (2B) could be included in the bill, including a requirement that the minister only exercise these powers after community consultation and a subsequent community request; and
- whether the bill could be amended to provide that determinations made under proposed subsections 124PJ(2A) and (2B), to vary the restricted portion of social security benefits for a class of program participants, are to be made by disallowable legislative instrument, rather than notifiable instrument.[43]

Minister's response

2.100 The minister advised:

> The Bill grants the Minister the power to vary the portion of restrictable and non-restrictable payments under new subsections 124PJ(2A), 124PJ(2B) and 124PJ(2C). This ability to vary rates for participants ensures the effective operation of the CDC and allows for response to the particular needs of individual communities.
>
> As outlined in the Explanatory Memorandum, the Minister will only consider exercising this power in response to a request from a community. When introducing these amendments, consistent with the ability to vary restricted portions for the purpose of Income Management measures, it was not considered appropriate to specify the requirements for exercising this power in the legislation itself. This decision was made to ensure the format of community requests and the nature of any necessary engagement with the community following a request, is flexible to respond to the specific circumstances of that community.
>
> Given that this power will only be used in response to a community request, making the determination by notifiable instrument is appropriate to respect the autonomy of the community making the request.

---

42 Schedule 1, item 87, proposed subsections 124PJ(2A) and (2B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 35-37.

Committee comment

2.101 The committee thanks the minister for this response. The committee notes the minister's advice that the minister will only consider utilising the power to vary the portion of restrictable and non-restrictable payments in response to a request from a community. The minister also advised that making the determination by notifiable instrument is appropriate to allow flexibility and to respect the autonomy of the community making the request.

2.102 While noting this advice, the committee reiterates its scrutiny concerns that, because the ministerial determinations would be made by notifiable instrument, they will not be subject to the tabling, disallowance and sunsetting requirements that apply to legislative instruments under the *Legislation Act 2003*. The committee's longstanding view is that significant matters, such as the restricted and unrestricted portions of social security payments, should be included in primary legislation or at least in delegated legislation which is subject to parliamentary disallowance. The committee further notes that there is no requirement that the minister only exercise the power to make a determination after community consultation and a community request.

2.103 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing ministerial determinations to vary the restricted portion of social security benefits to be made by notifiable instruments which are not subject to parliamentary disallowance.

Privacy[44]

2.104 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- the type of information that would be collected under paragraph 192(db) of the *Social Security (Administration) Act 1999* as amended by the bill;
- the type of information that would be shared under proposed sections 124POB, 124POC and 124POD; and
- any relevant safeguards in place to protect individuals' privacy.[45]

44 Schedule 1, item 93 proposed subsection 124POB, 124POC and 124POD, and Schedule 1, item 96, proposed paragraph 192(db). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

45 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 38-39.

Minister's response

2.105 The minister advised:

> Powers to obtain and share information about participants are necessary to facilitate the effective administration of the CDC and enable participants and their communities to be appropriately supported, including in times of crisis.
>
> The Bill proposes new sections 124POB, 124POC and 124POD to authorise certain information disclosures to the Queensland Commission (currently the Family Responsibilities Commission (FRC)), a child protection officer of the Northern Territory or recognised State/Territory authority of the Northern Territory. These entities are responsible for referring participants to the CDC under section 124PGD (FRC) and 124PGE(2) (a child protection officer of the Northern Territory or recognised State/Territory authority of the Northern Territory).
>
> The measures replicate existing provisions in Part 3B of the Act and are necessary to ensure that the personal circumstances of participants can be disclosed to ensure that participants are correctly placed onto the CDC and correctly authorised to cease to be participants. For example, information about a potential participant's address will be necessary to determine if the individual is a resident of a program area.
>
> In addition, the Bill amends section 192 of the Act to include the operation of Part 3D in this section to facilitate collection of information relevant to program participation. This replicates arrangements under Part 3B of the Act for the Income Management regime and will support the operation of the CDC, including with respect to exit and wellbeing exemptions. Information that may be obtained pursuant to this provision includes participant residential addresses, payment types and mental and social wellbeing. This information will support the administration of the program including the identification of participants and the management of wellbeing exemption and exit processes.
>
> As you have noted, the Bill addresses disclosure of information to community bodies and the Queensland Commission and officers and employees of certain state or territory authorities (including child protection officers). As explained in the Explanatory Memorandum, sections 124POA, 124POB, 124POC and 124POD replicate the current information sharing provisions in Part 3B of the Act.
>
> The information to be shared under the proposed 124POA, 124POB 124POC and 124POD is protected information for the purposes of the Act and relates to participation in, and exit from, the CDC. The information that may be disclosed is limited in scope according to the body involved. For example, section 124POA specifies that the Secretary may only disclose to a relevant community body the fact that the person has ceased to be a participant or a voluntary participant, the day the person ceased to be a participant and the fact that participation ceased due to a

