The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 3 of 2021

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Comment bills

1.1 The committee comments on the following bill and seeks further information from the relevant minister.

Social Services and Other Legislation Amendment (Student Assistance and Other Measures) Bill 2021

Purpose	Schedules 1 and 2 to this bill seek to amend the *Student Assistance Act 1973* to make the Act more consistent with social security law relating to Tax File Number collection and use, and information management. It also seeks to improve the effective administration schemes of the ABSTUDY and Assistance of Isolated Children schemes Schedule 3 to this bill makes technical amendments to social services legislation relating to the definition of 'social security law'
Portfolio	Social Services
Introduced	4 February 2021

Inappropriate delegation of legislative powers[1]

1.2 Items 1 and 2 of Schedule 3 seek to replace the definition of 'social security law' in subsections 23(17) and (18) of the *Social Security Act 1991* (Social Security Act). The explanatory memorandum explains that the current definition of 'social security law' provides that the term covers the Social Security Act, the *Social Security (Administration) Act 1999* (Administration Act) and the *Social Security (International Agreements) Act 1999*, and provisions of those Acts.[2]

1.3 The revised definition in proposed subsection 23(17) would provide that the 'social security law' includes the above three Acts, any other Act or provision of an Act that is expressed to form part of the social security law, and a legislative instrument made under an Act or provision referred to proposed paragraphs 17(a), (b) or (c).

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

2 Explanatory memorandum, p. 11, and subsections 23(17) and (18) of the *Social Security Act 1991*.

1.4 With respect to including legislative instruments in this definition, the explanatory memorandum explains:

> Various legislative instruments made under the three Acts referred to above are also important parts of the social security legislative scheme. The amendments confirm that any legislative instrument made under one of those Acts will also be part of the social security law. For example, the amendments confirm that the Adult Disability Assessment Determination 2018, made under section 38C of the Social Security Act and known as the Adult Disability Assessment Tool, is part of the social security law.[3]

1.5 While noting this explanation, the committee notes that the term 'social security law' is used widely throughout the Social Security Act and the Administration Act, as well as other legislation, such as the *Veterans' Entitlements Act 1986*, yet neither the justification for, nor the impact of including legislative instruments in this definition is explained clearly in the explanatory memorandum.

1.6 The committee is concerned that the expanded definition of the 'social security law' may result in delegated legislation made under social security legislation expanding the application of references to social security law in primary legislation in ways that are not explained in the explanatory memorandum.

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

- **why it is considered necessary and appropriate for legislative instruments made under Acts expressed to form part of the 'social security law' to be included in the new definition of 'social security law' in proposed subsection 23(17); and**
- **the practical impact of this change.[4]**

3 Explanatory memorandum, p. 11.

4 For example, it is not clear what the practical impact will be of providing that the Adult Disability Assessment Tool will form part of the 'social security law'.

Bills with no committee comment

1.7 The committee has no comment in relation to the following bills which were introduced into the Parliament between 2 – 4 February 2021:

- Education Legislation Amendment (2021 Measures No. 1) Bill 2021
- Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021
- Narcotic Drugs Amendment (Medicinal Cannabis) Bill 2021

Commentary on amendments and explanatory materials

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

1.8 On 2 February 2021, the Minister for Families and Social Services (Senator Ruston) tabled a revised explanatory memorandum, and the bill was read a third time.

1.9 The committee thanks the minister for tabling this revised explanatory memorandum which includes key information previously requested by the committee.[5]

Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill 2020

1.10 On 2 February 2021 in 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.

1.11 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[6]

Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020

1.12 On 4 February 2021, the Assistant Minister for Forestry and Fisheries (Senator Duniam) tabled an addendum to the explanatory memorandum, and the bill was read a third time.

1.13 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[7]

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2020*, 2 December 2020, pp. 35-37.

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021*, 29 January 2021, pp. 57-64.

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021*, 29 January 2021, pp. 67-69.

Export Control Amendment (Miscellaneous Measures) Bill 2020

1.14 On 2 February 2021, the Assistant Minister for Road Safety and Freight Transport (Mr Buchholz) presented an addendum to the explanatory memorandum, and the bill was read a third time.

1.15 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[8]

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

1.16 On 4 February 2021, the Minister for Energy and Emissions Reduction (Mr Taylor) presented an addendum to the explanatory memorandum, and the bill was read a third time.

1.17 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[9]

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

- National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019;[10] and
- Native Title Legislation Amendment Bill 2020.[11]

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8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021*, 29 January 2021, pp. 70-72.

9 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2020*, 2 December 2020, pp. 52-57.

10 On 3 February 2021, the Senate agreed to 34 Government amendments, the Minister for Superannuation, Financial Services and the Digital Economy (Senator Hume) tabled a supplementary explanatory memorandum, the House of Representatives agreed to the Senate amendments and the bill finally passed both Houses.

11 On 2 February 2021, the Assistant Minister to the Attorney-General (Senator Stoker) tabled a replacement revised explanatory memorandum, the bill was read a second time and the committee reported progress.

Chapter 2

Commentary on ministerial responses

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

Australian Immunisation Register Amendment (Reporting) Bill 2020

Purpose	This bill seeks to amend the *Australian Immunisation Register Act 2015* to create a requirement for recognised vaccination providers to report to the Australian Immunisation Register information relating to vaccinations administered by them, or vaccinations given outside of Australia that they are notified about. It also seeks to empower the Secretary of the Department of Health to compel the production of this information if a recognised vaccination provider does not comply with this reporting requirement
Portfolio	Health
Introduced	House of Representatives on 3 December 2020
Bill status	Finally passed both Houses on 4 February 2021

Privacy
Significant matters in delegated legislation[1]

2.2 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave the scope of mandatory reporting obligations in relation to vaccinations to delegated legislation, and whether the bill can be amended to instead specify the scope of these obligations (or at least high-level guidance in relation to these matters) on the face of the primary legislation.[2]

1 Schedule 1, item 7, proposed Division 2A of Part 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 1-3.

Minister's response[3]

2.3 The minister advised:

> The amendments to the *Australian Immunisation Register Act 2015* (Act) create a requirement for recognised vaccination providers to report to the Australian Immunisation Register (AIR) information relating to vaccinations they administer and vaccines they are notified about that were administered outside Australia.
>
> The delegated legislation design will allow for the Australian Government to respond dynamically in relation to a number of vaccination reporting matters such as specifying the types of vaccines to which mandatory reporting applies. The legislative design allows Government to quickly respond to the development of vaccinations, which are necessary to protect the Australian public. As shown in the current pandemic, swift responsiveness is crucial in the matters of vaccinations.
>
> The delegated legislation design allows the Government to manage the practical implementation of mandatory reporting to the AIR through a staged implementation. This is required to allow vaccination providers and software developers time to ensure they have the systems in place to meet their obligations under the new legislative arrangements.
>
> The rules will specify the reporting period. Flexibility in determining the period for reporting will ensure that compliance activities can be undertaken that take into account the circumstances of particular vaccination providers. The Government will work in consultation with stakeholders to ensure that the reporting period is appropriate and proportionate. Where the Government requires a change in the reporting period the delegated legislation design will provide for a quick and effective resolution.
>
> The legislative design goes to the ability of the Commonwealth to respond quickly and effectively on matters that affect the health and wellbeing of all Australians. It is considered appropriate that these matters be dealt with in delegated legislation as they relate to operational matters such as process and procedures. It is normal process for these types of matters to be dealt with in delegated legislation.
>
> By way of background, current legislative arrangements in the Act, approved by Parliament, allow the Minister to make rules prescribing matters required or permitted by the Act.
>
> The Government has undertaken consultation on the arrangements under the Act. This includes engagement with key stakeholders from the sector on the details of the Bill and what is proposed for delegated legislation. Further,

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3 The minister responded to the committee's comments in a letter dated 3 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> communications and guidance are being prepared to be issued across the sector, which will include details on these matters. As such, the Government does not consider it necessary to amend the Bill to include high-level guidance on these matters. As noted in the explanatory memorandum, these arrangements are intended to be broad to enable appropriate flexibility and adaption to circumstances.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the use of delegated legislation in relation to vaccination reporting matters will allow the government to quickly respond to the development of vaccinations, which are necessary to protect the Australian public. The committee also notes the minister's advice that rules will allow flexibility in determining the period for reporting to take into account the circumstances of particular vaccination providers, and that the government will consult with stakeholders to ensure appropriate and proportionate reporting periods.

2.5 The committee further notes the minister's advice that, as this delegated legislation relates to operational matters such as process and procedures, it is normal for these types of matters to be dealt with in delegated legislation. Finally, the committee notes the minister's advice that these arrangements are intended to be broad to enable appropriate flexibility and adaption to circumstances.

2.6 While noting this explanation, the committee does not generally consider administrative flexibility to be a sufficient justification for including significant matters in delegated legislation. 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 the proposed changes in the form of an amending bill.

2.7 Noting the sensitive nature of the information that may be required to be reported for inclusion in the register, the committee continues to have scrutiny concerns regarding leaving the scope of mandatory reporting obligations in relation to vaccinations to delegated legislation.

