The Senate

Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Initial scrutiny

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

Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021

Purpose	Schedule 1 to the bill seeks to amend the *Aged Care Act 1997* and the *Aged Care Quality and Safety Commission Act 2018* to further strengthen legislation on the use of restrictive practices in aged care Schedule 2 to the bill seeks to amend the *Aged Care Act 1997* to allow the Secretary to conduct reviews (assurance reviews) to assure the arrangements for the delivery and administration of home care are effective and efficient Schedule 3 to the bill seeks to remove the requirement for the minister to establish a committee known as the Aged Care Financing Authority
Portfolio	Aged Care
Introduced	House of Representatives on 27 May 2021

Significant matters in delegated legislation

Broad discretionary power[1]

1.2 The *Aged Care Act 1997* (the Aged Care Act) currently provides that the minister may make Quality of Care Principles to outline the responsibilities of an approved provider in relation to the quality of the aged care provided. Item 1 of Schedule 1 seeks to amend the Aged Care Act to provide that restrictive practices are only used in circumstances set out in the Quality of Care Principles. Proposed section 54-9 seeks to provide that a restrictive practice is any practice or intervention that has the effect of restricting the rights or movement of a care recipient. Proposed section 54-10 seeks to require that the Quality of Care Principles must set out a

1 Schedule 1, item 1, proposed paragraph 54-1(1)(f) and item 3, proposed sections 54-09 and 54-10. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

number of matters regarding the use of restrictive practices, including requiring that restrictive practices are used only:

- as a last resort to prevent harm after alternative best practice strategies have been explored, applied and documented, except in an emergency;
- after considering the likely impact of the use of the practice on the care recipient;
- to the extent necessary and proportionate to the risk of harm to the aged care recipient or other persons;
- in the least restrictive form, and for the shortest time, necessary to prevent harm to the care recipient or other persons;
- if informed consent to the use of the practice is given;
- in accordance with the Charter of Rights and the Aged Care Quality Standards; and
- if care recipients are monitored whilst the restrictive practice is in use, and the use and effectiveness is documented.[2]

1.3 The committee acknowledges that proposed section 54-10 provides more guidance on the face of the primary legislation regarding what matters must be included in the Quality of Care Principles than is currently provided for in the Aged Care Act. However, the committee notes that a number of key matters and definitions regarding when it is appropriate to use restrictive practices will be left to delegated legislation. For example, it is unclear who will be responsible for determining that the use of a restrictive practice has been proportionate to the risk of harm.[3]

1.4 The committee's consistent scrutiny view is that significant matters, such as when restrictive practices can be used in aged care settings, should be contained on the face of the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> Including matters in delegated legislation will allow for responsiveness in relation to the regulation of restrictive practices. As these amendments are intended to ensure that all forms of restrictive practices are accurately captured, it is appropriate that the legislation relating to restrictive practices can be adapted and modified in a timely manner. Allowing some flexibility to promptly respond to unforeseen risks, concerns and omissions aligns with community expectations and the key aim of regulating restrictive practices, which is to protect older Australians from use of such

2 Statement of compatibility, pp. 4–5.

3 Proposed paragraph 54-10(1)(d).

practices other than in accordance with the limited circumstances to be set out in the Aged Care Act and Quality of Care Principles.[4]

1.5 The committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for leaving significant elements of a legislative scheme to delegated legislation. The committee's concerns in this instance are heightened noting the potentially significant impact of the inappropriate use of restrictive practices and the vulnerable nature of the persons to whom the Quality of Care Principles would apply. The committee notes that a legislative instrument is not subject to the same level of parliamentary scrutiny as amendments to primary legislation.

1.6 Additionally, proposed subsection 54-10(2) seeks to provide that the Quality of Care Principles may provide that a requirement of the Principles does not apply if the use of a restrictive practice is necessary in an emergency. The committee considers that this provides the minister with a broad discretionary power to determine, in delegated legislation, when the requirements for the use of a restrictive practice no longer apply. The committee notes that there is no guidance on the face of the bill as to what would constitute an emergency or who would determine that an emergency is occurring. The committee has significant scrutiny concerns in relation to this ability to override *any* of the requirements in the Quality of Care Principles in circumstances where there is no guidance on the face of the primary legislation as to what may be considered an emergency. The committee notes that certain considerations set out at proposed subsection 54-10(1), such as that a restrictive practice must be used in the least restrictive form and for the shortest time,[5] would remain relevant during an emergency situation. In relation to subsection 54-10(2), the explanatory memorandum merely restates the operation of the provision and notes that an emergency could be behaviourally based.[6]

1.7 In light of the above, the committee requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to leave the details of when restrictive practices can be used in an aged care setting, including what would constitute an emergency, to delegated legislation;**
- **whether the bill could be amended to include additional high-level guidance about when restrictive practices can be used on the face of the primary legislation; and**

4 Explanatory memorandum, p. 14.

5 Proposed paragraph 54-10(1)(e).

6 Explanatory memorandum, p. 14.

- **whether the bill could be amended to include:**
  - **at least an inclusive definition of 'emergency'; and**
  - **limits around which considerations set out in proposed subsection 54-10(1) can be overridden in an emergency.**

Appropriation Bill (No. 1) 2021-2022

Appropriation Bill (No. 2) 2021-2022

Purpose	Appropriation Bill (No. 1) 2021-2022 seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government Appropriation Bill (No. 2) 2021-2022 seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure
Portfolio	Finance
Introduced	House of Representatives on 11 May 2021

Parliamentary scrutiny—ordinary annual services of the government[7]

1.8 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.9 Appropriation Bill (No. 1) 2021-2022 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.10 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[8]

1.11 The Senate Standing Committee on Appropriations and Staffing[9] has also actively considered the inappropriate classification of items as ordinary annual

7 Various provisions of Appropriation Bill (No. 1) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

8 See Senate standing order 24(1)(a)(v).

9 Now the Senate Standing Committee on Appropriations, Staffing and Security.

services of the government.[10] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[11]

1.12 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

> 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
>
> 2) That appropriations for expenditure on:
>
> a) the construction of public works and buildings;
>
> b) the acquisition of sites and buildings;
>
> c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
>
> d) grants to the states under section 96 of the Constitution;
>
> e) new policies not previously authorised by special legislation;
>
> f) items regarded as equity injections and loans; and
>
> g) existing asset replacement (which is to be regarded as depreciation),
>
> are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

1.13 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities

10 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

11 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

> of government and new programs and projects or to identify the expenditure on each of those areas.[12]

1.14 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[13]

1.15 Despite these comments, and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.[14]

1.16 Based on the Senate resolution of 22 June 2010, it appears that at least part of the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2021-2022:

- Implementing a National Soils Science Challenge ($20.9 million over four years);[15]
- Supporting Agricultural Showmen and Women ($4.3 million in 2021-22);[16] and
- Establish a renewable energy microgrid incorporating hydrogen in the Daintree community ($19.3 million over three years).[17]

1.17 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of

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12 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

13 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

14 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, *Senate Hansard*, 19 March 2018, pp. 1487-1490.

15 Budget Paper No. 2, 2021-22, p. 53.

16 Budget Paper No. 2, 2021-22, p. 60.

17 Budget Paper No. 2, 2021-22, p. 140.

occasions;[18] however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

1.18 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.19 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

1.20 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 1) 2021-2022 which should only contain appropriations that are not amendable by the Senate).

Parliamentary scrutiny—appropriations determined by the Finance Minister[19]

1.21 Clause 10 of Appropriation Bill (No. 1) 2021-2022 seeks to enable the Finance Minister to provide additional funds to entities when he or she is satisfied that there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in Schedule 1 to the bill. This additional appropriation is referred to as the Advance to the Finance Minister (AFM).

1.22 Subclause 10(2) enables the Finance Minister to make a determination that has the effect of allocating additional amounts, up to a total of $2 billion as specified by subclause 10(3), to the appropriations outlined in Schedule 1 to the bill. Subclause 10(4) provides that a determination under subclause 10(2) is a legislative instrument, which must therefore be registered and tabled in Parliament. However,

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18 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014,* pp. 402-406; *Fourth Report of 2015*, pp. 267-271; *Alert Digest No. 6 of 2015*, pp. 6-9; *Fourth Report of 2016*, pp. 249-255; *Alert Digest No. 7 of 2016*, pp. 1-9; *Scrutiny Digest 2 of 2017*, pp. 1-5; *Scrutiny Digest 6 of 2017*, pp. 1-6; *Scrutiny Digest 12 of 2017*, pp. 89-95; *Scrutiny Digest 2 of 2018*, pp. 1-7.

19 Clause 10 of Appropriation Bill (No. 1) 2021-2022; Clause 12 of Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

these determinations are not subject to parliamentary disallowance. The explanatory memorandum suggests that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.[20]

1.23 The amount available under the AFM—$2 billion—is significantly higher than that available in previous annual appropriation bills.[21] The explanatory memorandum states that the amount of the AFM 'takes into consideration the evolving nature of the COVID-19 pandemic, allocations that have been made in 2019-20 and 2020-21 to date, the uncertainty around the Government's necessary response and the likely need for the Government to act quickly'.[22] The committee notes, however, that the use of the AFM provision to allocate additional amounts is not limited on the face of the bill to COVID-19 response measures.

1.24 The committee notes that clause 10 (the AFM provision) allows the Finance Minister to allocate additional funds to entities up to a total of $2 billion via non-disallowable delegated legislation and that it therefore delegates significant legislative power to the executive. While this does not amount to a delegation of the power to create a new appropriation, one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[23] The AFM provision in this bill leaves the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.25 The committee has examined AFM provisions in previous appropriation bills and sought further information from the Finance Minister about their use.[24] The committee notes that AFM provisions have been used in previous years to allocate additional funds of varying amounts for a wide variety of purposes. Previous examples include $48.8 million for Mersey Community Hospital and Tasmanian

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20 Explanatory memorandum, pp. 8–9.

21 For example, subsection 10(3) of *Appropriation Act (No. 1) 2019-2020* set a cap of $295 million.

22 Explanatory memorandum, p. 9.

23 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [91].

24 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 95–8; and *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 5-7.

Health Initiatives, $206.5 million for payments to local governments, and $6 million for grants to arts and culture bodies.[25]

1.26 In 2020-21 to date, the AFM provisions have been used to allocate funding:

- to local government for the delivery of road resilience and community infrastructure projects ($250 million);[26]
- to extend the International Freight Assistance Mechanism (IFAM) to 31 December 2020 (the IFAM supports exporters of premium and perishable agricultural produce by underwriting domestic and international airfreight connectivity) ($230.1 million);[27]
- to enable Australians to be able to receive COVID-19 vaccines ($808.8 million);[28]
- to fund the procurement of personal protective equipment and other essential medical supplies and equipment for the National Medical Stockpile ($384.1 million);[29]
- to fund payments under the Domestic Aviation Network Support program to maintain connectivity on major domestic air routes ($71.7 million);[30]
- to fund payments to not-for-profit organisations in early December 2020 in accordance with grant agreements ($159.7 million);[31] and
- to provide urgent support to the aviation sector during the next stages of recovery from the COVID-19 pandemic ($475.8 million).[32]

1.27 The committee further notes that this issue also arises in relation to the Appropriation Bill (No. 2) 2021-2022.[33] The total amount that can be determined under the AFM provision in the No. 2 bill is $3 billion.