determination under subsection 124PHA(1) or 124PHB(3). In other contexts, the information required will be material to whether a person is a participant and may relate, for example, to the person's place of residence.

Commonwealth agencies administering social security law are subject to a range of legal obligations relating to privacy, which are supplemented by policies and practices to ensure that individual's privacy is protected in relation to protected (personal) information obtained under the Act. Personal information collected in connection with the CDC is held securely and is not disclosed otherwise than for the administration of Part 3D of the Act or in connection with possible breaches of the law.

Importantly, the Act contains confidentiality provisions, including offence provisions, to ensure that participant information is stringently protected. Protected information can only be disclosed in specified circumstances. Division 3 of Part 5 of the Act creates a series of strict liability offences, which are punishable, upon conviction, by a term of imprisonment not exceeding two years.

In addition, the *Privacy Act 1988* applies to the collection, use, storage and disclosure of personal information by relevant agencies and certain other entities.

People with access to protected data will:

- be required to comply with, among other things, the Australian Public Service Code of Conduct and Conflict of Interest Disclosure policy
- hold a Australian Government Security Vetting Agency (AGSVA) Baseline Security Clearance as a minimum
- be trained in handling protected information before given access to protected information, and
- be appropriately supervised.

Committee comment

2.106 The committee thanks the minister for this response. The committee notes the minister's advice that the type of information that would be collected under paragraph 192(db) as amended by the bill includes participant residential addresses, payment types and mental and social wellbeing.

2.107 The committee also notes the minister's advice that information shared under proposed sections 124POB, 124POC and 124POD is protected information for the purposes of the Act and relates to participation in, and exit from, the CDC. The minister further advises that the information that may be disclosed is limited in scope according to the body involved.

2.108 With respect to safeguards in place to protect individuals' privacy, the committee notes the minister's advice that personal information collected in

connection with the CDC is held securely and is not disclosed otherwise than for the administration of Part 3D of the Act or in connection with possible breaches of the law. The committee also notes the minister's advice with respect to confidentiality provisions and offences in the *Social Security (Administration) Act 1999* relating to participant information, the application of the *Privacy Act 1988*, and practices such as requiring that people with access to protected information comply with relevant codes of conduct and policy, hold a baseline security clearance, receive appropriate training before given access to protected information, and be appropriately supervised.

2.109 While noting the minister's advice, the committee reiterates its scrutiny concerns that allowing the sharing of information about program participants and extending the secretary's power to require information and documents may trespass unduly on an individuals' privacy, particularly when the information being shared and collected includes highly personal information such as information about a person's mental or social wellbeing.

2.110 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*).

2.111 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the sharing of information about cashless debit card program participants and extending the secretary's power to require information and documents relevant to the operation of cashless welfare arrangements.