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

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

Data Availability and Transparency Bill 2020

Purpose	This bill seeks to authorise and regulate controlled access to Australian Government data to promote better availability and use of government data, empower the government to deliver effective policies and services, and support research and development
Portfolio	Government Services
Introduced	House of Representatives on 9 December 2020
Bill status	Before the House of Representatives

Privacy[4]

Significant matters in delegated legislation[5]

2.10 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice, given the potential impact on an individual's right to privacy as a result of the use and disclosure of personal information under the proposed data sharing scheme, as to whether the bill can be amended to:

- include a public interest test which prioritises privacy interests in decision-making under the scheme;
- provide guidance on the face the bill about the circumstances in which it will be 'unreasonable or impracticable' to seek an individual's consent for sharing their personal information;
- require that, where possible, data that includes personal information is shared in a de-identified way;
- clarify the scope of the permitted data sharing purposes, and include guidance on the face of the bill about precluded purposes; and
- provide minimum standards for ethics approvals for private entities seeking to use data that includes personal information.[6]

4 Clauses 15, 16 and 88. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

5 Clauses 15, 126 and 133. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 4-8.

Minister's response[7]

2.11 The minister advised:

General comment

In 2018, the Australian Government committed to reform the way it shares public sector data. Reforms are necessary to realise the benefits of greater data availability and use identified by a Productivity Commission inquiry, supporting economic and research opportunities and the Government's vision for streamlined and efficient service delivery.

The *Data Availability and Transparency Bill* (the Bill) is central to these reforms, establishing an alternate pathway for the sharing of Commonwealth government data. The Bill authorises Commonwealth data custodians to share data with accredited entities for specific purposes in the public interest, with safeguards in place to mitigate risk. Modernising the approach to sharing public sector data will empower government to deliver effective services and better-informed policy, and support research and development.

While the Bill supports sharing of a wide range of Government data, such as environmental or business data, particular attention was given to the potential for sharing personal information during its development. The Bill deliberately leverages and operates alongside existing legislation, such as the *Privacy Act 1988* and the *Regulatory Powers (Standard Provisions) Act 2014*. To minimise duplication and overlap, the Bill also draws upon existing frameworks for matters such as ethics approvals and complaints.

The Bill takes a principles-based approach to data sharing, providing parties with the flexibility to tailor sharing arrangements to manage risks on a case-by-case basis, and ensuring the scheme can respond to evolving technologies and community expectations. To ensure efficient and adaptable administration of the scheme, key concepts are included in the Bill, with more detailed requirements and procedures addressed in delegated legislation or guidelines that entities must have regard to when operating under the scheme [see clause 27].

General comments – Interactions between the Bill and the Privacy Act 1988

The Bill has been developed using a privacy-by-design approach to identify, minimise and mitigate privacy impacts wherever possible. Two independent Privacy Impact Assessments (PIAs) were undertaken to identify strengths and weaknesses in the early policy positions and planned legislative framework, and the draft Bill itself.

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7 The minister responded to the committee's comments in a letter dated 10 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

The Bill works with the *Privacy Act 1988* to protect the personal information of individuals shared under the scheme. The Bill relies on the 'required or authorised by law' exception to Australian Privacy Principles (APP) 3 and 6 to allow personal information to be collected, used and disclosed under the scheme. In leveraging these exceptions, the Bill strikes an important balance — acknowledging the legitimate interests of entities in carrying out their functions or activities and balancing these interests with the protection of individual privacy. In this instance the functions and activities support government to deliver effective policy, service delivery and support research and development.

Australian Government agencies responsible for decisions under the Bill are also subject to the *Privacy Code (Australian Government Agencies – Governance) APP Code 2017* ('Privacy Code'). This includes a requirement that data custodians (as APP agencies) must conduct PIAs for 'high privacy risk projects' [the bill does not prevent custodians from requiring privacy impact assessments for projects beneath this threshold].

The Bill includes a range of 'privacy-positive' measures to protect the personal information of individuals, informed by consultation with the community and advice from privacy experts such as the Office of the Australian Information Commissioner (OAIC). These measures include:

- a privacy coverage model that ensures all entities have privacy obligations equivalent to the *Privacy Act 1988* (clause 28). APP entities continue to have obligations under the APPs, including governance, privacy policies, and data security, and the Notifiable Data Breaches scheme.
- permitting data sharing for three purposes in the public interest, while precluding sharing for purposes such as surveillance or monitoring of individuals (clause 15).
- a requirement to seek consent for the sharing of personal information, unless it is unreasonable or impracticable to do so (paragraph 16(2)(c)).
- a requirement to observe applicable ethics processes (subclause 16(2)(b))
- a data minimisation requirement, which includes minimising the sharing of personal information to the extent possible (paragraph 16(8)(b)).

Of the three permitted purposes, generally only government service delivery will require the sharing of personal information about individuals. By comparison, government policies and programs, and research and development will ordinarily involve the sharing of aggregate data to support decisions about cohorts of people or the Australian community as a whole [see subclause 16(8) of the Bill].

Whether the bill can be amended to clarify the scope of the permitted data sharing purposes, include a public interest test which prioritises privacy interests, and provide guidance on unreasonable or impracticable

The Bill's permitted purposes [see subclause 15(1)] are informed by extensive consultation and were considered as part of the two PIAs. The permitted purposes are government service delivery, informing government policy and programs; and research and development. The permitted purposes are intentionally broad to facilitate a wide range of projects using government data, with some reasonable, necessary and proportionate limitations in the form of precluded purposes. While the Minister may prescribe additional precluded purposes in Rules to circumscribe the scheme, any expansions to the permitted purposes must be passed by Parliament.

The Bill precludes sharing for certain enforcement related purposes, such as law enforcement investigations and operations, and for national security purposes [see subclause 15(2)]. While these activities are legitimate functions of government, they require specific oversight and redress mechanisms that are better dealt with through dedicated legislation. Existing legislation governing these activities, including offences and penalties, will continue to operate alongside the Bill.

Once a project is determined to be for a permitted purpose, further consideration of the appropriateness of the project occurs through application of the Project Principle [see subclause 16(1)]. This principle requires consideration of the public interest, consent, applicable ethics processes, and use of an Accredited Data Service Provider (ADSP). The data sharing agreement for a project must set out how the data sharing principles are to be applied, and must specifically include a description of how the public interest is served by the sharing [see subclause 19(7)(a)]. These details will then be made available by the Commissioner on a public register of data sharing agreements [see subclause 130].

Consistent with other laws, the Bill and its Explanatory Memorandum do not define the public interest to ensure the Bill can adapt to changing community expectations [see the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988*]. The question of whether a project can reasonably be expected to serve the public interest must be made on a project-by-project basis, weighing the range of factors for and against sharing.

In a similar manner, entities must consider the Bill's consent requirements on a project-by-project basis. The Bill's approach to consent builds upon the *Privacy Act 1988*, requiring consent for any sharing of personal information, unless it is unreasonable or impracticable to seek consent. The Bill's standard of consent is that set by the *Privacy Act 1988* and the language of 'unreasonable or impracticable' is drawn from section 16A of that Act. As noted in the Explanatory Memorandum, these terms should be interpreted using relevant guidance on consent made by the Australian Information Commissioner (AIC).

The Bill's holistic approach ensures privacy interests are appropriately balanced with the public interest in a project, and does not assume that one must prevail at the expense of the other. In this regard, the Bill is in step with the objects of the *Privacy Act 1988*, which specifically recognise the need to balance the protection of the privacy of individuals with entities' interests in carrying out their functions and activities [*Privacy Act 1988* s 2A(b)].

To support entities in their decision-making, the Bill empowers the Commissioner to issue codes of practice on how aspects of the scheme are to be applied and complied with. As legislative instruments, the purpose and legal status of data codes are similar to registered APP codes under sections 26B and 26C of the *Privacy Act 1988*.

The Commissioner may also release guidelines on any aspect of the data sharing scheme, such as the data sharing purposes and principles, to support data scheme entities in their application. Use of guidelines to provide clarity on the Bill's requirements is consistent with OAIC's model for ensuring compliance with the *Privacy Act 1988* [see *Privacy Act 1988* s 28]. Data scheme entities must have regard to such guidelines when operating under the scheme, and the Commissioner may issue directions to address non-compliance [see clause 27 of the Bill]. These guidelines will work with the Bill's privacy coverage model and data sharing principles to minimise the risk of interpretations that may trespass on privacy.

While I consider the level of detail to be included in these codes and guidelines is inappropriate for primary legislation, I acknowledge the importance of striking the balance between flexibility and Parliamentary scrutiny.

I note the Commissioner's power to issue guidelines is discretionary, though there is an implicit expectation that the Commissioner will do so to support entities to comply with the requirements of the scheme. Should the Committee consider this matter to be material, I am open to giving consideration to amendments to the Bill to require that the Commissioner must issue guidelines on certain matters, including application of the Data Sharing Principles, in consultation with relevant entities.

Whether the bill can be amended to provide that, where possible, personal information is shared in a de-identified way

Under the Data Principle, data custodians must only share data that is reasonably necessary for the relevant data sharing purpose [see paragraph 16(8)(a) of the Bill]. This data minimisation requirement is complemented by a further requirement to minimise the sharing of personal information as far as possible without compromising the data sharing purpose [see paragraph 16(8)(b)]. The Data Principle as worded avoids the term 'de-identified' to ensure the Bill remains technology-neutral.

Whether the bill can be amended to provide minimum standards for ethics approvals for private entities seeking to use data that includes personal information.

The Bill allows for private sector entities to participate in the scheme, subject to accreditation and privacy coverage. This acknowledges that sharing data with commercial entities can greatly benefit the public when it is done safely, for the right purposes and with effective oversight.

I note the Committee's specific concerns about private sector participation in the scheme. Paragraph 16(2)(b) of the Bill requires data scheme entities to observe any applicable ethics processes. This includes observance of established ethics approval or review processes, and seeking independent advice on the ethical implications of sharing as appropriate. The Bill leverages existing frameworks to ensure projects and research in specific fields meet accepted ethical standards. This requirement imposes a minimum standard for ethics approvals for all data scheme entities, irrespective of sector.