1.28 In light of the unprecedented amount available under the AFM provisions in the 2020-21 supply bills, the former Minister for Finance advised the Senate that the government had agreed to provide for increased transparency and oversight of the

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25 For further examples see Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 97–8. For a comprehensive list of AFMs made between the 2006-07 and 2017-18 financial years, see Appendix 1 to Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017.

26 *Advance to the Finance Minister Determination (No. 1 of 2020-2021)* [F2020L00875].

27 *Advance to the Finance Minister Determination (No. 2 of 2020-2021)* [F2020L01057].

28 *Advance to the Finance Minister Determination (No. 3 of 2020-2021)* [F2020L01237].

29 *Advance to the Finance Minister Determination (No. 4 of 2020-2021)* [F2020L01273].

30 *Advance to the Finance Minister Determination (No. 5 of 2020-2021)* [F2020L01483].

31 *Advance to the Finance Minister Determination (No. 6 of 2020-2021)* [F2020L01493].

32 *Advance to the Finance Minister Determination (No. 7 of 2020-2021)* [F2021L00431].

33 Appropriation Bill (No. 2) 2021-2022, clause 12.

use of the AFM. Under these measures the former minister advised that a media release would be issued each week that AFM determinations are made and the minister would write to the shadow finance minister to seek her concurrence prior to drawing any funding from an AFM for proposed expenditure greater than $1 billion.[34]

1.29 In *Scrutiny Digest 17 of 2020*, the committee welcomed advice from the minister that the additional transparency measures applying in relation to AFM determinations made under the 2020-2021 supply bills would continue in relation to AFM determinations made under Appropriation Bill (No. 1) 2020-2021 and Appropriation Bill (No. 2) 2020-2021. However, it is unclear to the committee whether it is intended that these increased transparency measures will continue in relation to AFM determinations made under Appropriation Bill (No. 1) 2021-2022 and Appropriation Bill (No. 2) 2021-2022, which together would allow $5 billion to be allocated under the AFM.

1.30 The committee draws its general scrutiny concerns about AFM provisions to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Finance Minister to determine the purposes for which up to $5 billion in additional funds may be allocated in legislative instruments not subject to disallowance, particularly in circumstances where the purposes for which the additional funds may be allocated are not limited on the face of the bill to COVID-19 response measures.

1.31 The committee also requests the minister's advice as to:

- **whether the additional transparency measures applying in relation to AFM determinations made since the 2020-2021 supply bills will continue in relation to AFM determinations made under Appropriation Bill (No. 1) 2021-2022 and Appropriation Bill (No. 2) 2020-2021; and**
- **whether information about AFM transparency measures can be included in the explanatory materials to future appropriation bills.**

Parliamentary scrutiny—measures marked 'not for publication'[35]

1.32 Clause 4 of both Appropriation Bill (No. 1) 2021-2022 and Appropriation Bill (No. 2) 2021-2022 provide that portfolio budget statements (PBS) are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*. That is, clause 4 provides that the PBS may be considered in interpreting the provisions of

34 *Senate Hansard*, 23 March 2020, p. 1860.

35 Clauses 4 and 6 and Schedule 1 to Appropriation Bill (No. 1) 2021-2022; Clauses 4 and 6 and Schedule 2 to Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

each bill. Moreover, the explanatory memorandums to the bills state that they should be read in conjunction with the PBS.[36]

1.33 In this regard, the committee notes that the Department of Finance *Guide to Preparing the 2021-22 Portfolio Budget Statements* states:

> The primary purpose of the PB Statements is to perform a legal function as 'relevant documents' under the *Acts Interpretation Act 1901* to aid the interpretation of Appropriation Bills (No. 1 and 2) 2021-22 and the Appropriation (Parliamentary Departments) Bill (No. 1) 2021-22.
>
> PB Statements are an important means by which the Executive Government (through Portfolio Ministers) are accountable to the Parliament. PB Statements inform Senators and Members of Parliament of changes in the proposed allocation of resources to entities within each portfolio.[37]

1.34 Noting the important role of PBS in interpreting Appropriation Bills No. 1 and No. 2, the committee has scrutiny concerns in relation to the inclusion of measures within the PBS that are marked as 'not for publication' (nfp), meaning that the proposed allocation of resources to those budget measures is not published within the PBS. Various reasons are provided for marking a measure as nfp, including that aspects of the relevant program are under negotiation, are legally or commercially sensitive, or relate to matters of national security.

1.35 It is currently unclear to the committee whether appropriations for any of the measures marked as nfp in either Budget Paper No. 2 or the PBS are included in the summary of appropriations at clause 6 of the bills or in the appropriation items in Schedule 1 to Appropriation Bill (No. 1) 2021-2022 and Schedule 2 to Appropriation Bill (No. 2) 2021-2022.

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

- **any of the items marked as nfp in Budget Paper No. 2 or the PBS are included in the summary of appropriations at clause 6 of the bills or in the appropriation items in Schedule 1 to Appropriation Bill (No. 1) 2021-2022 and Schedule 2 to Appropriation Bill (No. 2) 2021-2022; and**
- **if so, why it is considered necessary and appropriate to ask the Parliament to authorise appropriations without clear information about the amounts that are to be appropriated under each individual Budget measure.**

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36 Explanatory memorandum to Appropriation Bill (No. 1) 2021-2022, p. 2; Explanatory memorandum to Appropriation Bill (No. 2) 2021-2022, p. 2.

37 See Department of Finance, *Guide to Preparing the 2021-22 Portfolio Budget Statements,* p. 5, https://www.finance.gov.au/sites/default/files/2021-04/guide-to-preparing-the-2021-22-portfolio-budget-statement.pdf.

Parliamentary scrutiny—section 96 grants to the states[38]

1.37 Clause 16 of Appropriation Bill (No. 2) 2021-2022 deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'.

1.38 Clause 16 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- terms and conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;[39] and
- the amounts and timing of those payments.[40]

1.39 Subclause 16(4) provides that determinations made under subclause 16(2) are not legislative instruments. The explanatory memorandum states that this is:

> because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.[41]

1.40 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[42]

1.41 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution. While the Parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

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38 Clause 16 and Schedules 1 and 2 to Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

39 Paragraph 16(2)(a) of Appropriation Bill (No. 2) Bill 2021-2022.

40 Paragraph 16(2)(b) of Appropriation Bill (No. 2) Bill 2021-2022.

41 Explanatory memorandum to Appropriation Bill (No. 2) 2021-2022, p. 12.

42 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511-516; *Ninth Report of 2015*, pp. 611-614; *Fifth Report of 2016*, pp. 352-357; *Eighth Report of 2016*, pp. 457-460; *Scrutiny Digest 3 of 2017*, pp. 51-54; *Scrutiny Digest 6 of 2017*, pp. 7-10; *Scrutiny Digest 12 of 2017*, pp. 99-104; *Scrutiny Digest 2 of 2018*, pp. 8-11; *Scrutiny Digest 6 of 2018*, pp. 9-12; *Scrutiny Digest 4 of 2019*, pp. 9-12; *Scrutiny Digest 15 of 2020*, pp. 16-17.

1.42 The committee notes that important progress has been made to improve the provision of information regarding section 96 grants to the states since the 2017-18 budget, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.[43] These improvements include the addition of an Appendix E to Budget Paper No. 3,[44] which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them, and a mandatory requirement for the inclusion of further information in portfolio budget statements where departments and agencies are seeking appropriations for payments to the states, territories and local governments.[45]

1.43 The committee considers that these measures improve the ability of the Parliament to scrutinise the executive's use of the delegated power to make grants to the states and to determine terms and conditions attaching to them under section 96 of the Constitution.

1.44 The committee thanks the former minister for responding constructively to its proposals regarding the provision of additional information about the making of grants to the states under section 96 of the Constitution, and looks forward to these measures continuing for future appropriation bills.

1.45 The committee otherwise leaves to the Senate as a whole the appropriateness of clause 16 of Appropriation Bill (No. 2) 2021-2022, which allows ministers to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

Parliamentary scrutiny—debit limits[46]

1.46 Clause 13 of Appropriation Bill (No. 2) 2021-2022 specifies debit limits for certain grant programs. A debit limit must be set each financial year otherwise grants under these programs cannot be made. The total amount of grants cannot exceed the relevant debit limit set each year.

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43 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp. 7-10; and *Eighth Report of 2016*, pp. 457-460.

44 Appendix E of Budget Paper No. 3, https://budget.gov.au/2021-22/content/bp3/download/bp3_18_appendix_e_online.pdf.

45 See Department of Finance, *Guide to Preparing the 2021-22 Portfolio Budget Statements,* p. 27, https://www.finance.gov.au/sites/default/files/2021-04/guide-to-preparing-the-2021-22-portfolio-budget-statement.pdf.

46 Clause 13 of Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

1.47 The explanatory memorandum notes that Parliament may approve annual debit limits for general purpose financial assistance or national partnership payments to the states.[47]

1.48 The explanatory memorandum explains the purpose of setting these debit limits:

> Specifying a debit limit in clause 13 is an effective mechanism to manage expenditure of public money as the official or Minister making a payment of public money cannot do so without this authority. The purpose of doing so is to provide Parliament with a transparent mechanism by which it may review the rate at which amounts are committed for expenditure.[48]

1.49 This bill proposes the following debit limits for 2021-22:

- General purpose financial assistance to the states—$5 billion;[49] and
- National partnership payments to the states—$25 billion.[50]

1.50 In relation to the $25 billion debit limit for national partnership payments, the committee notes that the budget papers state that it is expected that national partnership payments will be $20.6 billion in 2021-22.[51] Therefore the debit limit proposed in this bill would allow an additional $4.4 billion in national partnership payments to be made without the need to seek further parliamentary approval. It is not clear what the expected level of expenditure is in relation to general purpose financial assistance.

1.51 The committee sought the minister's advice in relation to similar provisions in Appropriation Bill (No. 2) 2017-2018 and was informed that setting debit limits at a high level is necessary to ensure that the Commonwealth has appropriate provision to manage variations in expenditure required prior to the passage of further annual appropriation bills, including increases to existing undertakings to the states, and provision for any large-scale natural disasters or other major unexpected events.[52] While the committee acknowledges this rationale, it considers that setting a debit limit without clearly outlining the expected expenditure under each grants program may undermine the stated intention of the debit limit regime—that is, to provide Parliament with a 'transparent mechanism by which it may review the rate at which amounts are committed for expenditure'.[53]

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47 See sections 9 and 16 of the *Federal Financial Relations Act 2009*.