Territories Legislation Amendment Bill 2020

Purpose	This bill seeks to amend various Acts to improve the legal frameworks applying to the territories of Norfolk Island, Christmas Island, the Cocos (Keeling Islands) and the Jervis Bay Territory
Portfolio	Infrastructure, Transport, Regional Development and Communications
Introduced	House of Representatives on 7 October 2020
Bill status	Before the House of Representatives

Broad delegation of administrative powers[46]

2.112 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow for such a broad delegation of a person or authority's powers under these provisions;
- whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated; and
- whether the bill can be amended to require that the minister or the relevant person or authority be satisfied that persons exercising delegated powers have the appropriate expertise and qualifications to exercise those delegated powers.[47]

Minister's response[48]

2.113 The minister advised:

> As discussed in the explanatory memorandum of the Bill, proposed subsections 8G(5) of the CI Act and the CKI Act, as well as proposed subsection 18B(5) of the NI Act, are based on existing provisions of these

46 Schedule 1, item 14, proposed subsection 8G(5) of the *Christmas Island Act 1958*; Schedule 1, item 40, proposed subsection 8G(5) of the *Cocos (Keeling) Islands Act 1955*; Schedule 1, item 66, proposed subsection 18B(5) of the *Norfolk Island Act 1979*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

47 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 40-41.

48 The minister responded to the committee's comments in a letter dated 24 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

Acts, which deal with the delegation of powers vested in the minister under applied state or territory laws. These applied laws arrangements have been in place in the Indian Ocean Territories since 1992 and Norfolk Island since 2016.

The laws of Western Australia, as in force from time to time in that State, are applied in the Indian Ocean Territories, while presently, the laws of New South Wales, as in force from time in that State, are applied in Norfolk Island. These applied laws regimes provide that non-judicial powers and duties under these applied laws are vested in the minister, who has a capacity to delegate the powers, or direct that they be delegated, to some other person or authority.

Considering the potential breadth and scope of the powers and duties conferred by these applied laws upon the minister, which could, in practice, extend to all the non-judicial powers and duties contained in the laws of a state or territory, it is necessary and appropriate for the minister to have a broad delegation power to ensure that these powers are exercised effectively at an appropriate level. If the minister was constrained in his or her ability to delegate these powers there is a risk that these applied laws may not be properly or effectively administered in the external territories.

Similarly, it would not be appropriate to amend the Bill to provide some legislative guidance as to the delegation of these powers or that the minister or relevant person or authority be expressly satisfied that the persons exercising delegated powers have the appropriate expertise and qualification to exercise those delegated powers. Again, considering the potential breadth and scope of these powers and duties under these applied laws, it is desirable to allow significant discretion with respect to this delegation power. This is because the circumstances for which it may be appropriate to delegate these powers are not certain and cannot necessarily be foreseen. Similarly, it is impractical and restrictive to anticipate the factors with respect to these applied laws that the minister or relevant person or authority may consider when determining whether persons exercising delegated powers have the appropriate expertise and qualification to exercise those delegate powers.

Finally, it should be noted that in circumstances where there is an arrangement between the Commonwealth and a state or territory to administer the laws in force in the external territory, that the state or territory official, with the corresponding power in the relevant state or territory, will ordinarily exercise the delegated powers of the minister (see proposed subsections 8G(5A) of the CI Act and the CKI Act and proposed subsection 18B(5A) of the NI Act). This is the case in the Indian Ocean Territories, where under service delivery arrangements between the Commonwealth and Western Australia, Western Australian officials routinely exercise a range of functions and powers under applied Western

> Australian laws as in force in these territories in the same way that they would in Western Australia.

Committee comment

2.114 The committee thanks the minister for this response. The committee notes the minister's advice that, in light of the potential breadth and scope of the powers and duties under the applied laws, it is necessary and appropriate for the minister to have a broad delegation power to ensure that these powers are exercised effectively at an appropriate level. The committee also notes the minister's advice that in circumstances where there is an arrangement between the Commonwealth and a state or territory to administer the laws in force in the external territory, that the state or territory official, with the corresponding power in the relevant state or territory, will ordinarily exercise the delegated powers of the minister, and that the circumstances for which it may be appropriate for the minister to delegate powers under the applied laws are not certain and cannot necessarily be foreseen.