As an added safeguard, data custodians will be able to require ethics processes under the Project Principle in circumstances where no ethics processes would ordinarily apply. Other elements of the Project Principle (such as consent) and the privacy impact assessment requirements under the *Privacy Code* provide further safeguards for projects involving personal information.

A final element of the Bill's design is the requirement to make data sharing agreements public [see clause 130], a measure supported by the second independent PIA on the draft Bill [Information Integrity Solutions, *Privacy Impact Assessment – Draft Data Availability and Transparency Bill 2020* [https://www.datacommissioner.gov.au/exposure-draft/dat] (6 September 2020) p. 66]. Making transparent the factors taken into account by data custodians when making sharing decisions is an important check and balance. Such transparency places an onus on data custodians to make sharing decisions on the basis of guidelines issued by the Commissioner.

Committee comment

2.12 The committee thanks the minister for this response. The committee notes the minister's advice that the bill works with the *Privacy Act 1988* (Privacy Act) to protect the personal information of individuals shared under the scheme, and relies on the 'required or authorised by law' exception to Australian Privacy Principles 3 and 6 to allow personal information to be collected, used and disclosed. The minister also advised that the bill seeks to strike a balance between acknowledging the interests of entities in carrying out their functions or activities and balancing these interests with the protection of individual privacy.

Permitted data sharing purposes, public interest, and guidance on 'unreasonable or impracticable'

2.13 The committee notes the minister's advice that the permitted data sharing purposes are intentionally broad, and that, of the three permitted purposes, generally only government service delivery will require the sharing of personal information about individuals.

2.14 The minister also advised that questions of whether a project can reasonably be expected to serve the public interest and questions in relation to consent requirements must be resolved on a project-by-project basis. The minister advised that the bill's intended approach is to ensure privacy interests are appropriately balanced with the public interest in a project, rather than assuming that one must prevail at the expense of the other, and that this approach is consistent with the objects of the Privacy Act.

2.15 The committee also notes the minister's advice that the language of 'unreasonable or impracticable' in relation to the requirement to seek consent for the sharing of personal information is drawn from the Privacy Act, and that these terms should be interpreted using relevant guidance on consent made by the Australian Information Commissioner. While noting this advice, the committee considers that, to assist users and individuals seeking to understand the scheme, it would be useful for the explanatory material to provide specific current examples of this guidance and to describe where it may be located.

2.16 The committee further notes the minister's advice that, consistent with current measures for ensuring compliance with the Privacy Act, the National Data Commissioner may release guidelines on aspects of the data sharing scheme including the data sharing purposes and principles and that these guidelines will contribute to minimising the risk of interpretations that may trespass on privacy.

2.17 The committee welcomes the minister's advice that, noting that the Commissioner's power under the bill to issues guidelines is currently discretionary, the minister is open to considering amendments to require that the Commissioner *must* issue guidelines on certain matters, including application of the Data Sharing Principles.

2.18 The minister also advised that he did not consider the level of detail to be included in the guidelines to be appropriate for inclusion in primary legislation but acknowledged the importance of striking a balance between flexibility and parliamentary scrutiny. While noting this advice, the committee is concerned that the guidelines, which may play an important role in minimising the risk of interpretations of the operation of the scheme that trespass on personal privacy, will be established in non-legislative instruments that are not subject to tabling or scrutiny by the Parliament.

2.19 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*).

2.20 The committee remains concerned about the breadth of the 'unreasonable or impracticable' exception to the requirement to secure consent from an individual prior to sharing their personal information, especially noting the minister's advice that privacy interests will not be given priority in the public interest test. As such, the committee also requests the minister's further advice as to:

- **whether the addendum to the explanatory memorandum can provide specific examples of current guidance on the meaning of 'unreasonable or impracticable' and provide information on where this current guidance can be accessed; and**
- **why it is considered necessary and appropriate for guidelines on aspects of the data sharing scheme, which may play an important role in minimising the risk of interpretations of the operation of the scheme that trespass on personal privacy, to be included in non-legislative instruments that are not subject to parliamentary scrutiny.**

Where possible, personal information is shared in a de-identified way

2.21 The committee notes the minister's advice that, under the data principle, custodians must only share data that is reasonably necessary for the relevant data sharing purpose, and that this requirement is complemented by a requirement to minimise the sharing of personal information as far as possible without compromising the data sharing purpose. The minister also advised that the term 'de-identified' has been avoided to ensure the bill remains technology neutral.

2.22 While noting this advice, the committee remains concerned about the absence of an explicit requirement in the bill that, where possible, the sharing of data is done in a way that does not allow an individual to be identified.

2.23 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the bill not including an explicit requirement that, where possible, the sharing of data is done in a way that does not allow an individual to be identified.

Minimum standards for ethics approvals for private entities

2.24 The committee notes the minister's advice that paragraph 16(2)(b) of the bill requires data scheme entities to observe any applicable ethics processes, and that the bill leverages existing frameworks to ensure projects and research in specific fields meet accepted ethical standards. The minister advised that this requirement imposes a minimum standard for ethics approvals for all data scheme entities, irrespective of sector.

2.25 The committee also notes the minister's advice that data custodians may require ethics processes in circumstances where no ethics processes would ordinarily apply, and that this is an added safeguard. While noting this advice, the committee remains concerned that the ability to require a private entity who is otherwise not subject to existing ethics process to undertake such processes is discretionary, with the decision to set this requirement being left to the various Commonwealth bodies empowered to share data under the bill.

2.26 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not requiring minimum standards for ethics approvals for private entities seeking to use data that includes personal information where no ethics processes would ordinarily apply.

Privacy[8]
Significant matters in delegated legislation[9]

2.27 In *Scrutiny Digest 1 of 2021* the committee further requested the minister's advice as to why individuals whose privacy interests may be affected by the data sharing scheme should not have access to merits review and the dedicated complaints process established in Division 1 of Part 5.3.[10]

Minister's response[11]

2.28 The minister advised:

> *Privacy interests and merits review*
>
> The Bill's review and complaints mechanisms are scheme-specific to supplement existing redress mechanisms and reduce duplication and overlap. Part 5.3 of the Bill provides detailed requirements for the making of complaints, which may be supplemented by data codes that deal with the management and internal handling of complaints, and set additional requirements not inconsistent with the Bill [see Part 5.3 and paragraphs 126(2)(c)-(d)].

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8 Clauses 15, 16 and 88. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

9 Clauses 15, 126 and 133. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 4-8.

11 The minister responded to the committee's comments in a letter dated 10 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Individuals with concerns about the data sharing scheme will have access to existing complaints and administrative review processes. For example, the existing complaints mechanism under the *Privacy Act 1988* will be available for complaints relating to data scheme entities' handling of personal information [Individuals will also be able to complain to their State or Territory privacy regulator, if the complaint relates to an accredited entity that is a State or Territory government authority]. The Bill includes provisions to allow for the transfer of matters and information between regulators, and I make some further comments on these regulatory cooperation mechanisms below.

In addition to investigating complaints from data scheme entities, the Commissioner may also conduct own-motion investigations into potential breaches in response to a 'tip-off' from the public or media.

As a final point, I note that the Bill includes several privacy-positive measures to minimise the sharing of personal information and promote individual control over its use. As described above, sharing of personal information will generally only be reasonably necessary for the purposes of government service delivery, as the other policies, programs and research ordinarily have a population or cohort-level focus.

Once personal information enters the scheme, it must be validated or corrected by the individual before it can 'exit' the scheme and be used for other lawful purposes, for example pre-filling a form [see subclauses 21(1)-(2)]. Together, the consent requirement (which may be triggered by the project) and the exit mechanism 'bookend' the scheme.

Individuals will have access to a range of other redress options to address concerns unrelated to privacy. For example, individuals will be able to seek judicial review through the courts and make complaints to integrity agencies such as the Commonwealth Ombudsman. Merits review of substantive decisions *based* on shared data that has exited the scheme (though validating data in a pre- filled form) may also be available, if provided for by the legislation under which the decision was made. These frameworks will have their ordinary operation, without being replicated in the Bill itself.

Commissioner awareness of privacy complaints made directly to Australian Information Commissioner

I note the Committee's concern that the Commissioner may not have adequate oversight of privacy complaints relating to the scheme, if those complaints are made directly to the Australian Information Commissioner (AIC) under the *Privacy Act 1988* (para 1.21).

The Bill includes mechanisms to facilitate regulatory cooperation and to notify the Commissioner of data breaches involving personal information:

- Data scheme entities that report a personal information breach to the AIC must also provide a copy to the Commissioner to allow for monitoring of systemic privacy breaches [see subclause 37(5)].

- Further, where a privacy complaint is made directly to the Commissioner, the Commissioner may transfer the matter and related information to the AIC as the Commonwealth's dedicated privacy regulator [see clauses 107-108]. The AIC will have reciprocal transfer powers under a proposed amendment to section 50 of the *Privacy Act 1988* [see Data Availability and Transparency (Consequential Amendments) Bill 2020 items 6-8].

These aspects of the scheme have been designed in consultation with the Attorney-General's Department and the OAIC to avoid duplication and regulatory overlap, consistent with other laws that provide for transfers between regulators. I expect that the ONDC and OAIC will address specific requirements through a Memorandum of Understanding.