48 Explanatory memorandum to Appropriation Bill (No. 2) 2021-2022, p. 10.

49 Subclause 13(1) of Appropriation Bill (No. 2) 2021-2022.

50 Subclause 13(2) of Appropriation Bill (No. 2) 2021-2022.

51 *Federal Financial Relations: Budget Paper No. 3 2021-22*, p. 4.

52 See *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 104-107.

53 Explanatory memorandum to Appropriation Bill (No. 2) 2021-2022, p. 10.

1.52 The committee requests the minister's advice as to the level of expected expenditure in 2021-22 under the grants programs specified at clause 13 of Appropriation Bill (No. 2) 2021-2022. The committee also requests that future explanatory memoranda to appropriation bills containing debit limit provisions include this information to assist in ensuring meaningful parliamentary oversight of the debit limits for these grant programs.

Financial Regulator Assessment Authority Bill 2021

Purpose	This bill, along with the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021, seeks to establish the Financial Regulator Assessment Authority to assess the effectiveness and capability of each of the Australian Prudential Regulation Authority and Australian Securities and Investments Commission
Portfolio	Treasury
Introduced	House of Representatives on 13 May 2021

Tabling of documents in Parliament[54]

1.53 Clause 12 sets out the functions of the Financial Regulator Assessment Authority (the Authority). Under clause 12 the Authority's functions include assessing and reporting on the effectiveness and capability of APRA and ASIC once in every 2 financial years as well as upon request by the minister. Requests may be made by the minister under paragraph 12(1)(c) and reports prepared in response to such requests are known as 'ad hoc reports'. Other reports prepared under clause 12 are known as 'biennial reports'.

1.54 Clause 17 provides that biennial reports must be tabled in Parliament within 20 sitting days after the report is received by the minister, however, the bill contains no requirement that ad hoc reports be tabled.

1.55 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be appropriate justification for failing to mandate tabling requirements. In this instance, the explanatory memorandum does not provide an explanation as to why reports prepared by the Authority under paragraph 12(1)(c) are not required to be tabled in Parliament.

1.56 Noting the impact on parliamentary scrutiny of not providing for reports to be tabled in Parliament, the committee requests the Treasurer's advice as to whether clause 17 of the bill can be amended to provide that the minister must arrange for a copy of a report prepared under paragraph 12(1)(c) to be tabled in

54 Paragraph 12(1)(c) and clause 17. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

each House of the Parliament within 15 sitting days of the House after the report is given to the minister.

1.57 The committee also requests the Treasurer's advice as to why clause 17 provides that biennial reports must be tabled in Parliament within 20 sitting days after the report is received by the minister, rather than the standard 15 sitting days.

Legal professional privilege[55]

1.58 Clause 21 provides that a person is not excused from giving information, producing a document or answering a question on the ground that the material is protected from disclosure by legal professional privilege.

1.59 As recognised by the High Court,[56] legal professional privilege is not merely a rule of substantive law but an important common law right which is fundamental to the administration of justice. The committee considers that abrogating legal professional privilege may unduly trespass on individual rights, as to do so may interfere with legitimate, confidential communications between individuals and their legal representatives.

1.60 The committee notes that the bill contains some safeguards in relation to legal professional privilege. Subclause 21(2) provides that the operation of subclause 21(1) does not affect a later claim of legal professional privilege that anyone may make in relation to information, documents or records. Further, clause 39 provides that protected information that has not already been lawfully made available to the public must not be included in reports produced by the Authority. Protected information includes information that is protected against disclosure by legal professional privilege.[57]

1.61 While the committee welcomes the inclusion of these safeguards, the committee reiterates its consistent scrutiny view that legal professional privilege should only be abrogated or modified in exceptional circumstances. Where a bill seeks to abrogate legal professional privilege, the committee expects that a sound justification is included in the explanatory memorandum. In this instance the explanatory memorandum does not contain a justification for abrogating the right to legal professional privilege.

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55 Clause 21. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

56 See for example *Baker v Campbell* (1983) 153 CLR 52.

57 Clause 5, definition of 'protected information'.

1.62 In light of the above, the committee requests the Treasurer's detailed advice as to the rationale for, and the appropriateness of, abrogating legal professional privilege in the bill.

Reverse evidential burden of proof[58]

1.63 Clause 40 makes it an offence for an entrusted person to use or disclose protected information if they are not otherwise authorised to do so by the bill. The offence carries a maximum penalty of imprisonment for up to 2 years.

1.64 Clause 40 provides two offence-specific defences to the unauthorised use or disclosure of protected information. Subclause 40(2) provides that it is a defence if the relevant information was already lawfully available to the public. Subclause 40(3) provides that it is a defence if the use or disclosure was either authorised by another Commonwealth law or done in compliance with a requirement of another Commonwealth law. A defendant bears an evidential burden in relation to these defences.

1.65 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.66 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified in the explanatory memorandum. In this instance the explanatory memorandum states that the reversal of the evidential burden of proof is appropriate because:

> …in many cases, it will be peculiarly within the knowledge of the defendant how the information may be publicly accessed, or the means by which the conduct was authorised by another law of the Commonwealth. In cases where these matters are peculiarly within the defendants' knowledge, it would be significantly more difficult for the prosecution to disprove these matters than it would be for the defendant to establish these matters. This is due to the wide range of publicly available

58 Clause 40. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

information and circumstances in which Commonwealth laws authorise or require the disclosure of information.[59]

1.67 From the justification provided, it is unclear to the committee that the defences in subclauses 40(2) and 40(3) are matters that would be peculiarly within the knowledge of the defendant, noting that the elements of each defence seem to relate to matters of public fact or to questions of law. For example, whether disclosure of information is authorised by another Commonwealth law would appear to be a matter that the prosecution could readily ascertain. Moreover, the committee does not consider it sufficient that the relevant matters are 'in many cases' within the knowledge of the defendant. Rather, the committee considers that the matter must be, as a matter of course, *peculiarly* within the defendant's knowledge and not available to the prosecution.

1.68 While the committee acknowledges that it may be difficult for the prosecution to establish that a person did not have lawful authority to engage in the conduct set out in the offences, the committee emphasises that the mere fact that it is more difficult for the prosecution to prove a particular matter is not, of itself, a sufficient justification for placing the burden of proof on a defendant.[60] The committee considers that it does not appear to be appropriate to reverse the evidential burden of proof in relation to these matters.

1.69 The committee requests the Treasurer's more detailed justification as to the appropriateness of including the specified matters as offence-specific defences.

1.70 In addition, from a scrutiny perspective, the committee suggests that it may be appropriate if the bill were amended so that the offence-specific defences in subclauses 40(2) and 40(3) are instead framed as elements of the relevant offence. The committee also requests the Treasurer's advice in relation to this matter.

Immunity from liability[61]

1.71 Subclause 47(1) of the bill provides that members and staff members of the Authority are protected from civil liability in relation to loss, damage or injury of any kind that results from an act done, or omitted to be done, in good faith in the performance of functions or duties or the exercise of powers under the bill. Subclause 47(2) provides that consultants and contractors are similarly protected in

59 Explanatory memorandum, p. 19.

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

61 Clause 47. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

relation to acts done, or omitted to be done, while assisting members or staff members in the performance of functions or duties or the exercise of powers under the bill. Subclause 47(3) further extends immunity from civil liability to members and staff members of cooperating agencies in relation to acts done, or omitted to be done, while giving information, producing documents or answering questions under subclause 20(2) of the bill.

1.72 The immunities provided for under clause 47 would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve a personal attack on the honesty of the decision maker. As such, courts have taken the position that bad faith can only be shown in very limited circumstances. The committee expects that, if a bill seeks to confer immunity from liability, particularly where such immunity could affect individual rights, this should be soundly justified in the explanatory materials. In this instance, the explanatory memorandum states that providing immunity from liability:

> enables the Authority to efficiently perform its functions and exercise its powers without being hampered by undue concerns over potential civil liability. APRA and ASIC staff members and individuals are also protected from any civil liability resulting from compliance with a request to provide information in accordance with clause 20(2) of the Financial Regulator Assessment Authority Bill 2021.[62]

1.73 The committee considers that a desire for administrative efficiency is not, of itself, sufficient justification for conferring immunity from liability. Moreover, it is not clear to the committee why, or in what circumstances, 'undue concerns' over civil liability will hamper the efficient performance of functions or the exercise of powers by the Authority.

1.74 In light of the above, the committee requests the Treasurer's detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on members and staff members of the Authority and on consultants, contractors, and members and staff members of cooperating agencies.

Delegation of administrative powers[63]

1.75 Subclause 49(2) of the bill provides that the Authority may delegate its information-gathering powers under subclause 20(2) to a staff member who is

62 Explanatory memorandum, p. 20.

63 Subclause 49(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

classified as Executive Level 2, or equivalent, or who is acting at an Executive Level 2 level.

1.76 The committee has consistently drawn attention to legislation that allows the broad delegation of administrative powers. Generally, the committee prefers to see a limit set on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated.

1.77 The committee notes that, in this instance, the scope of the powers that may be delegated has been limited to the information-gathering powers set out in subclause 20(2). However, the committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. As a result, where broad delegations are provided for, the committee considers that an explanation of why these delegations are considered necessary should be included in the explanatory memorandum. In this instance, the explanatory memorandum does not explain why it is necessary to allow the Authority to delegate its powers under subclause 20(2) to a person below the Senior Executive Service level.

1.78 The committee requests the Treasurer's detailed advice as to why it is considered necessary and appropriate to allow the Authority to delegate its information-gathering powers under subclause 20(2) to Executive Level 2 staff members, rather than restricting the delegation of these powers to members of the Senior Executive Service or to holders of nominated offices.

Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021

Purpose	This bill, along with the Financial Regulator Assessment Authority Bill 2021, seeks to establish the Financial Regulator Assessment Authority to assess the effectiveness and capability of each of the Australian Prudential Regulation Authority and Australian Securities and Investments Commission
Portfolio	Treasury
Introduced	House of Representatives on 13 May 2021

Reverse evidential burden of proof[64]

1.79 Subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) provides that it is an offence if a person discloses protected information or produces a protected document and the disclosure or production is not authorised by the APRA Act. The offence carries a maximum penalty of imprisonment for up to 2 years.

1.80 Item 3 of Schedule 1 to the bill seeks to insert proposed subsections 56(6AA) and 56(6AB) into the APRA Act to provide two offence-specific defences to the offence in existing subsection 56(2). Proposed subsection 56(6AA) provides that it is a defence if the disclosure or production was to a Financial Regulator Assessment Authority (Authority) official for the purpose of the performance of functions or the exercise of powers of the Authority. Proposed subsection 56(6AB) provides that it is a defence if the disclosure or production was by a person who is, or has been, an Authority official and the information or document was acquired in the course of their duties with the Authority. A defendant bears an evidential burden in relation to these defences.

1.81 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise

64 Schedule 1, Item 3, proposed subsections 56(6AA) and 56(6AB). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

1.82 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed subsections 56(6AA) and 56(6AB) have not been addressed in the explanatory materials.