2.115 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*).

2.116 In light of the information provided, the committee makes no further comment on this matter.

Significant matters in delegated legislation[49]

2.117 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to allow regulations to determine which state or territory laws will be in force on Norfolk Island, and which state and territory courts will have jurisdiction to hear and determine matters in relation to Norfolk Island.[50]

Minister's response

2.118 The minister advised:

> New South Wales (NSW) has announced that the existing arrangements in Norfolk Island, under which it provides some state-type education and

---

49 Schedule 1, item 57, proposed subsection 5(2) and Schedule 1, item 81, proposed subsections 60AA(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

50 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 41-42.

health support services, will cease by the end of 2021. In light of this, the Australian Government is considering its options with respect to the future provision of state-type services in Norfolk Island and is currently involved in confidential government-to-government negotiations with a number of jurisdictions about possible future state-type service delivery options in Norfolk Island.

Accordingly, the applied laws amendments are intended to provide a flexible legal mechanism under which the laws of a state or territory may be applied as Commonwealth law in Norfolk Island and will enable state-type service arrangements to be entered into with a state or territory. These applied laws arrangements are intended to operate in a similar way to the existing applied NSW laws arrangements. An 'applied law jurisdiction', being NSW or another state or territory, may be prescribed by regulations made under the Act. The laws of a jurisdiction would only be applied when there is an agreement in place between the relevant state or territory and the Government.

Amendments in relation to the jurisdiction of Norfolk Island courts complement the proposed amendments to the NI Act which allow state or territory laws to be applied in Norfolk Island. The provisions to permit the courts of a prescribed state or territory to have jurisdiction in relation to Norfolk Island would only be utilised if the Australian Government entered into an agreement with a state or territory government for the delivery of state-type services and it was considered appropriate for the courts of that jurisdiction to also operate in Norfolk Island. Where a state or territory government was delivering most or all state-type services in Norfolk Island under the laws of that state or territory, it may be appropriate for the courts of that state or territory to adjudicate on matters arising under those laws.

In light of the present circumstances regarding the provision of state-type services in Norfolk Island, it is considered necessary and appropriate to allow regulations to determine which state or territory laws will be in force in Norfolk Island. Prescribing these matters in regulations will allow these arrangements to be implemented in a timely manner if agreement is achieved between the relevant state or territory and the Government. If provision for these matters were to be included in primary legislation there is risk of a delay in implementing state-type arrangements which would have an adverse effect on the provision of state-type services to the community in Norfolk Island.

Further, any regulations prescribing these matters are disallowable by a single House of Parliament acting alone, and are subject to the usual parliamentary scrutiny, including the Senate Scrutiny of Delegated Legislation Committee. As legislative instruments, section 17 of the *Legislation Act 2003* requires that the instrument-maker be satisfied that appropriate consultation has occurred. For instance, should a decision be made in the future to transfer the jurisdiction of the Norfolk Island courts

> to the courts of another Australian state and territory, then there would be consultation with all relevant parties to inform development of a comprehensive transition plan, with justice system administrators being a key part of that process.

Committee comment

2.119 The committee thanks the minister for this response. The committee notes the minister's advice that the applied laws amendments are intended to provide a flexible legal mechanism under which laws of a state or territory may be applied in Norfolk Island, and that the laws of a jurisdiction would only be applied when there is an agreement in place between the relevant state or territory and the Commonwealth government. The minister advised that, if provision for these matters were to be included in primary legislation, there is a risk that the implementation of state-type arrangements would be delayed, which would have an adverse effect the provision of state-type services to the community in Norfolk Island.