Committee comment

2.29 The committee thanks the minister for this response. The committee notes the minister's advice that individuals with privacy concerns about the data sharing scheme will have access to existing complaints and administrative review processes, such as the existing complaints mechanism under the Privacy Act in relation to data scheme entities' handling of personal information, and complaints mechanisms in relation to State or Territory privacy regulators, if the complaint relates to an accredited entity that is a State or Territory government authority.

2.30 The committee also notes the minister's advice that the National Data Commissioner may conduct own-motion investigations into potential breaches. The minister also advised that other redress options to address concerns unrelated to privacy will be available to individuals such as judicial review and making a complaint to the Commonwealth Ombudsman. The committee further notes the minister's advice that merits review of substantive decisions based on shared data that has exited the scheme may also be available, if this is provided for by the legislation under which the decision was made.

2.31 While also noting the minister's advice in relation to the requirements in subclauses 21(1) and (2) that personal information in the scheme must be validated or corrected by the individual before it can 'exit' the scheme, the committee notes that paragraph 21(1)(b)(iii) also permits data as 'output'[12] to be shared in circumstances prescribed by the rules. While the explanatory memorandum states that any such rules created must be consistent with the bill,[13] the committee is concerned that allowing delegated legislation to expand the circumstances in which output may be shared may undermine the value of this measure as a safeguard as described in the minister's response.

12 Subclause 10(4) provides that 'output' is data that is the result or product of the use, by an accredited user, of public sector data shared with the accredited used under subsection 13(1).

13 Explanatory memorandum, p. 30.

2.32 Further, while noting the minister's advice in relation to the mechanisms for regulatory cooperation and requirements to notify the Commissioner of data breaches, the committee remains concerned that the bill does not require any information to be given to the Commissioner with respect to complaints received by the Australian Information Commissioner, or other bodies who may receive complaints about the scheme, such as the Commonwealth Ombudsman, or Commonwealth entities acting as data custodians within the scheme. In raising this scrutiny concern, the committee notes that full visibility of complaints about the scheme may assist in reducing the possibility of tension between the dual roles of the National Data Commissioner as both regulator and champion of the data sharing scheme.

2.33 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the complaint mechanisms available to individuals whose privacy interests may be affected by the scheme, including the lack of mechanisms on the face of the bill to ensure that the National Data Commissioner has full visibility of privacy complaints made in relation to the scheme.

Significant matters in delegated legislation[14]

2.34 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave procedures, requirements and other matters relating to the accreditation of entities for the purposes of the data sharing scheme to delegated legislation;
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[15]

Minister's response

2.35 The minister advised:

> Part 6.4 of the Bill provides for three types of disallowable legislative instruments, which must be complied with by data scheme entities: Ministerial rules, regulations made by the Governor-General and data codes issued by the Commissioner [see clause 26 of the Bill]. This approach helps to ensure the scheme can adapt to emerging technologies and future needs over time, while allowing for oversight through the disallowance process.

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14 Clause 86. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, p. 10.

> Accreditation is an essential precondition for entities' participation in the data sharing scheme. In recognition of this, Part 5.2 of the Bill includes detailed provisions on matters such as criteria, applications and conditions of accreditation [see also chapter 3, which sets out core obligations of data scheme entities, including accredited entities]. This Part also includes procedures for accreditation transfer, cancellation and suspension, and notice of accreditation decisions. Decisions of this nature are subject to merits review to promote procedural fairness, with some exceptions for foreign entities [see clause 118]. As these requirements and procedures go to the 'essence' of the legislative scheme, it is necessary and appropriate to include them in the primary legislation to allow for Parliamentary oversight [Department of the Prime Minister and Cabinet, *Legislative Handbook*, 2017 para 1.10(j)]. This distinguishes the Bill from the recent Consumer Data Right, which delegates most of its accreditation framework to the *Competition and Consumer (Consumer Data Right) Rules 2020*.
>
> As the Committee notes, clause 86 allows Rules to provide for procedures, requirements and any other matters relating to accreditation. This approach aligns with the Department of the Prime Minister and Cabinet's Legislative Handbook, which states that matters of detail and matters that may change frequently are best dealt with in delegated legislation to streamline the primary legislation [Department of the Prime Minister and Cabinet, *Legislative Handbook*, 2017 paras 5.65-5.66; see also para 1.10(d)]. At the time of writing, the Accreditation Rules will describe circumstances in which data custodians must use an accredited data service provider (ADSP), and specify documentation to support entities' claims against the accreditation criteria in clause 77 [see clauses 29 and 87 of the Bill]. This content is appropriate for Rules, as documents and circumstances for use of an ADSP are detailed and may change over time. These Rules will be subject to oversight through the disallowance process for legislative instruments.
>
> For these reasons, I do not consider it necessary to include further guidance on accreditation matters on the face of the Bill. As the weight of accreditation framework is already located in Part 5.2, significant accreditation matters will not be left to delegated legislation. Where the Bill does provide for delegated legislation, it is aligned with standard drafting practices to balance legal certainty and flexibility.

Committee comment

2.36 The committee thanks the minister for this response. The committee notes the minister's advice that the approach of providing for various types of legislative instruments in the bill helps to ensure the scheme can adapt to emerging technologies and future needs over time, while allowing for oversight through the disallowance process. The minister also advised that the approach taken in relation to allowing rules to provide for procedures, requirements and any other matters relating to accreditation aligns with the *Legislative Handbook*, issued by the Department of the Prime Minister and Cabinet.

2.37 The committee also notes the minister's advice that, at the time of writing, the Accreditation Rules will describe circumstances in which data custodians must use an accredited data service provider (ADSP) and specify documentation to support entities' claims against accreditation criteria. The minister advised that, as documents and circumstances for use of an ADSP are detailed and may change over time, this content is appropriate for rules. The committee further notes the minister's advice that significant matters will not be left to delegated legislation, as the weight of the accreditation framework is already located on the face of the bill, in Part 5.2.

2.38 However, noting the importance of ensuring that the accreditation framework only permits accreditation of entities who can safely handle public sector data, from a scrutiny perspective, the committee remains concerned about the extent to which the bill relies on delegated legislation to determine matters related to the accreditation of entities under the scheme.

2.39 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving procedures, requirements and other matters relating to the accreditation of entities for the purposes of the data sharing scheme to delegated legislation.

2.40 The committee also requests that an addendum to the explanatory memorandum containing the key information provided by the minister relating to the expected content of the Accreditation Rules 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*).

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

Broad delegation of investigatory powers[16]

2.42 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow any 'other person' to assist an authorised person in exercising monitoring and investigatory powers; and

16 Clauses 109 and 110. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

- whether the bill can be amended to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.[17]

Minister's response

2.43 The minister advised:

> The Bill establishes the National Data Commissioner as an independent statutory office holder to oversee the scheme as its regulator and champion. As regulator, the Commissioner has oversight of the scheme and is empowered to monitor, investigate, and enforce compliance with the Bill by data scheme entities. Part 5.5 of the Bill sets out the Commissioner's regulatory and enforcement powers. This Part provides for a range of mechanisms to deter and address non-compliance, allowing the Commissioner to take a graduated approach to enforcement.
>
> Subclauses 109(4) and 110(3) of the Bill allow the Commissioner (as an authorised person) to receive assistance from 'other persons' in the exercise of monitoring and investigation powers. This clause invokes s 23(1) of the *Regulatory Powers (Standard Provisions) Act 2014* ('*RPA*') and aligns with the Office of Parliamentary Counsel's Drafting Direction No. 3.5A. The standard suite of RPA provisions is an accepted baseline of powers required for an effective monitoring, investigation or enforcement regulatory regime, while providing adequate safeguards and protecting important common law privileges [Replacement Explanatory Memorandum, Regulatory Powers (Standard Provisions) Bill 2014, p. 2]. The Bill adopts this standard approach to the exercise of regulatory powers to promote an efficient, flexible and accountable approach to regulation.
>
> The Explanatory Memorandum for clauses 109 and 110 refers to the staffing provisions in the Bill [Explanatory Memorandum, Data Availability and Transparency Bill 2020, paras 555 and 560] The Bill's staffing provisions ensure that 'other persons' at the Commissioner's disposal will have the appropriate knowledge, training and expertise in the exercise and performance of investigatory powers and functions [see clauses 47-49 of the Bill]. APS employees made available to the Commissioner must have the skills, qualifications or experience necessary to assist the Commissioner, while contractors and consultants may be specifically engaged in order to assist with the performance or exercise of the Commissioner's functions or powers.
>
> Subsections 23(2)-(4) of the RPA ensure monitoring and investigatory powers are exercised accountably. Persons assisting must act under the direction of the Commissioner as authorised person and any valid actions of the person assisting will be taken to be those of the Commissioner. As persons employed or engaged by an APS Department, assisting individuals

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 10-11.

will be further subject to standard accountability measures such as the APS Code of Conduct (for staff), Commonwealth Procurement Rules (for contractors), security clearances and other pre-employment screening procedures.

For these reasons, the Bill and RPA already give effect to the suggested drafting changes to clauses 109 and 110.

Committee comment

2.44 The committee thanks the minister for this response. The committee notes the minister's advice that the provisions adopt standard provisions under the *Regulatory Powers (Standard Provisions) Act 2014*, and that these are an accepted baseline of powers required for an effective monitoring, investigation or enforcement regulatory regime, while providing adequate safeguards and protecting important common law privileges.