1.83 The committee notes that the *Guide to Framing Commonwealth Offences*[65] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is *peculiarly* within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[66]

1.84 On the information provided, noting no explanation has been included in the explanatory memorandum, it is unclear to the committee that the defences in proposed subsections 56(6AA) and 56(6AB) are matters that would be peculiarly within the knowledge of the defendant. For example, in relation to proposed subsection 56(6AA) it appears to the committee that the relevant Authority official would be aware of the disclosure or production.

1.85 The committee requests the Treasurer's more detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

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

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

Fuel Security Bill 2021

Purpose	This bill seeks to establish a minimum stockholding obligation to ensure industry holds minimum qualities of key transport fuels to guarantee a baseline level of stock at all times, and to enable a production payment for refinery operators to provide an adjustable payment to refineries in return for a commitment to continue refining until at least 30 June 2027
Portfolio	Energy
Introduced	House of Representatives on 26 May 2021

Significant matters in delegated legislation[67]

1.86 The bill includes a number of provisions which would allow for the inclusion of significant matters in delegated legislation. These provisions relate to the minimum stockholding obligation (MSO) imposed on certain entities by Part 2 of the bill.

1.87 The substance of the MSO is set out at clause 7 of the bill. In summary, the MSO is a national-level obligation which requires certain corporate entities operating within the fuel industry to hold a minimum quantity of transport fuels on a set date or dates, known as obligation days. The relevant transport fuels for the purposes of the MSO are known as MSO products,[68] and are principally gasoline, diesel, and kerosene. Each regulated entity may be subject to a different obligation in terms of the quantity of MSO product to be held.[69]

1.88 The specific quantity of MSO products that is required to be held by affected entities is determined by the Secretary. Subclauses 10(3) and 15(3) provide that this determination must be made in accordance with the rules.

1.89 Clause 12 of the bill provides that the rules may exempt entities from being subject to the MSO for a specific MSO product.

1.90 Clause 18 of the bill provides that the Secretary may approve, or refuse to approve, an application for the temporary reduction of the quantity of MSO product to be held by an entity. Subclause 18(6) provides that the Secretary's decision in relation to a temporary reduction application must be made in accordance with the rules.

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67 Subclause 10(3), clause 12, subclauses 15(3) and 18(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

68 Definition of 'MSO product' at clause 5.

69 Clause 13.

1.91 The committee's view is that significant matters, such as powers to grant exemptions or to substantially determine or alter the scope of a requirement, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states in relation to subclause 10(3) that:

> It is anticipated that the rules will specify a formula to be used, with quantities based on each entity's actual annual import and production volumes. From time to time variations may be required to the formula to ensure smaller entities are not disproportionately affected by the MSO.[70]

1.92 Similarly, the explanatory memorandum states in relation to clause 12 that:

> The exemption mechanism is to be prescribed by the rules as it allows an administratively efficient way to factor in unforeseen circumstances when entities should not be regulated under the MSO scheme. It would be impractical to amend the primary legislation each time an entity is exempted. It is not intended that exemptions will be a significant part of the legislative framework given the flexibility provided under clauses 17 and 18 to reduce quantities of stocks of MSO product required to be held, and the volume threshold for coverage prescribed under subparagraph 10(1)(b)(ii) in specific circumstances. The need for any exemptions would be carefully considered along with any potential impacts on competition in relevant markets.[71]

1.93 Finally, the explanatory memorandum states in relation to subclause 18(6) that:

> Consultation with industry will be key to ensure appropriate settings. Flexibility has been maintained to allow the list to be amended in case unexpected circumstances arise where amendments need to be made. The rules may also make provision in relation to the appropriate length of the temporary reduction period.[72]

1.94 While noting these explanations, the committee has generally not accepted a desire for administrative flexibility as a sufficient justification for leaving significant matters to delegated legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. Leaving significant matters to delegated legislation provides the executive with a broad power to determine and modify the substance of the MSO and potentially increases uncertainty for regulated entities. It is unclear to the committee why at least high-

70 Explanatory memorandum, pp. 28-29.

71 Explanatory memorandum, pp. 29-30.

72 Explanatory memorandum, p. 36.

level guidance in relation to the matters identified above, such as exemptions to the MSO, cannot be provided on the face of the bill.

1.95 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave significant matters related to the requirements of the minimum stockholding obligation to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Fees in delegated legislation[73]

1.96 Clause 74 of the bill provides that a person affected by a reviewable decision may apply for reconsideration of the decision. Paragraph 74(2)(c) provides that an application for reconsideration of a decision must be accompanied by the fee, if any, that is prescribed by the rules.

1.97 The committee has scrutiny concerns regarding the inclusion of a fee-making power within delegated legislation where the face of the bill contains no cap on the maximum fee amount or any information or guidance as to how a fee will be calculated. In this instance, the committee's scrutiny concerns are heightened as the explanatory memorandum also contains no information as to how the fee will be calculated.

1.98 In this instance, the committee considers that, at a minimum, a provision stating that the fee must not be such as to amount to taxation should be included on the face of the bill.[74] In this regard, the committee notes the advice set out at paragraph 24 of the Office of Parliamentary Counsel Drafting Direction No. 3.1.[75] While there is no legal need to include such a provision, the committee considers that it is nonetheless important to avoid confusion and to emphasise the point that the amount calculated under the regulations will be a fee and not a tax. In addition, as set out in the Drafting Direction, such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.

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73 Clause 26. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

74 See, for example, subsection 399(3) of the *Export Control Act 2020* and subsection 32(4) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

75 Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, September 2020, para 24.

1.99 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide at least high-level guidance regarding how the application fee in paragraph 74(2)(c) will be calculated, including, at a minimum, a provision stating that the fee must not be such as to amount to taxation.

Independent Office of Animal Welfare Bill 2021

Purpose	This bill seeks to establish a new Commonwealth statutory authority with responsibility for the development of animal welfare policy at the Commonwealth level
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 24 May 2021

Broad delegation of administrative powers[76]

1.100 This bill seeks to establish the Independent Office of Animal Welfare (the Office). This new Commonwealth statutory authority would have the ability to conduct inquiries and reviews into the effectiveness and implementation of Australian animal welfare laws.[77]

1.101 The Chief Executive Officer's (CEO) role has a number of regulatory, reporting and department review functions.[78] Clause 31 of the bill provides that the CEO may delegate, in writing, all or any of their functions and powers under the proposed Act 'to a member of the staff of the Office'.[79]

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

1.103 The explanatory memorandum does not provide a justification for this broad delegation of administrative power and contains no guidance on the knowledge or expertise that may be required for a member of staff to carry out these delegated functions and powers.

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

77 Explanatory memorandum, p. 2.

78 Explanatory memorandum, p. 3.

79 Subclause 31(1).

1.104 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the functions and powers of the CEO to be delegated to any member of staff of the Office.

Liability for Climate Change Damage (Make the Polluters Pay) Bill 2021

Purpose	This bill seeks to make fossil fuel companies liable for climate change damage, giving victims of climate change, such as the 2019–2020 bushfire survivors, the right to bring an action against thermal coal, oil and gas companies for climate change damage
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 24 May 2021

Retrospective application[80]

1.105 The bill seeks to allow persons to bring an action against a major emitter for climate change damage suffered by the person. Clause 10 of the bill provides that the provisions of the bill would apply in relation to climate change damage suffered on or after 1 July 2019.

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

1.107 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum notes the retrospective application and states that it ensures that 'victims of the 2019-20 bushfires are able to utilise the Act.'[81]

1.108 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for the bill to apply retrospectively in relation to climate change damage suffered on or after 1 July 2019.

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

81 Explanatory memorandum, p. 7.

Migration Amendment (Tabling Notice of Certain Character Decisions) Bill 2021

Purpose	This bill amends the *Migration Act 1958* to provide that if the minister makes certain character decisions under the existing Migration Act in relation to a person, the minister must table this decision before each House of Parliament within 15 sitting days of the decision being made
Portfolio	Immigration, Citizenship, Migration and Multicultural Affairs
Introduced	12 May 2021

Tabling of documents in Parliament[82]

1.109 The bill seeks to insert proposed subsection 501(4A) into the *Migration Act 1958* (Migration Act) to require that the minister table notice of decisions made under subsection 501(3) of the Migration Act in both Houses of the Parliament within 15 sitting days of the making of the decision. Under subsection 501(3) the minister may decide to refuse to grant a visa or to cancel a visa. Proposed paragraph 501(4B)(a) provides that the tabling requirement does not apply to decisions made under subsection 501(3) if the relevant person does not pass the character test because of the operation of:

- paragraph 501(6)(a) (substantial criminal record);
- paragraph 501(6)(e) (sexually based offences involving a child); or
- paragraph 501(6)(g) (assessed by the Australian Security Intelligence Organisation as directly or indirectly a risk to security).

1.110 In addition, the tabling requirement does not apply if the person was the subject of an adverse security assessment, or a qualified security assessment, under the *Australian Security Intelligence Organisation Act 1979* when the decision was made.

1.111 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. The committee notes that the explanatory memorandum in this instances states that the purpose of the new provisions is to provide greater transparency before Parliament of the

82 Schedule 1, item 1, proposed subsections 501(4A) and 501(4B). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

instances in which the minister uses the power in subsection 501(3) of the Migration Act to refuse, or to cancel, a visa on certain character grounds.[83]

1.112 While the committee welcomes the increased transparency provided by the bill, it is unclear to the committee why certain decisions have been excluded from the requirement. No justification has been provided in the explanatory memorandum for these exclusions. The explanatory memorandum states that similar arrangements are provided for in subsection 501C(8), in relation to subsequent decisions to revoke decisions under subsection 501(3).[84] However the committee notes that current subsection 501C(8) does not contain any exemptions to tabling as exist in the bill.

1.113 The committee therefore requests the minister's advice regarding why notice of the making of certain decisions by the minister is not required to be tabled in both Houses of the Parliament under proposed subsection 501(4A).

83 Explanatory memorandum, p. 4.

84 Explanatory memorandum, p. 4.

National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021

Purpose	This bill seeks to amend the *National Disability Insurance Scheme Act 2013* in order to strengthen supports and protections for NDIS participants who may be at risk of harm, and to clarify the NDIS Commissioner's powers
Portfolio	National Disability Insurance Scheme
Introduced	House of Representative on 3 June 2021

Broad discretionary power

Significant penalties[85]

Banning orders

1.114 Under existing section 73ZN of the *National Disability Insurance Scheme Act 2013* (the NDIS Act), the NDIS Quality and Safety Commissioner (the Commissioner) may make a banning order prohibiting or restricting a person from being involved in the provision of specified supports or specified services to people with a disability. A banning order may be made against:

- an NDIS provider (subsection 73ZN(1));
- a person who is or was employed or otherwise engaged by an NDIS provider (subsection 73ZN(2)); or
- a person who is not suitable to be involved in the provision of support who has not previously been an NDIS provider or previously employed or engaged by an NDIS provider (subsection 73ZN(2A)).