2.120 The committee also notes the minister's advice that the provisions to permit the courts of a prescribed state or territory to have jurisdiction in relation to Norfolk Island would only be utilised if the Commonwealth government entered into an agreement with a state or territory government for the delivery of state-type services and it was considered appropriate for the courts of that jurisdiction to also operate in Norfolk Island.

2.121 The committee reiterates its view that significant matters, such as the determination of which laws will be in force on Norfolk Island and which state or territory courts will have jurisdiction for Norfolk Island, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, while the minister's response notes a risk of delay in the implementation of arrangements for the provision of services to the Norfolk Island community, it is not clear to the committee that the determination of applied laws for Norfolk Island would need to occur on a regular basis. The committee considers that a new bill to set out the 'applied law jurisdiction' and the state or territory whose courts will be conferred with jurisdiction in relation to Norfolk Island should be introduced into the Parliament in the future. Such a bill could, if necessary and with appropriate parliamentary support, be passed through the Parliament quickly to ensure continuity of services on Norfolk Island.

2.122 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*).

2.123 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing regulations to set out which laws will be in force on Norfolk Island and which state or territory courts will have jurisdiction for Norfolk Island.

Instruments not subject to parliamentary disallowance[51]

2.124 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice regarding: why it is appropriate to specify that instruments made under proposed sections 18B and 18D are not legislative instruments, and whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.[52]

Minister's response

2.125 The minister advised:

> The instruments made under section 18B, as amended, and proposed section 18D, deal with a range of matters relating to the vesting and delegation of powers under applied state and territory laws in Norfolk Island. Proposed subsections 18B(13) and 18D(13) respectively provide that an instrument made under section 18B or 18D is not a legislative instrument. These provisions are based on existing subsection 18B(11) of the NI Act which similarly provides that an instrument made under this section is not a legislative instrument.
>
> I note that subsections 8(1) and (4) of the *Legislation Act 2003* have the combined effect that an instrument that is made under a power delegated by Parliament and has one or more provisions that have legislative character (rather than administrative character) will be a legislative instrument: unless the relevant Act expressly exempts the instrument from being a legislative instrument.
>
> In *Visa International Services Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 424 (Visa International), the Federal Court identified a number of factors that are likely to have bearing on whether a decision is to be characterised as being of administrative or legislative character. The list included (at paragraph 592):
>
> - whether the decision determined rules of general application, or whether there was an application of rules to particular cases;
> - whether there was Parliamentary control of the decision;

---

51 Schedule 1, items 67 and 72, proposed subsections 18B(1) and 18D(13). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

52 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, p. 43.

- whether there was public notification of the making of the decision;
- whether there was public consultation;
- whether there were broad policy considerations imposed;
- whether the regulations (or other instrument) could be varied;
- whether there was power of executive variation or control;
- whether there was provision for merits review; and
- whether there was binding effect.

The case law makes it clear that not one of these factors will determine whether the decision is of an administrative or legislative character. Rather, it is necessary to consider the decision in light of all these factors.

Legislative and administrative decisions can also be broadly distinguished between legislative decisions which determine the content of the law and administrative decisions which apply the law in particular cases (*Roche Products Pty Limited v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451 per Branson J).

Applying these factors to the instruments made under sections 18B and 18D, I am satisfied that none of these instruments determine the content of the law. Notably, these instruments deal with the vesting, delegating or directing of powers otherwise vested in the minister and other persons under applied state or territory laws. In this respect, the instruments are of an administrative character, dealing with the application or carrying out of these powers, and do not determine or alter the content of these delegated, vested or otherwise directed powers.

Furthermore, there is no public consultation required for making the instrument, nor is there any requirement to notify the public when the instrument is made. The policy considerations imposed are narrow, being confined to the administration of these applied laws, and do not otherwise generally affect the public.