2.45 The committee also notes the minister's advice that staffing provisions in the bill will ensure that 'other persons' at the Commissioner's disposal will have the appropriate knowledge, training and expertise in the exercise and performance of investigatory powers and functions. The minister advised that APS employees made available to the Commissioner must have the skills, qualifications or experience necessary to assist the Commissioner, while contractors and consultants may be specifically engaged in order to assist with the performance or exercise of the Commissioner's functions or powers. The minister further advised that:

- persons assisting must act under the direction of the Commissioner as authorised person;
- any valid actions of the person assisting will be taken to be those of the Commissioner; and
- as persons employed or engaged by an APS Department, assisting individuals will be further subject to standard accountability measures such as the APS Code of Conduct (for staff), Commonwealth Procurement Rules (for contractors), security clearances and other pre-employment screening procedures.

2.46 The minister advised that, for the above reasons, the bill and the *Regulatory Powers (Standard Provisions) Act 2014* already give effect to the committee's suggested drafting changes.

2.47 While the committee acknowledges the minister's advice as to how it is intended this power will be exercised, and the ways in which an authorised person will be made accountable for the actions of persons assisting, there is nothing on the face of the bill to limit the use of 'other persons' to assist the Commissioner as set out in the response. In particular, it appears that there is no requirement on the face of the bill that 'other persons' assisting an authorised person must be the staff, consultants or contractors to which clauses 47 to 49 of the bill refer. The committee reiterates its

consistent scrutiny view in relation to the exercise of coercive or investigatory powers that persons authorised to use such powers should have appropriate training and experience.

2.48 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing authorised persons who are exercising monitoring and investigation powers to be assisted by other persons with no requirement on the face of the bill that the other person has appropriate training or experience.

Reversal of evidential burden of proof [18]

2.49 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice, given the explanatory materials do not address the issue, as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.[19]

Minister's response

2.50 The minister advised:

> For data sharing to be authorised under the Bill, data custodians must only share data with accredited users, either directly or through an ADSP. Accreditation is not limited to Australian entities to encourage international cooperation on projects in the public interest, with appropriate controls in place such as ASIO security assessments [see Data Availability and Transparency (Consequential Amendments) Bill 2020 items 3-4].
>
> Section 136 of the Bill provides a set of provisions for extended geographical jurisdiction, drawn from section 15.2 of the *Criminal Code Act 1995*. Subclauses 136(2) and (3) provide offence-specific defences for foreign entities if they are not an Australian entity, the conduct occurred wholly in a foreign country and the conduct is lawful in the foreign jurisdiction in which it occurred.
>
> As described in subclause 136(4), a person that seeks to rely on these defences bears an evidential burden. It is appropriate for the defendant to bear the evidential burden in these circumstances because evidence to establish whether:
>
> - the relevant conduct occurred wholly in a foreign country (but not on board an Australian aircraft or ship); and

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18 Clause 136. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 11-12.

- the defendant is not an Australian entity (as defined in clause 9 of the Bill)

is best able to be adduced by, and within the knowledge of, the defendant. Evidence that suggests the reasonable possibility that the conduct in question was lawful in the foreign country is also best raised by the defendant, as the defendant would have knowledge of that foreign jurisdiction, and it would be significantly more difficult or costly for Australian-based prosecutors to bear this burden.

I am willing to consider an addendum to the Bill's Explanatory Memorandum at an appropriate time that incorporates the explanation above.

Committee comment

2.51 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate for the defendant to bear the evidential burden in the circumstances set out in subclauses 136(2) and (3) as evidence to establish whether the relevant conduct occurred wholly in a foreign country (but not on board an Australian aircraft or ship), and whether the defendant is not an Australian entity is best able to be adduced by, and within the knowledge of, the defendant. The minister also advised that evidence that suggests the reasonable possibility that the conduct in question was lawful in the foreign country is also best raised by the defendant, as the defendant would have knowledge of that foreign jurisdiction, and it would be significantly more difficult or costly for Australian-based prosecutors to bear this burden.

2.52 The committee welcomes the minister's advice that he is willing to consider an addendum to the bill's explanatory memorandum at an appropriate time that incorporates the explanation above.

2.53 In light of the minister's advice, the committee makes no further comment on this matter.

2.54 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*).

Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020

Purpose	Schedule 1 to this bill seeks to amend the *Corporations Act 2001* to require financial services providers that receive fees under an ongoing arrangement to provide annual fee updates to clients, and to obtain written consent before such fees can be deducted from a client's account Schedule 2 to this bill seeks to amend the *Corporations Act 2001* to require a providing entity to give written disclosure of lack of independence when authorised to provide personal advice to a retail client Schedule 3 to this bill seeks to amend the *Superannuation Industry (Supervision) Act 1993* to provide greater protection for superannuation members against paying fees for no service
Portfolio	Treasury
Introduced	House of Representatives on 9 December 2020
Bill status	Before the House of Representatives

Significant penalties
Significant matters in delegated legislation[20]

2.55 In *Scrutiny Digest 1 of 2021* the committee requested the Treasurer's advice as to

- the justification for the significant maximum penalty that may be imposed for failing to comply with proposed subsection 962X(1), including whether this level of penalty is comparable to similar offences in other Commonwealth legislation;
- why it is considered necessary and appropriate to leave the scope of recordkeeping obligations which are subject to significant penalties to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding the scope and type of records that must be kept on the face of the primary legislation.[21]

20 Schedule 1, item 24, proposed section 962X; and item 35. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 13-14.

Treasurer's response[22]

2.56 The Treasurer advised:

Maximum penalty

Subsection 962X(1) requires financial service providers that receive fees ('fee recipients') to keep records sufficient to ascertain their compliance with the obligations in Division 3 of Part 7.7A in relation to ongoing fee arrangements. A failure to do so attracts a maximum penalty of up to 5 years' imprisonment and/or a fine of up to 600 penalty units for an individual (or 6,000 penalty units for a corporation) (calculated in accordance with the existing rules regarding penalties in sections 1311B and 1311C of the *Corporations Act 2001* (Corporations Act)).

The inclusion of this new obligation is part of the law implementing recommendation 2.1 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which addresses significant problems that were identified with clients being charged for services that were not provided (particularly in relation to ongoing fee arrangements). To address these issues, the new law imposes a range of obligations on fee recipients – including in relation to the information provided to a client about the services provided under an ongoing fee arrangement and the frequency with which clients must opt-in to such arrangements.

The new obligation to keep sufficient compliance records is integral to the legal framework in addressing the problems identified with ongoing fee arrangements. This is because it ensures that Australian Securities and Investments Commission (ASIC) has access to all relevant information when undertaking compliance and enforcement work. A contravention of this obligation is the only contravention in the new law regulating ongoing fee arrangements that gives rise to a potential criminal offence, highlighting its importance to the overall integrity of the regime.

Additionally, this penalty is in line with penalties for breaching other record keeping provisions, including the requirement to keep financial records in subsection 988A(1) of the Corporations Act.

Scope of records subject to record keeping obligations

Subsection 962X(1) of the Bill provides that the regulations may specify records that the fee recipient must keep as part of the obligation to keep records of their compliance with the ongoing fee arrangement rules. The financial advice industry is dynamic and it is not possible to foresee how the industry will change in the future, particularly its business operations.

22 The Treasurer responded to the committee's comments in a letter dated 10 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> Delegated legislation is necessary to be used in this situation because it provides the flexibility to change record keeping requirements in line with emerging industry practices.
>
> *High-level guidance regarding scope and type of records*
>
> The power to specify records that a fee recipient must keep is limited to records which relate to fee recipients' compliance with the ongoing fee arrangement obligations. It would not be appropriate to include any extra guidance on what records can be specified as this could inadvertently limit the kinds of records that can be specified in the future. This could ultimately hinder the ability of ASIC to effectively regulate fee recipients by restricting their ability to access all documents which relate to fee recipients' compliance with their obligations.

Committee comment

2.57 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the obligation to keep compliance records is part of the law implementing recommendation 2.1 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, and that this obligation is integral to the new legal framework in addressing the problems identified with ongoing fee arrangements. The Treasurer advised that a contravention of this obligation is the only contravention in the new law regulating ongoing fee arrangements that gives rise to a potential criminal offence, and that the penalty is in line with penalties for breaching other record keeping provisions, including the requirement to keep financial records in subsection 988A(1) of the *Corporations Act 2001*.

2.58 The committee also notes the Treasurer's advice that the use of delegated legislation is necessary in this instance because it provides the flexibility to change record keeping requirements in line with emerging industry practices, noting that the financial advice industry is dynamic and it is not possible to foresee how the industry will change in the future. The Treasurer further advised that the inclusion of extra guidance in primary legislation on what records can be specified could inadvertently limit the kinds of records that can be specified in the future, which may hinder the effective regulation of fee recipients by restricting the ability of the Australian Securities and Investments Commission to access all documents which relate to fee recipients' compliance with their obligations.

2.59 While noting this advice, from a scrutiny perspective, the committee remains concerned that the bill provides for recordkeeping obligations which are subject to significant penalties to be set out in delegated legislation.

2.60 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the scope of recordkeeping obligations which are subject to significant penalties to delegated legislation.

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

National Emergency Declaration Bill 2020

Purpose	This bill seeks to establish a legislative framework for the declaration of a national emergency by the Governor-General, on the advice of the Prime Minister
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020
Bill status	Received the Royal Assent on 15 December 2020

Broad discretionary power[23]

2.62 In *Scrutiny Digest 18 of 2020* the committee requested the Attorney-General's advice as to:

- why it is necessary and appropriate to provide the executive with a broad power to declare a national emergency in circumstances where key terms in the bill are undefined; and
- whether the bill can be amended to include inclusive definitions of 'emergency' and 'Commonwealth interest', or, at minimum, additional guidance on the exercise of the power in relation to these concepts on the face of the primary legislation.[24]

Attorney-General's response[25]

2.63 The Attorney-General advised:

> The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).
>
> The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the National Emergency Declaration Act 2020 (NED Act)

23 Clauses 11 and 12. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 9-11.

25 The Attorney-General responded to the committee's comments in a letter dated 25 January 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

In relation to the Committee's requests for more detailed advice, the following is provided.