1.115 The NDIS Act currently provides that a banning order may apply generally or be of limited application, and be permanent or for a specified period.[86] Schedule 1 to the bill seeks to make a number of amendments regarding the making of banning orders.

1.116 Item 32 seeks to amend subsection 73ZN(3) of the NDIS Act to provide that the Commissioner may make a banning order subject to 'specified conditions'. There

85 Item 28, proposed subsection 73ZN(2); item 32, proposed paragraph 73ZN(3)(c); item 35, proposed paragraph 73ZN(10)(b); item 36, proposed subsection 73ZO(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

86 *National Disability Insurance Scheme Act 2013*, subsection 73ZN(3).

is no guidance on the face of the bill as to what types of conditions could be imposed, how long any condition will be imposed for or the criteria the Commissioner will use when determining the imposition of a condition is appropriate.

1.117 The committee considers that this provision provides the Commissioner with a broad discretionary power to impose conditions on banning orders in circumstances where there is no guidance on the face of the bill as to how or when the power should be exercised. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory materials. In this instance, the explanatory memorandum states:

> Without limiting the kinds of conditions that may be imposed, this may include conditions that the subject of the banning order must provide a copy of the banning order to prospective employers where the banning order restricts them from engaging in some but not all activities related to disability service provisions. This assists the employer to ensure the worker is not involved in those activities.
>
> […] The decision to subject a provider or worker to a banning order is the most serious regulatory action the Commission can enforce.[87]

1.118 While noting this explanation, it is unclear why at least high-level guidance cannot be provided on the face of the primary legislation as to the types of conditions that can be imposed. The committee notes that items 26, 29 and 30 of the bill amend the banning order provisions to provide that when considering whether a person is not suitable to provide supports or services, the Commissioner must have regard to any matters prescribed by the NDIS rules. It is unclear to the committee why, at a minimum, a similar requirement cannot be provided in relation to the imposition of specified conditions.

1.119 Additionally, item 28 seeks to amend subsection 73ZN(2) to provide that such a banning order may also apply to a person who is or was a member of the key personnel of an NDIS provider. The explanatory memorandum notes that this would include current or former board members and chief executive officers of NDIS providers.[88] Item 33 seeks to provide that if a banning order is made against a person who is a member of the key personnel, the continuity of the order is not affected by the person ceasing to be a member. This further heightens the committee's concerns outlined above as this would expand the categories of persons who may be subject to a banning order.

87 Explanatory memorandum, pp. 11–12.

88 Explanatory memorandum, pp. 9–10.

Civil penalties

1.120 Item 35 seeks to amend paragraph 73ZN(10)(b) of the NDIS Act to provide that by contravening a *condition* of a banning order, a person may attract a civil penalty of up to 1,000 penalty units (or $222,000).[89] Further, item 36 seeks to insert subsection 73ZO(2A) into the NDIS Act to provide that a banning order may be varied to impose new conditions on the order, or to vary or remove existing conditions.

1.121 The explanatory memorandum states that 'the maximum penalty for a breach of a condition is the same as the breach of the banning order'.[90] The explanatory memorandum also states that proposed subsection 73ZO(2A) 'allows the Commissioner to adjust and apply necessary regulatory action where circumstances change or new information supports the need for an adjustment to provide effective safeguards to participants'.[91]

1.122 Noting the broad discretionary nature of the Commissioner's power to impose conditions on a banning order and the lack of guidance on the face of the bill as to the types of conditions that can be imposed, the committee has scrutiny concerns regarding the imposition of a significant civil penalty for persons who breach conditions of banning orders. For example, in cases where a person is required to comply with banning order conditions but has since left the disability sector, it is unclear to the committee whether these conditions—which may include compulsory training—would remain enforceable, with failure to comply resulting in a civil penalty of up to $222,000. The committee does not consider the explanatory memorandum has adequately explained why it is appropriate to provide a civil penalty of up to 1,000 penalty units for the breach of a condition of a banning order.

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

- **why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to impose specified conditions on a banning order;**
- **whether the bill can be amended to provide, at a minimum, that the Commissioner must consider any matters set out in the NDIS rules when imposing a specified condition on a banning order; and**
- **why it is considered necessary and appropriate to apply a significant civil penalty to breaches of specified conditions on banning orders.**

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89 *National Disability Insurance Scheme Act 2013*, subsection 73ZN(10).

90 Explanatory memorandum, p. 12.

91 Explanatory memorandum, p. 12.

Significant matters in delegated legislation

Privacy[92]

1.124 Current section 67A of the NDIS Act provides that a person may use or disclose protected Commission information in certain circumstances. Item 10 of Schedule 1 seeks to insert proposed paragraph 67A(1)(db) to provide that a disclosure is permitted if the disclosure of information is to a person or body prescribed by the NDIS rules for the purpose prescribed by the rules.

1.125 The committee's consistent scrutiny view is that significant matters, such as when protected information may be disclosed, should be included in primary legislation unless a sound justification is provided for the use of delegated legislation. In this instance, the explanatory memorandum states:

> This will enable the NDIS rules to specify entities with a role in relation to persons with disability and facilitate information disclosure to those entities, including: early identification of people with disability who are at risk of harm or neglect; and to support a reasonable, necessary and proportionate safeguarding response by those entities.[93]

1.126 While noting this explanation, the committee has scrutiny concerns regarding allowing the NDIS rules to expand the permitted disclosures of information to *any* person or body prescribed by the rules for *any* purpose prescribed by the rules. The committee considers that it would be possible to include at least high-level guidance regarding the types of entities or purposes that could be prescribed in the rules. The committee's scrutiny concerns in this instance are heightened as this could allow for broad permitted disclosures of personal information.

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

- **why it is considered necessary and appropriate to allow delegated legislation to expand the permitted disclosures of information to *any* person or body prescribed by the rules for *any* purpose prescribed by the rules; and**
- **whether the bill could be amended to include at least high-level guidance as to the types of entities information can be disclosed to and the purposes for which it can be disclosed.**

92 Schedule 1, item 10, proposed paragraph 67A(1)(db). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

93 Explanatory memorandum, p. 7.

Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021

Purpose	This bill seeks to amend *the Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act) to provide for increased government oversight and scrutiny of entities throughout the life of an offshore project, from exploration through to development and eventual decommissioning
Portfolio	Resources
Introduced	House of Representatives on 26 May 2021

Fees in delegated legislation[94]

1.128 Item 1 of Schedule 1 to the bill seeks to insert several provisions into the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) which would provide for fee-making powers within delegated legislation.

1.129 Proposed section 566ZD provides that the Titles Administrator must ensure that all instruments, or copies of instruments, that may be subject to inspection under proposed Chapter 5A are open for inspection by any person on payment of a fee calculated under the regulations.

1.130 Proposed subsection 566ZE(1) provides that the Titles Administrator may provide a copy of or extract from an instrument lodged under Chapter 5A upon payment of a fee calculated under the regulations. Proposed subsection 566ZE(3) provides that the Titles Administrator may, upon payment of a fee calculated under the regulations, issue an evidentiary certificate.

1.131 The committee has consistent scrutiny concerns regarding provisions which allow fees to be calculated under delegated legislation where the face of the bill contains no cap on the maximum fee amount or any information or guidance as to how a fee will be calculated. In this instance the explanatory memorandum provides some guidance in relation to how the fee will be calculated. For example, in relation to proposed section 566ZD the explanatory memorandum states:

94 Schedule 1, item 1, proposed section 566ZD and proposed subsections 566ZE(1) and (3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

> The applicable fee (if any) will only serve to enable the Titles Administrator, as a fully cost-recovered entity, to recover the costs that it will incur in relation to enabling public access to the relevant instrument.[95]

1.132 The committee considers that this kind of guidance should also be included on the face of the bill and that, at a minimum, the bill should include a provision stating that the fee must not be such as to amount to taxation. In this regard, the committee notes the advice set out at paragraph 24 of the Office of Parliamentary Counsel Drafting Direction No. 3.1.[96] While there is no legal need to include such a provision, the committee considers that it is nonetheless important to include to avoid confusion and to emphasise the point that the amount calculated under the regulations will be a fee and not a tax. In addition, as set out in the Drafting Direction, such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.

1.133 The committee also notes that proposed subsection 566M(2), along with existing subsections 256(3) and 427(4) of the Act, state that the relevant fee must not be such as to amount to taxation. It is unclear to the committee why the fee-making powers at proposed section 566ZD and proposed subsections 566ZE(1) and (3) do not include similar guidance.

1.134 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide at least high-level guidance regarding how the fees under proposed section 566ZD and proposed subsections 566ZE(1) and (3) will be calculated, including, at a minimum, a provision stating that the fees must not be such as to amount to taxation.

95 Explanatory memorandum, p. 43. The Explanatory memorandum provides similar explanations for proposed subsections 566ZE(1) and (3) at p. 44.

96 Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, September 2020, para 24.

Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021

Purpose	This bill seeks to modernise and streamline social security law to support the New Employment Services Model, which will operate from July 2022
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 27 May 2021s

Instruments not subject to parliamentary disallowance[97]

1.135 Item 123 of Schedule 1 seeks to insert a new Division 2A relating to employment pathway plans into Part 3 of the *Social Security (Administration) Act 1999*. Proposed Subdivision C of Division 2A of Part 3 sets out the circumstances where a person will be exempt from employment pathway plan requirements. Proposed section 40T seeks to provide that a person is not required to satisfy the employment pathway plan requirements if the person is in a class of persons specified in a determination made by the Employment Secretary. Proposed subsection 40T(3) provides that the Employment Secretary must be satisfied that exceptional circumstances exist to justify making the determination.

1.136 Proposed subsection 40U(4) provides that any determination under Subdivision C of Division 2A of Part 3 will not be a legislative instrument. The committee notes that the other determinations in this subdivision relate to the circumstances of an individual person and, as such, are likely not administrative in character.[98] As determinations under proposed section 40T will apply to a class of persons, the committee considers that this may be legislative in character. This is acknowledged in the explanatory memorandum.[99]

1.137 The committee notes that as instruments made under proposed section 40T are specified to not be legislative instruments they will not be subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As such there is no parliamentary scrutiny of non-legislative instruments. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials

97 Schedule 1, item 123, proposed sections 40T and 40U. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

98 See, for example, proposed section 40L.

99 Explanatory memorandum, p. 76.

to include a justification for why instruments made under proposed section 40T are not legislative in character. In this instance, the explanatory memorandum states:

> There is…a need to avoid delays which would be caused by a requirement to draft and register potentially a large number of legislative instruments with accompanying explanatory statements before an exemption could take effect in all required areas, and then a requirement to repeatedly make new or amended instruments to expand or vary the class(es) of persons to whom the exemption(s) is/are applicable. Accordingly, determinations under this section are not legislative instruments. This will enable agile, flexible and tailored responses to emergencies.[100]

While, noting this explanation, the committee has not generally accepted a desire for administrative flexibility to be a sufficient justification for providing that an instrument will not be a legislative instrument. The committee concurs with the view of the Senate Standing Committee for the Scrutiny of Delegated Legislation that substantive exemptions from the usual parliamentary tabling and disallowance process are unlikely to be acceptable unless exceptional circumstances can be demonstrated.[101]

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

- **why it is considered necessary and appropriate that all determinations made under proposed section 40T are not legislative instruments; and**
- **whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

Broad discretionary powers

Parliamentary scrutiny – section 96 grants to the states[102]

1.139 Item 2 of Schedule 2 to the bill seeks to insert proposed section 1062A into the *Social Security Act 1991* (the Social Security Act) to provide that the Employment Secretary may make, vary or administer an arrangement for the making of payments by the Commonwealth, or make, vary or administer a grant of financial assistance, in relation to various activities aimed at assisting unemployed or other persons to obtain and maintain paid work. Proposed section 1062B sets out the constitutional

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100 Explanatory memorandum, p. 77.