In any case, I also note that an instrument of delegation, including any directions to the delegate, as well as an instrument that is a direction to a delegate are classes of instruments that are not legislative instruments for the purposes of the *Legislation Act 2003*: see *Legislation (Exemptions and Other Matters) Regulation 2015* (the Regulation), items 1 and 2 of the table in subsection 6(1). The explanatory statement to the Regulation explains that delegations, including directions to the delegate, 'are administrative in character, as they facilitate the carrying out of powers and functions but do not alter the scope or effect of those powers and functions.'

In light of this, I consider that the instruments made under section 18B and 18D will be instruments of an administrative character, rather than a legislative character. The statements in proposed subsections 18B(13) and

18D(13), that the relevant instruments are not legislative instruments, are declarations of the law and do not provide an exemption from the *Legislation Act 2003*.

However, because the legislative versus administrative character test is complex, the declaratory statement is intended to assist readers of the Bill to understand that the instruments are not legislative instruments.

Committee comment

2.126 The committee thanks the minister for this response. The committee notes the minister's advice that, taking into account factors set out in case law, the minister considers that the instruments made under section 18B and 18D will be instruments of an administrative character, rather than a legislative character. The committee also notes the minister's advice that the statements in proposed subsections 18B(13) and 18D(13), that the relevant instruments are not legislative instruments, are declarations of the law intended to assist readers of the bill, and do not provide an exemption from the *Legislation Act 2003*.

2.127 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*).

2.128 In light of the detailed information provided, the committee makes no further comment on this matter.

Procedural fairness

Fair trial rights[53]

2.129 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to whether the bill can be amended to include additional protections to protect the rights of an accused person whose trial is held in a prescribed state or territory, rather than on Norfolk Island.[54]

Minister's response

2.130 The minister advised:

---

53 Schedule 1, item 112, proposed section 60C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

54 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 44-46.

As discussed in the explanatory memorandum, these provisions dealing with the criminal jurisdiction of the courts of a prescribed state or territory with respect to Norfolk Island are modelled on 2018 amendments to the NI Act, contained in the *Investigation and Prosecution Measures Act 2018*, which similarly authorise the Supreme Court of Norfolk Island to hear criminal trials outside Norfolk Island in its criminal jurisdiction if the court is satisfied that the interests of justice require it.

The Committee expresses concern that these measures may, over time, have the effect of reducing the number of criminal trials held in Norfolk Island and have the potential of limiting access to justice in Norfolk Island for accused persons, including by creating barriers to accessing legal representation, evidence and trial support. In light of this, the Committee requests whether the Bill can be amended to include additional protections to protect the rights of an accused person whose trial is held in a prescribed state or territory, rather than in Norfolk Island.

It should be noted that the proposed provisions to permit the courts of a prescribed state or territory to have jurisdiction in relation to Norfolk Island would only be utilised if the Government entered into an agreement with a state or territory government for the delivery of state-type services and it was considered appropriate for the courts of that jurisdiction to also operate in Norfolk Island. Where a state or territory government was delivering most or all state-type services in Norfolk Island under the laws of that state or territory, it may be appropriate for the courts of that state or territory to adjudicate on matters arising under those laws.

This is the same as the situation in Christmas Island and the Cocos (Keeling) Islands where the courts of Western Australia have jurisdiction as if these external territories were part of Western Australia. Similar to the proposed provisions of the NI Act, provisions in the CI Act and the CKI Act provide that the Supreme Court of Western Australia may, when exercising its criminal jurisdiction with respect to these external territories, conduct criminal trials in Western Australia if the court is satisfied that the interests of justice require it.

If these provisions were ever utilised in the future, I do not consider that they would substantially change the manner in which the courts presently exercise their criminal jurisdiction in Norfolk Island or limit access to justice in Norfolk Island for accused persons. As is presently the case, serious criminal trials would only take place outside Norfolk Island in circumstances where the interests of justice require it, for instance where there are concerns about the ability to empanel an impartial local jury. Many of the existing services of the Norfolk Island courts are already delivered remotely by judicial officers sitting on the mainland and it is expected that these arrangements would continue.