The Committee requested more detailed advice as to why it is necessary and appropriate to provide the executive with a broad power to declare a national emergency in circumstances where key terms in the bill are undefined (at paragraph [1.29]).

The NED Bill does not define key terms, such as 'emergency' and 'Commonwealth interest' (clause 10), to ensure the framework supports an 'all hazards' approach. This is necessary and appropriate so as not to limit the circumstances in which a declaration can be made to certain types or kinds of defined emergencies. For instance, the unpredictable nature of the COVID-19 pandemic has demonstrated the importance of such flexibility to ensure that the framework will apply to emergencies that are beyond our current thinking and experience. The term 'emergency' should be read in conjunction with the definition of 'nationally significant harm'. If an emergency has caused, is causing or is likely to cause harm that rises to the level of national significance, that emergency may be the subject of a national emergency declaration, regardless of the cause of the emergency.

The Revised Explanatory Memorandum to the NED Bill provides guidance on what constitutes an 'emergency' for the purpose of the framework. For example, the types of emergencies that may be subject of a declaration include:

- major natural disasters – such as bushfires that spread across multiple jurisdictions, or a geomagnetic storm that causes extensive disruption or damage to electricity and communication networks
- communicable disease outbreaks that pose a major threat to the health and life of Australians
- large-scale cyber incidents or terrorist attacks, and
- major chemical, biological or radiological incidents.

The Bill does not define 'Commonwealth interests', as this term is intended to reflect the full extent of the Commonwealth's constitutional interests and power. As such, it would not be appropriate to include a definitive list. This position is supported by the Senate Foreign Affairs, Defence and Trade Legislation Committee's Report into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. In that Report, the Committee rejected submissions that the concept 'Commonwealth interests' should be defined, noting its scope is extensive and would be difficult to exhaustively define [see Senate Standing Committee on Foreign Affairs and Trade, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000* (Inquiry,

> 16 August 2000) p. 13 [1.59]]. Consistent with this position, it is not appropriate to include a definition of 'Commonwealth interest'. As the Committee notes, the Explanatory Memorandum provides guidance on the interpretation of this concept.
>
> Although the Bill includes terms that are necessarily undefined, the threshold to make a declaration is appropriately high. This is because the framework is not intended to be used to respond to emergencies to which states and territories have the capacity to respond. To satisfy the threshold to make a declaration, the emergency must cause, or be likely to cause, nationally significant harm or damage to:
>
> - the life or health of an individual, or group of individuals, animals or plants
> - the environment
> - property, including infrastructure, or
> - disruption to an essential service.

Committee comment

2.64 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that while the bill includes terms that are undefined, the threshold to make a declaration is appropriately high, as the framework is not intended to be used to respond to emergencies to which states and territories have the capacity to respond.

2.65 The committee also notes the advice that the term 'emergency' should be read in conjunction with the definition of 'nationally significant harm', and that regardless of the cause of an emergency, under the Act an emergency may be the subject of a national emergency declaration if it has caused, is causing or is likely to cause harm that rises to the level of national significance.

2.66 With respect to the term 'Commonwealth interests', the committee notes the Attorney-General's advice that the government's position is supported by the Senate Foreign Affairs, Defence and Trade Legislation Committee's Report into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. However, the committee also highlights its own comments in relation to that bill, which raised concerns about the breadth of undefined terms in the bill. At that time, the committee noted that the use of undefined terms and a failure to fully address rights and obligations of persons affected by the bill invited great reliance on the good faith of persons exercising powers under the bill. The committee further commented that:

> Australia has a proud democratic tradition, and its governments have traditionally been governments of good faith. There is no question that good faith has been shown by all governments in the manner in which the existing call out powers have been exercised. However, laws which affect rights and liberties should not be drafted on the assumption that those using them will necessarily always be of good faith. Laws which assume

> good faith are inevitably misused by those whose motives are less than good.[26]

2.67 The committee further notes that Attorney-General's advice raised concerns with respect to exhaustively defining the identified terms. While noting this advice, the committee notes that its suggestions were in relation to the inclusion of an *inclusive* definition to assist in interpreting the scope of terms used in the bill, rather than an exhaustive definition.

2.68 From a scrutiny perspective, the committee remains concerned about the lack of guidance on the terms 'emergency' and 'Commonwealth interests' on the face of the *National Emergency Declaration Act 2020*.

2.69 However, 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.

Exemption from disallowance[27]

2.70 In *Scrutiny Digest 18 of 2020*, having regard to comments and recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation in its *Interim report on the exemption of delegated legislation from parliamentary oversight*, the committee requested the Attorney-General's more detailed advice as to:

- why it is considered necessary and appropriate for national emergency declarations and variations to extend a national emergency declaration to be exempt from disallowance; and
- whether the bill can be amended to omit subclauses 11(6) and 12(5) so that national emergency declarations made under subclause 11(1) and extensions of a national emergency declaration under subclause 12(1) are subject to the usual parliamentary disallowance process.[28]

Attorney-General's response

2.71 The Attorney-General advised:

> The Committee requested more detailed advice as to why it is considered necessary and appropriate for national emergency declarations and variations to extend a national emergency declaration to be exempt from disallowance (at paragraph [1.38]).

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26 Senate Scrutiny of Bills Committee, *Eleventh Report of 2000*, pp. 313-314.

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

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 11-14.

Although disallowance of an instrument does not invalidate actions taken under the instrument prior to the time of disallowance, the prospect of a declaration being disallowed would undermine the key objective of the NED Bill—to provide a clear, certain and unambiguous signal about the significance and severity of an emergency event. If the status of the declaration were to change following a successful motion to disallow, this could suggest (potentially erroneously) that the emergency no longer exists. While it is accepted that the rate of successful disallowance motions are low, the possibility of disallowance cannot be unequivocally discounted.

The disallowance of the declaration or a variation may have inequitable flow-on effects, particularly in relation to the power for Ministers to substitute, suspend or modify 'red tape' requirements in legislation they administer (clause 15). Such determinations continue in force only while a national emergency declaration (to which the determinations relate) is in force; that is, once a national emergency declaration ceases to be in force, so too does the determination (subparagraph 15(7)(b)(iii)). If a motion to disallow a national emergency declaration were successful, it may produce inequitable outcomes among those for whom it was intended to have beneficial application. For instance, it may produce a situation in which a benefit or streamlined process is available to those who apply one day, while those who apply the next day will be ineligible due to intervening disallowance of the underlying national emergency declaration. Similarly, where a national emergency declaration provides a basis for imposing or suspending obligations or liabilities, the arbitrary timing of a successful disallowance motion could create inappropriate variations in the law that is applicable at particular points in time, leading to differential treatment of individuals without warning.

The Committee noted that arguments against making emergency-related delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to such delegated legislation. In recognition of this, the framework will be subject to a rigorous scheme of reviews, to ensure that it is proportionate and remains appropriate to respond to emergencies of national significance. The Senate Standing Committee on Legal and Constitutional Affairs will immediately review the framework after the NED Act commences, and report to the Senate by 30 June 2021, and is to undertake a statutory review of the Act five years after its commencement. In addition, the Minister responsible for administering the relevant national emergency law must report on the exercise of the powers or the performance of the functions if a national emergency declaration is made and powers are exercised or functions are performed under a national emergency law for the purposes of the declaration (subclause 17(2)). Together these review requirements will ensure that the framework remains appropriate, adapted and responsive to Parliament and the community's expectations.

> While there is no limit to the number of extensions that can be made to the period that a national emergency declaration is in force, each extension is limited to a period of up to three months and must meet the high threshold to make a national emergency declaration.

Committee comment

2.72 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the prospect of a declaration being disallowed would undermine the key objective of the bill, which is to provide a clear, certain and unambiguous signal about the significance and severity of an emergency event. The committee also notes the advice that the disallowance of the declaration may have inequitable flow-on effects, for example in relation to the power for ministers to suspend or modify 'red tape' requirements in legislation they administer.

2.73 The Attorney-General also advised that, in recognition of the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to emergency-related delegated legislation, the framework will be subject to a rigorous scheme of reviews, to ensure that it is proportionate and remains appropriate to respond to emergencies of national significance. This includes the review by the Senate Standing Committee on Legal and Constitutional Affairs noted above.

2.74 While acknowledging the Attorney-General's advice, from a scrutiny perspective, the committee remains concerned that delegated legislation should be subject to parliamentary oversight, with only very limited exemptions. In this instance, the declaration of a national emergency is a precondition to the implementation of the 'streamlined framework' envisioned by the bill, including measures which may modify the operation of primary legislation or impact on the privacy of individuals. The committee therefore remains concerned that national emergency declarations and variations to extend a national emergency declaration are exempt from disallowance.

2.75 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.