101 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight: Final Report*, March 2021, p. 115.

102 Schedule 2, item 2, proposed sections 1062A and 1062B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

limits of any arrangement or grant made under proposed section 1062A. Proposed paragraph 1062B(i) provides that arrangements or grants under proposed section 1062A may include the granting of financial assistance to a State or Territory.

1.140 The committee's view is that, where it is proposed to allow the expenditure of a potentially significant amount of public money, the expenditure should be subject to appropriate parliamentary scrutiny and oversight. In this regard, the committee is concerned that the bill contains no guidance on its face as to how the Employment Secretary's broad power to make arrangements and grants under proposed section 1062A is to be exercised. The explanatory memorandum in this instance states:

> Placing legislative authority for Commonwealth expenditure on employment programs in portfolio legislation administered by the Minister and department responsible for employment policy and programs will enhance transparency and accountability for that expenditure. This will also make the source of the authority more accessible to members of the public instead of requiring them to access items in regulations which most will not have heard of...
>
> Funding for employment programs under Chapter 2D will not be supported by the standing appropriation in the social security law (see items 4 and 5). Instead, it will need to come from annual appropriations in the usual way.
>
> Government decisions in relation to these programs will therefore be subject to Budget processes, and be published in the Employment Department's portfolio budget papers. Parliament will continue to be able to scrutinise expenditure on, and the operation of, these employment programs through all of the usual mechanisms available to it, including the Senate Estimates process. [103]

1.141 The committee welcomes the increased transparency provided by placing legislative authority for spending in primary legislation and notes that government decisions in relation to arrangements and grants will still be subject to parliamentary oversight through the budget process. The committee also acknowledges that proposed section 1062D provides that the Employment Secretary must detail the total amount paid under arrangements or grants and the total number of arrangements and grants in the Department's annual report. However, from a scrutiny perspective, the committee remains concerned that there is insufficient guidance on the face of the primary legislation as to how the Employment Secretary's broad discretionary power to make agreements or grants will be exercised.

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103 Explanatory memorandum, pp. 85, 88.

1.142 The committee has also previously noted that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution.[104] If this provision is agreed to and the Parliament is therefore delegating this power to the executive in this instance, the committee considers that it is appropriate that the exercise of this power be subject to appropriate parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

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

- **why it is considered necessary and appropriate to confer on the Employment Secretary a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised;**
- **whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which arrangements or grants can be made; and**
- **whether the bill can be amended to include a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 sitting days after being made.**

Instruments not subject to parliamentary disallowance[105]

1.144 Schedule 4 to the bill seeks to amend the Social Security Act to provide that certain payments and benefits from Commonwealth and State and Territory employment programs, which may otherwise be income for social security law purposes, will not be considered income for those purposes. Proposed subsection 8(8AC) seeks to provide that the Employment Secretary may determine, by notifiable instrument, programs that will not be considered income for social security law purposes.

1.145 Schedule 6 to the bill seeks to insert proposed section 40 into the Social Security Act to provide that if a person participates in an approved program of work

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104 Section 96 of the Constitution provides that: '…the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

105 Schedule 4, item 2, proposed subsection 8(8AC) and Schedule 6, item 1, proposed subsection 40(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

for income support payment or in an employment program, or undertakes an activity in accordance with an employment pathway plan, that person will not be taken to be an employee or worker for the Commonwealth. Proposed subsection 40(3) seeks to provide that the Employment Secretary may, by notifiable instrument, determine programs to be employment programs for the purposes of proposed section 40.

1.146 The committee notes that as instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are specified to be notifiable instruments they will not be subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As such, there is no parliamentary scrutiny of notifiable instruments. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are not legislative in character. The explanatory memorandum provides no justification as to why these instruments should be notifiable rather than legislative.

1.147 The committee notes that Schedule 5 to the bill seeks to amend subsection 28(1) of the Social Security Act to provide that declarations by the Secretary that particular programs of work are approved programs of work for income support payment will be legislative instruments. The explanatory memorandum in that instance states that:

> The amendment will remove uncertainty by clarifying the status of the instrument, bring the provision into line with modern drafting practices, and provide Parliamentary oversight of such declarations by requiring the instrument to be registered on the Federal Register of Legislation, and tabled.[106]

1.148 Noting the similarity in the types of determinations being made, it is unclear to the committee why determinations under proposed subsection 8(8AC) and proposed subsection 40(3) cannot be legislative instruments.

1.149 The committee therefore requests the minister's advice regarding:

- **why it is considered appropriate that instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are not legislative instruments; and**
- **whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

106 Explanatory memorandum, p. 95.

Tertiary Education Quality and Standards Agency (Charges) Bill 2021

Purpose	This bill seeks to establish a new registered higher education provider charge to recover the costs of the Tertiary Education Quality and Standards Agency's sector risk monitoring and regulatory oversight activities
Portfolio	Education
Introduced	House of Representatives on 13 May 2021

Broad discretionary power

Significant matters in delegated legislation[107]

1.150 The bill seeks to allow recovery of the costs of the Tertiary Education Quality and Standards Agency's (TEQSA) sector risk monitoring and regulatory oversight activities, which do not currently attract a charge.

1.151 Clause 6 seeks to provide that a charge is imposed on registered higher education providers. Clause 8 of the bill would allow the regulations to exempt registered higher education providers from the charge.

1.152 The committee considers that this provision provides the minister with a broad discretionary power to exempt providers from the requirement to pay the charge by legislative instrument in circumstances where there is no guidance on the face of the bill as to when these powers may be exercised. The committee expects that the inclusion of broad discretionary powers, and the inclusion of significant matters in delegated legislation, should be thoroughly justified in the explanatory memorandum. In this instance, the explanatory memorandum does not provide a justification as to why it is necessary or appropriate for the exemption power to be left to delegated legislation.

1.153 In light of the above, the committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to give the minister a broad discretionary power to provide for exemptions from the proposed registered higher education provider charge in delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding when it will be appropriate provide for such exemptions.**

107 Clause 8. The committee draws senators' attention to this provision pursuant to Senate Standing Orders 24(1)(a)(ii) and (iv).

Tertiary Education Quality and Standards Agency Amendment (Cost Recovery) Bill 2021

Purpose	This bill seeks to amend the *Tertiary Education Quality and Standards Agency Act 2011* to reflect the introduction of the new registered higher education provider charge under the Tertiary Education Quality and Standards Agency (Charges) Bill 2021
Portfolio	Education
Introduced	House of Representatives on 13 May 2021

Significant matters in delegated legislation[108]

1.154 The bill seeks to amend the *Tertiary Education Quality and Standards Agency Act 2011* (the Act) in relation to the collection and administration of the proposed registered higher education provider charge (the charge). Proposed subsection 26C(2) provides that the Registered Higher Education Provider Charge Guidelines (the Guidelines) may make provision for, or in relation to:

- the issue of notices setting out the amount of the charge payable by a provider;
- when the charge is due and payable, and to whom;
- the issue of notices extending the time for payment of the charge;
- penalties for late payment of the charge, and to whom they are payable;
- the refund, remission or waiver of the charge or penalties for late payment; and
- the review of decisions made under the Guidelines, and any other matters, in relation to the collection or recovery of the charge.

1.155 The explanatory memorandum notes that the charge will be developed according to the Australian Government Charging Framework.[109] In relation to the Guidelines, the explanatory memorandum notes:

> Prior to the introduction of the regulations, TEQSA will seek stakeholder feedback on a draft Cost Recovery Implementation Statement (available from www.teqsa.gov.au), consistent with *the Australian Government Cost Recovery Guidelines* (available from www.finance.gov.au).[110]

108 Schedule 1, Item 2, proposed subsection 26C(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

109 Explanatory memorandum, p. 2.

110 Explanatory memorandum, p. 2.

1.156 While welcoming this information, the committee's view is that significant matters relating to the collection and administration of new charges and the review of related decisions should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no information regarding why these matters will be left to delegated legislation.

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

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

- **why it is considered necessary and appropriate to leave key aspects of the operation of the proposed Registered Higher Education Provider Charge to delegated legislation; and**
- **whether the bill could be amended to include at least high-level guidance on the face of the primary legislation regarding matters to be contained in the Registered Higher Education Provider Charge Guidelines.**

Treasury Laws Amendment (2021 Measures No. 3) Bill 2021

Purpose	Schedule 1 to the bill seeks to increase the Medicare levy low-income thresholds for singles, families, and seniors and pensioners, consistent with increases in the consumer price index Schedule 2 to the bill seeks to amend the *National Housing Finance and Investment Corporation Act 2018* to establish the Family Home Guarantee Schedule 3 to the bill seeks to exempt eligible payments made by the Australian government to thalidomide survivors from income tax and from the social security and veterans' entitlement income test Schedule 4 to the bill seeks to provide an income tax exemption for qualifying grants in relation to the February and March 2021 storms and floods Schedule 5 to the bill seeks to amend the *Income Tax Assessment Act 1997* to include a number of organisations on the list of deductible gift recipients
Portfolio	Treasury
Introduced	House of Representative on 13 May 2021

Significant matters in non-disallowable delegated legislation[111]

1.159 Schedule 2 to the bill seeks to amend section 3 of the *National Housing Finance and Investment Corporation Act 2018* (the NHFIC Act) to add 'assisting earlier access to the housing market by single parents with dependants' to the objects of the NHFIC Act. This will allow the minister to issues directions to the NHFIC concerning the Family Home Guarantee through the NHFIC Investment Mandate.[112]

1.160 The explanatory memorandum states that:

> The Investment Mandate will enable the Family Home Guarantee to assist eligible single parents with dependants who are first home buyers or have previously owned a home but do not currently hold a freehold or

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

112 As set out in section 12 of the *National Housing Finance and Investment Corporation Act 2018*.

leasehold interest in real property in Australia, a lease of land in Australia or a company title interest in land in Australia.[113]

1.161 The committee notes that directions constituting the NHFIC Investment Mandate are not subject to disallowance, and that there is no detail on the face of the bill as to how the new Family Home Guarantee is to operate.