In response to the Committee's concerns about access, I note that courts serving remote communities, like Norfolk Island, adopt a range of practices to ensure appropriate access to justice, including circuit visits and the use

> of technology such as telephone and video conferencing. In practice, if these provisions were ever utilised in the future, the experience of defendants and practitioners would be very similar to the present administration of the Norfolk Island courts. Legal aid would continue to be available.
>
> Also consistent with present arrangements, an accused required to be remanded for significant periods would be transferred to the mainland. This is because Norfolk Island has very limited remand facilities and this would not change under any future criminal justice arrangements.
>
> I also do not think it is appropriate to further restrict the discretion of judicial officers when considering whether the hearing of a criminal trial in a prescribed state or territory, rather than Norfolk Island, is in the interests of justice. The judiciary is best placed to consider these factors on a case by case basis and case law indicates that these factors will include the court considering any potential hardship on the accused, including potential reduced access to witnesses or evidence. Under the proposed provisions, the accused can make submissions to the court on whether a trial should be heard in a prescribed state or territory, rather than Norfolk Island, including making submissions on access to legal representation, evidence and trial support in their specific circumstances. It is impractical and restrictive to anticipate the factors that a court may legitimately consider when determining this matter in practice, on a case by case basis. Accordingly, if further provision for these matters were to be expressly included in primary legislation there is the risk that such factors may, in restricting judicial discretion, lead to inadvertent or perverse outcomes and may actually work against the interests of justice.
>
> In light of these circumstances, I do not consider it necessary to amend the Bill to include additional protections to protect the rights of an accused person whose trial is held in a prescribed state or territory, rather than in Norfolk Island.

Committee comment

2.131 The committee thanks the minister for this response. The committee notes the minister's advice that it is more appropriate for the judiciary to consider, on a case by case basis, whether the hearing of a criminal trial in a prescribed state or territory, rather than Norfolk Island, is in the interests of justice. The minister advised that restricting judicial discretion through express provision for these matters in primary legislation may lead to inadvertent or perverse outcomes.

2.132 The committee also notes the minister’s advice that the accused will be able to make submissions to the court on whether a trial should be heard in a prescribed state or territory, rather than Norfolk Island, including making submissions on access to legal representation, evidence and trial support in their specific circumstances. The minister further advised that case law indicates that factors for the court to consider in relation to this issue will include any potential hardship on the accused,

including potential reduced access to witnesses or evidence under the proposed provisions.

2.133 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*).

2.134 In light of the information provided, the committee makes no further comment on this matter.

Significant matters in delegated legislation
Privacy[55]

2.135 In *Scrutiny Digest 15 of 2020* the committee requested the minister's advice as to:

- why it is necessary and appropriate to leave significant matters, such as exemptions from the requirements of the Privacy Act, to delegated legislation, noting the potential impact on the privacy of individuals;
- whether the bill can be amended to include at least high-level guidance in relation to when the exemption power may be used; and
- how the minister will assess whether the relevant state or territory jurisdiction has equivalent or substantially similar privacy protections as provided for under the Privacy Act.[56]

Minister's response

2.136 The minister advised:

> Proposed subsection 6(5A) of the Privacy Act will potentially allow the minister, by legislative instrument, to exempt a body, office or appointment, established by or under a law of a state or territory as in force in an external territory, from the definition of 'agency' (see proposed paragraphs 6(1)(ca) or 6(1)(ea) of the definition of 'agency'). The effect of any such instrument would be to exclude these entities from the requirements of the Privacy Act which operate with respect to a range of Commonwealth entities and officials, such as Commonwealth ministers and their departments.

---

55 Schedule 3, item 60, proposed subsection 6(5A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

56 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 46-47.