Power for delegated legislation to modify primary legislation (Henry VIII clause)[29]

2.76 In *Scrutiny Digest 18 of 2020*, in light of the recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation, the committee requested the Attorney-General's advice as to whether the bill could be amended to provide that:

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

- determinations made under clause 15 cease to be in force after three months; and
- before making a determination under clause 15, a minister must be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the determination is made.[30]

Attorney-General's response

2.77 The Attorney-General advised:

> The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).
>
> The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the National Emergency Declaration Act 2020 (NED Act) by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

Committee comment

2.78 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice regarding the opportunity for the consideration of further amendments provided by the current review of the *National Emergency Declaration Act 2020* by the Senate Standing Committee on Legal and Constitutional Affairs. However, the committee takes this opportunity to emphasise the importance of fulsome ministerial responses in providing information the committee needs for the effective performance of its functions set out in Senate standing order 24, and the importance of ensuring that other committees may benefit from this committee's views in undertaking their own inquiries. In this instance, the rapid passage of the bill did not allow for this committee's views to be considered when the bill was before the Parliament. The committee therefore considers that it is of particular importance that any review of the legislation is able to benefit from the committee's concluded observations.

2.79 The committee therefore reiterates its request for the Attorney-General's advice as to the appropriateness of amending the *National Emergency Declaration Act 2020* to:

- **provide that determinations made under section 15 cease to be in force after three months; and**

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 14-16.

- **provide that before making a determination under section 15, a minister must be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the determination is made.**

Tabling of reports[31]

2.80 In *Scrutiny Digest 18 of 2020* the committee requested the Attorney-General's advice as to whether proposed paragraph 17(4)(a) of the bill can be amended to provide that reports on the exercise of powers and the performance of functions in relation to a national emergency declaration must be given to the minister responsible for administering the National Emergency Declaration Act as soon as practicable, and in any case not later than 14 days after the national emergency declaration ceases to be in force.

2.81 The committee also requested the Attorney-General's advice as to whether subclause 17(5) of the bill can be amended to provide:

- that the above reports must be tabled in each House of the Parliament as soon as practicable, and in any case not later than 14 days after the Minister receives the reports; and
- that the reports are to be presented in accordance with procedures in each House for the presentation of documents out of sitting in circumstances where the reports are ready for presentation, but the relevant House is not sitting.[32]

Attorney-General's response

2.82 The Attorney-General advised:

> The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).
>
> The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the National Emergency Declaration Act 2020 (NED Act) by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

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31 Clause 17. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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

Committee comment

2.83 The committee thanks the Attorney-General for this response. The committee notes that the Attorney-General's response did not address the committee's concerns in relation to the tabling requirements in the bill, instead raising the opportunity for the consideration of further amendments that is provided by the current review of the *National Emergency Declaration Act 2020* by the Senate Standing Committee on Legal and Constitutional Affairs. While noting this advice, the committee reiterates its above comments at paragraph [2.78] in relation to the importance of ensuring that other committees are able to benefit from the concluded comments of this committee when undertaking their own inquiries.

2.84 The committee therefore reiterates its request for the Attorney-General's advice as to:

- **the appropriateness of amending paragraph 17(4)(a) of the *National Emergency Declaration Act 2020* to provide that reports on the exercise of powers and the performance of functions in relation to a national emergency declaration must be given to the minister responsible for administering the National Emergency Declaration Act as soon as practicable, and in any case not later than 14 days after the national emergency declaration ceases to be in force;**
- **the appropriateness of amending subsection 17(5) of the *National Emergency Declaration Act 2020* to provide that:**
  - **the above reports must be tabled in each House of the Parliament as soon as practicable, and in any case not later than 14 days after the Minister receives the reports; and**
  - **that the reports are to be presented in accordance with procedures in each House for the presentation of documents out of sitting in circumstances where the reports are ready for presentation, but the relevant House is not sitting.**

Significant matters in delegated legislation[33]

2.85 In *Scrutiny Digest 18 of 2020* the committee requested the Attorney-General's advice as to:

- why it is considered necessary and appropriate to leave the specification of additional kinds of information that must not be included in a report on the

33 Subclause 17(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

exercise of powers and functions during a national emergency to delegated legislation; and

- whether the bill can be amended omit proposed paragraph 17(6)(c) or, at a minimum, to include at least high-level guidance regarding the kinds of additional information that may be prescribed in the regulations.[34]

Attorney-General's response

2.86 The Attorney-General advised:

> The Committee requested more detailed advice as to why it is considered necessary and appropriate to leave the specification of additional kinds of information that must not be included in a report on the exercise of powers and functions during a national emergency to delegated legislation (at paragraph [1.56]).
>
> Paragraph 17(6)(c) provides that the Minister can prevent certain information from being required to be provided in a report under subclause 17(2) via the regulation-making power in paragraph 19(a). The inclusion of this paragraph is appropriate and necessary to provide flexibility to enable the framework to reflect tabling exemptions in legislation that contains national emergency laws, particularly where those tabling exemptions would protect sensitive information from being divulged in reporting. The ability for further tabling exemptions to be added is necessary and appropriate to ensure that the NED Bill keeps pace and can be appropriately adapted to reflect existing and new tabling exemptions that may be relevant in other legislation in a responsive manner.

Committee comment

2.87 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the inclusion of paragraph 17(6)(c) is appropriate and necessary to provide flexibility to enable the framework to reflect tabling exemptions in legislation that contains national emergency laws, particularly where those tabling exemptions would protect sensitive information from being divulged in reporting. The Attorney-General also advised that the ability to add further tabling exemptions is necessary and appropriate to ensure that the legislation keeps pace and can be appropriately adapted to reflect existing and new tabling exemptions that may be relevant in other legislation in a responsive manner.

2.88 While noting this advice, 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.

2.89 The committee also notes that the Attorney-General's response did not address the committee's broader concerns in relation to the tabling requirements in

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

the bill, which would assist the committee in considering the advice provided in relation to the appropriateness of paragraph 17(6)(c).

2.90 The committee reiterates its concerns that allowing the regulations to prescribe types of information that must not be provided in reports presented to Parliament provides the minister with a broad power to prevent important information about the exercise of powers and functions during an emergency from being reviewed by the Parliament in circumstances where there are already limitations on the Parliament's ability to review actions of the executive in relation to the declaration of national emergencies.

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

2.92 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.

National Emergency Declaration (Consequential Amendments) Bill 2020

Purpose	This bill seeks to amend various Acts and Regulations that contain powers used by the Commonwealth when responding to, or supporting the recovery from, emergencies to enable the use of alternative or simplified statutory tests to streamline the exercise of those powers where a national emergency has been declared
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020
Bill status	Received the Royal Assent on 15 December 2020

Significant matters in non-disallowable instruments

Privacy[35]

2.93 In *Scrutiny Digest 18 of 2020* the committee requested the Attorney-General's advice as to why it is considered necessary and appropriate to leave the activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments which are not subject to parliamentary scrutiny.[36]

Attorney-General's response[37]

2.94 The Attorney-General advised:

> The amendments to the *Privacy Act 1988* (Privacy Act) import a new, simplified test to make an emergency declaration where the Governor-General has already declared a national emergency. Subclause 80J(2) of the Consequential Amendments Bill enables the Prime Minister or the Attorney-General to make a declaration under section 80J of the Privacy Act if a national emergency declaration is in force, and they are satisfied that the emergency to which the declaration relates is of such a kind that it is appropriate in the circumstances for Part VIA to apply. This is intended to streamline the process of making a declaration under the Privacy Act by

35 Schedule 1, item 40, proposed subsection 80J(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 21-22.

37 The Attorney-General responded to the committee's comments in a letter dated 25 January 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest.

removing the elements of the test that overlap with the test to make an emergency declaration under the Bill.

An emergency declaration made under existing section 80J of the Privacy Act is not a legislative instrument (subsection 80L(3) of the Privacy Act). The approach taken in establishing the framework in the NED Bill was to provide simplified, alternative tests where a national emergency declaration has been made, rather than modify other existing requirements in existing legislation. Consistent with existing subsection 80J of the Privacy Act, as a declaration made under subclause 80J(2) is not a legislative instrument by virtue of existing subsection 80L(3), it is therefore not subject to disallowance. This is appropriate and necessary to maintain the structure and policy underpinning the original declaration mechanism in the Privacy Act.

Committee comment

2.95 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the approach taken in establishing the framework in the National Emergency Declaration Bill 2020 was to provide simplified, alternative tests where a national emergency declaration has been made, rather than modify other existing requirements in existing legislation. The Attorney-General also advised that the approach taken in section 80J to leave the activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments is consistent with existing section 80J of the Privacy Act and that this is appropriate and necessary to maintain the structure and policy underpinning the original declaration mechanism in the Privacy Act.

2.96 While acknowledging the Attorney-General's advice, the committee maintains its scrutiny view that it does not consider that a desire to simplify legislative procedures or to have consistency with existing legislative provisions is an adequate justification for leaving significant matters, such as measures that have a potential impact on individual privacy, to non-disallowable instruments which are not subject to parliamentary scrutiny.

2.97 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.

Significant matters in non-disallowable legislative instruments[38]

2.98 In *Scrutiny Digest 18 of 2020* the committee requested the Attorney-General's advice as to whether the bill can be amended to:

38 Schedule 1, item 55, proposed subsections 313(4A) – (4H). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- provide that an emergency declaration made under proposed subsection 313(4D) of the *Telecommunications Act 1997* is subject to parliamentary disallowance; and
- set out at least high-level guidance in relation to when an emergency may be declared under proposed subsection 313(4D).[39]

Attorney-General's response

2.99 The Attorney-General advised:

> The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).
>
> The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the National Emergency Declaration Act 2020 (NED Act) by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

Committee comment

2.100 The committee thanks the Attorney-General for this response. While the committee notes the Attorney-General's advice that the Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the *National Emergency Declaration Act 2020* by 30 June 2021, the committee reiterates its comments made above in relation to the National Emergency Declaration Bill 2020 at [2.78] with respect to the importance of ministerial responses to the effective performance of the committee's duties and the importance of ensuring that other committees may benefit from this committee's views in undertaking their own inquiries.