1.162 The committee's view is that significant matters, such as core details of a programs such as the proposed Family Home Guarantee, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee is particularly concerned that all of the details of the proposed Family Home Guarantee are being left to non-disallowable delegated legislation and will therefore not be subject to effective parliamentary oversight. The committee has consistently raised concerns regarding the lack of parliamentary oversight of Investment Mandates.[114] The committee concurs with the view of the Senate Standing Committee for the Scrutiny of Delegated Legislation that exemptions from disallowance are unlikely to be acceptable unless exceptional circumstances can be demonstrated.[115]

1.163 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum contains no explanation as to why the core details of the Family Home Guarantee will be left to non-disallowable delegated legislation.

1.164 The committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave nearly all of the elements of the proposed Family Home Guarantee to non-disallowable delegated legislation; and**
- **whether the bill can be amended to set out the core elements of the Family Home Guarantee on the face of the primary legislation, or to at least provide that directions given to the NHFIC regarding the scheme be subject to the usual parliamentary disallowance process.**

113 Explanatory memorandum, p. 15.

114 See for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2019*, pp. 14–16.

115 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight: Final Report*, March 2021, p. 115.

Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *Water Act 2007* to establish the role of an independent Inspector-General of Water Compliance to monitor, and provide independent oversight of, water compliance
Portfolio	Resources, Water and Northern Australia
Introduced	House of Representatives on 26 May 2021

Reverse evidential burden[116]

1.165 Schedule 1 to the bill seeks to insert a number of new criminal offences and civil penalty provisions into the *Water Act 2007* (the Water Act).

Criminal offences

1.166 Proposed sections 73A and 73B provide that it is an offence to take water from an area that is subject to a water resource plan where the taking of that water is not permitted under the law of a state. Proposed subsections 73A(8) and 73B(9) state that a person may rely on an exception, exemption, excuse, qualification or justification provided by the law of a state, so long as this does not involve determining the person's state of mind. A defendant bears an evidential burden in relation to these offence-specific defences.

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

1.168 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified in the explanatory memorandum. In this instance the explanatory memorandum states that the reversal of the evidential burden of proof is appropriate because:

116 Schedule 1, item 2, proposed subsections 73A(8), 73B(9), 73F(2), and 73G(2); item 78, proposed subsection 222D(6); item 147, proposed subsection 238(6); item 148, proposed subsections 239AC(6) and 239AD(7). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

> … the applicability of any State-based excuse or defence will be peculiarly within the knowledge of the first person as it relates to that person's particular circumstances with respect to their water arrangements. For criminal proceedings this is in line with Part 2.6 of the Criminal Code, which provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.[117]

1.169 The committee notes that the *Guide to Framing Commonwealth Offences*[118] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is *peculiarly* within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[119]

1.170 From the justification provided, it is unclear to the committee that the defences in proposed subsections 73A(8) and 73B(9) are matters that would be peculiarly within the knowledge of the defendant. For example, whether the relevant conduct is permitted by a state law would appear to be a matter of public fact that the prosecution could readily ascertain.

Civil penalty provisions

1.171 A number of other provisions within the bill provide that a person is not liable for a civil penalty if the person has a reasonable excuse. Proposed section 154E provides that a person bears an evidential burden if they wish to rely on the defence of reasonable excuse under one of these provisions.

1.172 Proposed sections 73F and 73G provide that a person is liable to a civil penalty if they are required by the Basin Plan to give a notification with respect to the trading of water access rights and fail to do so. Proposed subsections 73F(2) and 73G(2) provide that it is a defence if the person has a reasonable excuse.

1.173 Proposed sections 222D, 238, 239AC, and 239AD provide that a person is liable for a civil penalty if they are required to give information by the Inspector-General and fail to do so. Proposed subsections 222D(6), 238(6), 239AC(6), and 239AD(7) provide that it is a defence if the person has a reasonable excuse.

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117 Explanatory memorandum, p. 24.

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

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

1.174 The committee notes that the *Guide to Framing Commonwealth Offences* states that:

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[120]

1.175 The committee notes that these reversals of the evidential burden of proof relate to civil penalty provisions, rather than criminal offences. However, the committee recognises that, in certain cases, there may be a blurring of distinctions between criminal offences and civil penalty provisions, with civil penalties applied in circumstances that are akin to criminal offences. The committee considers that reversals of the evidential burden of proof in such cases merit careful scrutiny,[121] as there could be a risk that reversing the evidential burden of proof may unduly trespass on personal rights and liberties.

1.176 The committee therefore expects the explanatory materials for a bill which includes the defence of 'reasonable excuse' to include a justification as to why the defence is appropriate and an explanation as to why it is not possible to include more specific defences within the bill. In this instance, the statement of compatibility with human rights states:

> Sections 73F, 73G, 222D, 238, 239AC and 239AD include offences for which an exception applies if the person has a reasonable excuse. The defendant would bear the evidential burden of proving any exception. This is necessary in order to achieve the legitimate objective of ensuring the Basin Plan is complied with, with respect to the trading of water access rights, and ensuring the Inspector-General is provided with information when requested from a person. These sections are reasonable and proportionate to the legitimate objective because the defendant will exclusively have the information or knowledge that is evidence of the exception, being their reasonable excuse for not having complied with their requirements under the Basin Plan, or why they cannot provide the Inspector-General with information when requested.[122]

1.177 The committee notes that this justification does not contain any information regarding why it is not possible to include more specific defences within the bill. Moreover, the committee does not consider it sufficient to merely state that information about a reasonable excuse will be exclusively within the defendant's knowledge. Rather, the committee expects that an explanation as to the appropriateness of including a defence of reasonable excuse be provided.

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

121 See also Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129), December 2015, p. 284.

122 Statement of compatibility with human rights, pp. 10-11.

1.178 The committee emphasises that the mere fact that it is more difficult for the prosecution to prove a particular matter is not, of itself, a sufficient justification for placing the evidential burden of proof on a defendant. The committee considers that it does not appear to be appropriate to reverse the evidential burden of proof in relation to these matters.

1.179 The committee therefore requests the minister's detailed advice as to the appropriateness of including the specified matters as offence-specific defences rather than as elements of the offences, including:

- **how the matters in proposed sections 73A and 73B are peculiarly within the knowledge of the defendant; and**
- **why it is appropriate to use a defence of reasonable excuse in proposed subsections 73F(2), 73G(2), 222D(6), 238(6), 239AC(6), and 239AD(7), including why it is not possible to rely upon more specific defences.**

Significant matters in delegated legislation[123]

1.180 Item 9 of Schedule 1 to the bill seeks to insert proposed subsection 22(8A) into the Water Act to provide that the Basin Plan may confer functions or powers on the Inspector-General for the purpose of ensuring compliance with provisions of the Basin Plan.

1.181 The committee's view is that significant matters, such as conferring functions and powers for the purposes of compliance, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification for including these matters in delegated legislation.

1.182 Moreover, although the explanatory memorandum provides an example of a matter for the purposes of which functions and powers may be conferred,[124] neither the explanatory memorandum nor the bill contain any guidance regarding what kinds of functions or powers it is contemplated will be conferred on the Inspector-General, other than that they must relate to ensuring compliance with a relevant matter.

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123 Schedule 1, item 9, proposed subsection 22(8A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

124 Explanatory memorandum, p. 40; namely, that functions and powers conferred under proposed subsection 22(8A) could relate to the purpose of ensuring compliance with matters set out in the environmental watering plan.

1.183 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave the conferral of functions and powers on the Inspector-General for the purpose of ensuring compliance with the Basin Plan to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.**

Tabling of documents in Parliament[125]

1.184 The bill seeks to insert several provisions into the Water Act which provide for the preparation of reports, guidelines and other documents. These are:

- schedule 1, item 14, 73L;
- schedule 1, item 14, 73M;
- schedule 1, item 67, 215V;
- schedule 1, item 67, 215Y;
- schedule 1, item 67, 215Z;
- schedule 1, item 148, 239AE; and
- schedule 1, item 148, 239AF.

1.185 Of the reports prepared under the provisions listed above, only the report prepared under proposed section 215Z, on the review of the role of the Inspector-General, is required to be tabled in the Parliament.[126] The remaining provisions relate to reports into audits,[127] annual reports,[128] reports on inquiries conducted by the Inspector-General,[129] and guidelines issued by the Inspector-General.[130]

1.186 While the committee notes that each of these reports either may, or must, be published online, the committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts

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125 Schedule 1, item 14, proposed section 73L and 73M; item 67, proposed sections 215V, 215Y and 215Z; item 148, proposed sections 239AA, 239AE and 239AF. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

126 See proposed subsection 215Z(5).

127 Proposed sections 73L and 73M.

128 Proposed section 215Y.

129 Proposed sections 239AE and 239AF.

130 Proposed section 215V.

parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be appropriate justification for failing to mandate tabling requirements. In this instance, the explanatory memorandum does not provide an explanation as to why any of the reports or guidelines referred to in paragraph 1.184 are not required to be tabled in Parliament.

1.187 Noting the impact on parliamentary scrutiny of not providing for reports to be tabled in Parliament, the committee requests the minister's advice as to whether the bill can be amended to provide that the minister must arrange for a copy of a report prepared under each of the provisions listed at paragraph 1.184 be tabled in each House of the Parliament.

Instruments not subject to parliamentary disallowance[131]

1.188 Proposed section 215V provides that the Inspector-General of Water Compliance may issue guidelines relating to the management of basin water resources by Commonwealth and basin state agencies under certain provisions of the Act, legislative instruments made under the Water Act, the Basin Plan, and water resource plans. Proposed subsection 215V(3) states that these guidelines are not legislative instruments.

1.189 The committee notes that non-legislative guidelines will not be subject to the tabling, disallowance or sunsetting requirements that typically apply to legislative instruments. As such there is no parliamentary scrutiny of non-legislative guidelines. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to the bill to include a justification for why instruments such as the guidelines issued under proposed section 215V are not legislative in character. In this case the explanatory memorandum merely notes that:

> Subsection 215V(3) would clarify that guidelines issued under new subsection 215V(1) are not legislative instruments for the purposes of subsection 8(1) of the Legislation Act. This provision is declaratory of the law and is to assist the reader. Guidelines are administrative in nature.[132]

1.190 While acknowledging this explanation, it is unclear to the committee why guidelines relating to the management of basin water resources by Commonwealth and state agencies are considered to be administrative, rather than legislative, in character. The committee notes that paragraph 8(4)(b) of the *Legislation Act 2003*

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131 Schedule 1, item 67, proposed subsection 215V(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

132 Explanatory memorandum, p. 70.

states that, among other things, an instrument has legislative character if it determines the law, alters the content of the law, has the direct or indirect effect of affecting a privilege or interest, or of imposing an obligation, creating a right, or varying or removing an obligation or right.