The amendments made to the Privacy Act by the Bill will clarify its application with respect to this very small category of public entities established under applied laws in the external territories. In this context, the minister's power to exempt any of these bodies from the definition of 'agency' is expected to be rarely used. As discussed in the explanatory memorandum, the minister would only exempt where the relevant body, office or appointment would be subject to an applied state or territory law which provides equivalent, or substantially similar, requirements regarding the use of personal information by public bodies, for instance, the *Privacy and Personal Information Protection Act 1998* (NSW) which regulates the use of personal information with respect to local government councils in NSW.

These amendments ensure that these public entities and officials are subject to the operation of appropriate privacy legislation but recognise that in certain circumstances, it may be more appropriate for the relevant entity or official to be subject to the privacy law requirements of the applied state or territory law instead of the Privacy Act. This is consistent with Government policy that public bodies in the external territories, such as local government bodies, which are established and regulated by an applied state and territory should be subject to the same regulatory environment as equivalent bodies in the relevant state or territory. These arrangements are important for ensuring that with respect to any state-type service delivery arrangements agreed by the Commonwealth with a state or territory, that the relevant state or territory official may administer these applied laws consistently with the operation of these laws in their home jurisdiction.

The applied laws regimes which apply in the external territories are dynamic and subject to change, because laws apply in the external territories as they are in force from time to time in their original jurisdiction. The administration of applied laws is dependent on state-type service delivery arrangements entered into with state or territory governments which are also subject to change over time. Accordingly, the use of delegated legislation to exempt bodies established and regulated by these applied laws is appropriate in this context as it allows these arrangements to be adjusted relatively quickly as circumstances change. If provision for these matters were to be included in primary legislation there is the risk that such exemptions may quickly become redundant or inappropriate as circumstances change.

Further, any legislative instrument made by the minister pursuant to proposed subsection 6(5A) of the Privacy Act is disallowable by a single House of Parliament acting alone, and subject to the usual parliamentary scrutiny, including the Senate Scrutiny of Delegated Legislation Committee. The minister will be obliged in any explanatory statement to justify the making of the instrument, including any reasoning that the relevant entity will be subject to an applied state or territory law which provides equivalent, or substantially similar, requirements regarding the

> use of personal information as the Privacy Act, as well as recording any relevant consultation undertaken. In making this assessment, the minister would consult relevant stakeholders, including the Office of the Australian Information Commissioner.
>
> Given the special context of the applied laws regimes in the external territories, and noting the oversight mechanisms available to Parliament, the use of delegated legislation here remains appropriate. Accordingly, I do not consider it necessary to amend the Bill to include additional high-level guidance in relation to when this exemption power may be used. However, acknowledging the views of the Committee, my Department will carefully monitor these arrangements.

Committee comment

2.137 The committee thanks the minister for this response. The committee notes the minister's advice regarding the government's policy that public bodies in the external territories which are established and regulated by an applied state or territory should be subject to the same regulatory environment as equivalent bodies in the relevant state or territory. The minister advised that these arrangements are important for ensuring that state or territory officials may administer applied laws consistently with the operation of these laws in their home jurisdiction.

2.138 The committee also notes the minister's advice that, in making an assessment of whether the relevant entity will be subject to an applied state or territory law which provides equivalent, or substantially similar, requirements regarding the use of personal information as the Privacy Act, the minister would consult relevant stakeholders, including the Office of the Australian Information Commissioner. The committee notes, however, that such consultation is not required in the bill or elsewhere in the *Privacy Act 1988*.

2.139 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*).

2.140 In light of the information provided by the minister, and with reference to the committee's scrutiny concerns in relation to this matter outlined in *Scrutiny Digest 15 of 2020*, the committee requests the minister's further advice as to whether the bill can be amended to provide that the minister must consult with the Office of the Australian Information Commissioner before making an instrument to exempt a body, office or appointment for the purposes of proposed paragraphs 6(1)(ca) or 6(1)(ea) of the definition of 'agency' in the *Privacy Act 1988*.

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

---

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*.