2.101 As with the National Emergency Declaration Bill 2020, the rapid passage of this bill did not allow for this committee's views to be considered when the bill was before the Parliament, and the committee considers that it is of particular importance that any review of the new National Emergency legislation is able to benefit from the committee's concluded observations.

2.102 The committee therefore reiterates its request for the Attorney-General's advice as to the appropriateness of amending the *Telecommunications Act 1997* to:

- **provide that an emergency declaration made under subsection 313(4D) is subject to parliamentary disallowance; and**

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 22-24.

- **set out at least high-level guidance in relation to when an emergency may be declared under subsection 313(4D).**[40]

Significant matters in non-disallowable instruments (provisions akin to Henry VIII clause)[41]

Exclusion from tabling[42]

2.103 In *Scrutiny Digest 18 of 2020* the committee requested the Attorney-General's advice as to:

- why it is considered necessary and appropriate to include powers in the bill which allow non-legislative instruments to modify the operation of the *Therapeutic Goods Act 1989*; and
- why it is necessary and appropriate to provide that instruments made under proposed subparagraphs 18A(2A)(b)(i), 32CB(2A)(b)(i), and 41GS(2A)(b)(i) are not required to be tabled in the Parliament.[43]

Attorney-General's response

2.104 The Attorney-General advised:

> Proposed subparagraphs 18A(2A)(b)(i), 32CB(2A)(b)(i), and 41GS(2A)(b)(i) provide for alternative tests to exempt certain therapeutic goods, biologicals and medical devices from certain requirements under the *Therapeutic Goods Act 1989*, so that the goods, biologicals or medical devices can be quickly stockpiled or made available urgently to deal with an emergency. The alternative tests streamline the requirement for the Minister to establish a possible future emergency or an actual emergency, where there is a national emergency declaration in force.
>
> The approach taken in establishing the framework was to provide simplified, alternative tests where a national emergency declaration has been made, rather than modify other existing requirements in the legislation. In this regard, the proposed subparagraphs are appropriate and necessary to maintain the structure and policy underpinning the original tests and tabling exemptions.

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40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 22-24.

41 Schedule 1, item 60, proposed subsection 18A(2A); item 65, proposed subsection 32CB(2A); and item 70, proposed subsection 41GS(2A). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

42 Schedule 1, item 62, proposed paragraph 18A(11)(a); item 67, proposed paragraph 32CF(2)(a); item 72, proposed paragraph 41GW(2)(a)(v).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 25-27.

> The amendments are intended to enable the Minister to establish a possible future emergency or an actual emergency by reason of a national emergency declaration being made. Where a national emergency declaration is in force, the Minister is not required to satisfy themselves of other factual circumstances to establish a possible future emergency or an actual emergency. This is necessary and appropriate to enable the Minister to act decisively where a national emergency declaration is on foot and it is necessary to exempt specific therapeutic goods, biologicals or medical devices from certain requirements so they can be stockpiled or made available without delay.

Committee comment

2.105 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the relevant subparagraphs provide for alternative tests for exemptions from certain requirements under the *Therapeutic Goods Act 1989* so that goods, biologicals or medical devices can be quickly stockpiled or made available urgently to deal with an emergency. The Attorney-General advised that where a national emergency declaration is in force, the Minister is not required to satisfy themselves of other factual circumstances to establish a possible future emergency or an actual emergency, and that this is necessary and appropriate to enable the Minister to act decisively where a national emergency declaration is on foot and it is necessary to exempt specific therapeutic goods, biologicals or medical devices from certain requirements so they can be stockpiled or made available without delay.

2.106 The Attorney-General also advised that the approach in establishing the National Emergency Declaration framework was to provide simplified, alternative tests when a national emergency declaration has been made, and that, in this regard, the subparagraphs maintain the structure and policy underpinning the original tests and tabling exemptions.

2.107 While acknowledging the Attorney-General's advice, the committee maintains its scrutiny view that the fact that a certain matter continues current arrangements does not, of itself, provide an adequate justification for provisions that enable non-disallowable instruments to modify the operation of primary legislation, or for exclusions from tabling requirements.

2.108 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.

Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

Purpose	This bill seeks to establish a mandatory code of conduct to support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses
Portfolio	Treasury
Introduced	House of Representatives on 9 December 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation—digital platforms[44]

2.109 In *Scrutiny Digest 1 of 2021* the committee requested the Treasurer's advice as to why it is considered necessary and appropriate to leave the determination of which digital platforms must participate in the News Media and Digital Platforms Mandatory Bargaining Code to delegated legislation.

2.110 The committee further requested the Treasurer's advice, if it is considered appropriate to leave this matter to delegated legislation, as to whether the bill can be amended to require the positive approval of each House of the Parliament before determinations made under proposed section 52E come into effect.[45]

Treasurer's response[46]

2.111 The Treasurer advised:

> In your letter, you expressed concerns that the Bill allows the relevant Minister to determine which digital platforms will be required to participate in the News Media and Digital Platforms Mandatory Bargaining Code (the Code) without the endorsement of the Parliament. You inquired whether the Bill can be amended to require positive approval of the Parliament before a platform is required to participate in the Code.

44 Item 1, Schedule 1, proposed section 52E. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

45 For an example of this approach, see section 10B of the *Health Insurance Act 1973*. Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 48-49.

46 The Treasurer responded to the committee's comments in a letter dated 10 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> Section 52E of the Bill allows the relevant Minister to designate, via legislative instrument, which digital platforms are subject to the Code. The legislative instrument is subject to disallowance by either house of the Parliament. Designation by legislative instrument remains suitable in this instance as it provides the Parliament with sufficient and appropriate oversight of the designation process.

Committee comment

2.112 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that designation by legislative instrument remains suitable in this instance as it provides the Parliament with sufficient and appropriate oversight of the designation process.

2.113 While noting this advice, the committee reiterates its scrutiny concerns with respect to including significant matters, such as which digital platforms must participate in the News Media and Digital Platforms Mandatory Bargaining Code, in delegated legislation.

2.114 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the determination of which digital platforms must participate in the News Media and Digital Platforms Mandatory Bargaining Code to delegated legislation.

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

Significant matters in delegated legislation[47]

2.116 In *Scrutiny Digest 1 of 2021* the committee requested the Treasurer's detailed advice as to why it is considered necessary and appropriate to leave each of the matters identified in the committee's comments to delegated legislation.[48]

Treasurer's response

2.117 The Treasurer advised:

> Your letter also noted the Committee's concerns at a number of powers in the Bill which allow for matters to be determined by delegated legislation.
>
> The Bill allows a variety of minor and technical matters to be determined in delegated legislation such as in relation to deadlines for the arbitration process, record keeping obligations, costs of the arbitral panel and the updating of the list of relevant professional standards. This provides

47 A range of proposed sections in Schedule 1. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

48 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 49-51.

> flexibility to ensure that the technical aspects of the Code can be expeditiously altered if necessary in the future to ensure the effectiveness and workability of the Code.
>
> For these reasons, I consider that the regulation-making powers are appropriate and necessary.

Committee comment

2.118 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the various delegated legislation-making powers are appropriate and necessary as they provide flexibility to ensure that the technical aspects of the Code can be expeditiously altered if necessary in the future to ensure the effectiveness and workability of the Code.

2.119 While noting this advice, 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. Further, the committee reiterates its significant scrutiny concerns with respect to provisions in the bill that enable delegated legislation to modify the operation of primary legislation, noting that such clauses impact the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.

2.120 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including in the bill, without sufficient justification in the explanatory memorandum, a range of powers to prescribe matters in delegated legislation, including provisions which enable delegated legislation to modify the operation of primary legislation.

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

Parliamentary scrutiny—tabling[49]

2.122 In *Scrutiny Digest 1 of 2021*, noting the impact on parliamentary scrutiny of not providing for the review report to be tabled in Parliament, the committee requested the Treasurer's advice as to whether proposed section 52ZZS of the bill can be amended to provide that the minister must arrange for a copy of the review report to be tabled in each House of the Parliament within 15 sitting days of the House after the report is given to the minister.[50]

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49 Item 1, Schedule 1, proposed section 52ZZS. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

50 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 51.

Treasurer's response

2.123 The Treasurer advised:

> The Bill requires that a review of the operation of the Code be commenced within 12 months. The Committee has asked whether it would be appropriate to move amendments that require the review to be tabled in the Parliament.
>
> I do not consider it necessary to amend the Bill to require the review of the operation of the Code be tabled in Parliament. The Bill requires that the review of the operation of the Code be made publicly available within 28 days of the Minister receiving the report. This will mean that members of the public and parliamentarians are both able to access the report.

Committee comment

2.124 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that he does not consider it necessary to amend the bill to require the review of the operation of the Code be tabled in Parliament, as the review of the operation of the Code is required to be made publicly available within 28 days of the Minister receiving the report, and this will mean that members of the public and parliamentarians are both able to access the report.

2.125 While noting this advice, the committee reiterates its scrutiny concerns with respect to the importance of tabling requirements for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only available for public inspection.

2.126 The committee draws its scrutiny concerns to the attention of senators and suggests that it would be appropriate to amend proposed section 52ZZS of the bill to provide that the minister must arrange for a copy of the report of the review of the operation of the News Media and Digital Platforms Mandatory Bargaining Code to be tabled in each House of the Parliament within 15 sitting days of the House after the report is given to the minister.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.