1.191 In this regard, the committee notes that the matters to which the guidelines may relate are broadly construed, that Commonwealth and basin state agencies must have regard to the guidelines when performing their water management obligations,[133] that the Inspector-General must have regard to the guidelines while conducting inquiries under proposed section 239AA,[134] and that an auditor must have regard to any applicable guidelines while conducting an audit under proposed section 73L.[135] In any event, given that the management of Basin water resources is of such significance, from a scrutiny perspective the committee considers that it is important to allow for additional parliamentary scrutiny and oversight.

1.192 In light of the above, the committee requests the minister's detailed advice regarding:

- **why it is considered necessary and appropriate to specify that guidelines made under proposed section 215V are not legislative instruments; and**
- **whether the bill could be amended to provide that the guidelines are legislative instruments to ensure they are subject to appropriate parliamentary scrutiny.**

Broad delegation of administrative powers[136]

1.193 Proposed subsection 215W(1) provides that the Inspector-General may delegate any or all of their functions or powers to an APS employee within the department. This delegation power is limited by proposed subsections 215W(2), (3) and (4) which variously provide that the Inspector-General must not delegate certain functions or powers or must only delegate certain functions or powers to employees who are at a Senior Executive Service, acting Senior Executive Service, Executive Level 2, or acting Executive Level 2 level.

1.194 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee

133 Schedule 1, item 14, proposed paragraph 73L(2)(b).

134 Schedule 1, item 148, proposed subsection 239AA(7).

135 Schedule 1, item 67, proposed subsection 215V(5).

136 Schedule 1, item 67, proposed section 215W. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.195 While the committee notes that proposed subsections 215W(2), (3) and (4) provide some safeguards in relation to the broad delegation under subsection 215W(1), the committee remains concerned that the explanatory memorandum contains no justification for the delegation of functions or powers to employees below the Senior Executive Service level.

1.196 The committee has concerns in relation to the Inspector-General's power to delegate their powers to a person at the Executive Level 2 level under proposed subsection 215W(4). While the scope of the powers that may be delegated under proposed subsection 215W(4) are limited to powers to give certain kinds of notices or disclose certain kinds of information, the committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. In this instance, the explanatory memorandum states:

> Delegation to this level would be necessary to ensure the efficiency and effectiveness of government operations. The powers and functions contained within paragraphs 215W(4)(a) to (c) require undertaking without any undue delay or deferral and delegation would provide the necessary flexibility to adapt to these requirements.[137]

1.197 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials below the Senior Executive Service level.

1.198 In light of the above, the committee requests the minister's detailed advice as to:

- **which powers and functions it is proposed to allow the Inspector-General to delegate under proposed subsection 215W(1) that will not be subject to the limitations in subsections 215W(2), (3) and (4); and**
- **why it is considered necessary and appropriate to allow the Inspector-General to delegate their functions and powers to any APS employees under proposed subsection 215W(1) and to Executive Level 2 employees under proposed subsection 215W(4), rather than restricting the delegation of these powers to members of the Senior Executive Service or to holders of nominated offices.**

137 Explanatory memorandum, pp. 71-72.

Significant matters in delegated legislation[138]

1.199 Item 67 of Schedule 1 seeks to insert proposed section 222G into the Water Act to provide that the Inspector-General may appoint one or more individuals to be authorised compliance officers. The Inspector-General must not make such an appointment unless satisfied that the person is fit and proper to be an authorised compliance officer.[139] In considering whether a person is fit and proper, proposed paragraph 222G(5)(a) provides that the Inspector-General must have regard to the matters prescribed by the regulations.

1.200 The committee's view is that significant matters, such as whether a person can be considered to be fit and proper to be an authorised officer, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification for including these matters in delegated legislation.

1.201 The committee's scrutiny concerns are heightened in this instance because there is little guidance on the face of the bill as to what will be relevant to considering whether a person is fit and proper to be an authorised compliance officer.

1.202 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave matters relevant to whether a person is fit and proper to be an authorised compliance officer to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.**

Immunity from liability[140]

1.203 Item 148 of Schedule 1 seeks to insert proposed section 239AG into the Water Act to provide that, if the Inspector-General proposes to include material that is critical of a person or body in a report prepared under either proposed sections 239AE or 215Y, the Inspector-General must give the person or body an opportunity to comment on the report before it is finalised. Proposed subsection 239AG(3)

138 Schedule 1, item 67, proposed paragraph 222G(5)(a). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

139 Proposed subsection 222G(4).

140 Schedule 1, item 148, proposed subsection 239AG(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

provides that a person or body acting in good faith is not liable for contravening a law of the Commonwealth or for civil proceedings for loss, damage or injury as a result of giving the comments.

1.204 The immunities provided for under proposed subsection 239AG(3) would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve a personal attack on the honesty of the decision maker. As such, courts have taken the position that bad faith can only be shown in very limited circumstances.

1.205 The committee expects that, if a bill seeks to confer immunity from liability, particularly where such immunity could affect individual rights, this should be soundly justified in the explanatory materials. In this instance, the explanatory memorandum does not contain any justification for conferring immunity under proposed subsection 239AG(3). The committee's concerns in this instance are heightened as immunity is provided for contravention of any law of the Commonwealth in addition to civil proceedings.

1.206 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on persons and bodies giving comments under proposed section 239AG.

Incorporation of external material into the law[141]

1.207 Item 2 of Schedule 3 seeks to insert proposed subsection 18C(2A) into the Water Act to provide that subsection 14(2) of the *Legislation Act 2003* does not apply to regulations made for the purposes of existing subsection 18C(1) of the Water Act. This means that regulations made under subsection 18C(1) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. Subsection 18C(1) of the Water Act currently provides that the regulations may make amendments to Schedule 1 of that Act by incorporating amendments made to, and in accordance with, the Murray-Darling Basin Agreement.

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

- raises the prospect of changes being made to the law in the absence of parliamentary scrutiny;

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141 Schedule 3, item 2, proposed subsection 18C(2A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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

1.209 The committee will have heightened concerns where provisions in a bill propose to incorporate external documents as in force 'from time to time' because this would mean that any future changes to that document would operate to change the law without any involvement from Parliament. Consequently, the committee expects that the explanatory materials for a bill which proposes to allow the incorporation of external materials as in force from time to time should contain a sound justification as to why this incorporation power is necessary and appropriate. In this instance, the explanatory memorandum states:

> This item would provide the necessary contrary intention such that the prohibition in subsection 14(2) of the Legislation Act against legislative or notifiable instruments making provision in relation to a matter by reference to any matter contained in an instrument or other writing as in force or existing from time to time does not apply. This means that regulations made for the purposes of subsection 18C(1) may make reference to a matter contained in an instrument or other writing as in force or existing from time to time, if necessary, to do so.[142]

1.210 The committee notes that this explanation is merely declarative of the law and does not contain any justification as to why it is necessary and appropriate to include a contrary intention to subsection 14(2) of the *Legislation Act 2003* within the bill.

1.211 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to allow for the incorporation of documents as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change aspects of the Murray-Darling Basin Agreement without any involvement from the Parliament.

142 Explanatory memorandum, p. 118.

Bills with no committee comment

1.212 The committee has no comment in relation to the following bills which were introduced into the Parliament between 11 –13 May 2021:

- Appropriation (Parliamentary Departments) Bill (No. 1) 2021-2022
- Biosecurity Amendment (No Crime to Return Home) Bill 2021
- Farm Household Support Amendment (Debt Waiver) Bill 2021
- Fuel Security (Consequential and Transitional Provisions) Bill 2021
- Higher Education Support Amendment (Extending the Student Loan Fee Exemption) Bill 2021
- Medical and Midwife Indemnity Legislation Amendment Bill 2021
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2021
- Private Health Insurance Amendment (Income Thresholds) Bill 2021
- Snowy Hydro Corporatisation Amendment (No New Fossil Fuels) Bill 2021
- Snowy Hydro Corporatisation Amendment (No New Fossil Fuels) Bill 2021 [No. 2]
- Social Services Legislation Amendment (Portability Extensions) Bill 2021
- Treasury Laws Amendment (2021 Measures No. 4) Bill 2021

Commentary on amendments and explanatory materials

Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021

1.213 On 2 June 2021, the Minister for Communications, Urban Infrastructure, Cities and the Arts (Mr Fletcher) presented an addendum to the explanatory memorandum, and the bill was read a third time.

1.214 The committee thanks the Minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[143]

Northern Australia Infrastructure Facility Amendment (Extension and Other Measures) Bill 2021

1.215 On 11 May 2021, the Assistant Minister for Forestry and Fisheries (Senator Duniam) tabled an addendum to the explanatory memorandum, and the second reading was moved.

1.216 The committee thanks the Assistant Minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[144]

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

1.217 On 12 May 2021, the Assistant Minister for Defence (Mr Hastie) presented an addendum to the explanatory memorandum, and the bill was read a third time.

1.218 The committee thanks the Assistant Minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[145]

143 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, 12 May 2021, pp. 6–10.

144 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2021*, 21 April 2021, pp. 51–53.

145 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2021*, 21 April 2021, pp. 86–87.

Treasury Laws Amendment (Your Future, Your Super) Bill 2021

1.219 On 3 June 2021, the House agreed to two Government amendments, the Assistant Treasurer (Mr Sukkar) presented a supplementary explanatory memorandum, and the bill was read a third time.

1.220 The committee welcomes these amendments, which appear to partially address scrutiny concerns regarding the inclusion of significant matters in delegated legislation by removing provisions which would have allowed the regulations to prohibit a trustee of a registrable superannuation entity from making certain payments or investments.[146]

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

- Migration Amendment (Clarifying International Obligations for Removal) Bill 2021;[147]
- Mutual Recognition Amendment Bill 2021;[148]
- Treasury Laws Amendment (2020 Measures No. 4) Bill 2021.[149]

146 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2021*, 21 April 2021, pp. 95–99.

147 On 12 May 2021, the House agreed to four Government amendments, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Mr Hawke) presented a supplementary explanatory memorandum, and the bill was read a third time. On 13 May 2021, Senator Ruston tabled a revised explanatory memorandum, and the bill finally passed both Houses.

148 On 12 May 2021, the Senate agreed to 11 Government amendments, the Attorney-General (Senator Cash) tabled a supplementary explanatory memorandum, and the bill was read a third time.

149 On 11 May 2021, the Assistant Minister for Forestry and Fisheries (Senator Duniam) tabled a revised explanatory memorandum, and the second reading was moved.

Chapter 2

Commentary on ministerial responses

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

Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021

Purpose	This bill seeks to establish a scheme that mandates that service and repair information provided to car dealership and manufacturing preferred repairs be made available for independent repairs and registered organisations to purchase at a fair market price
Portfolio	Treasury
Introduced	House of Representatives on 24 March 2021
Bill status	Before the House of Representatives

Privacy

Significant matters in delegated legislation[1]

2.2 The committee initially scrutinised this bill in *Scrutiny Digest 6 of 2021* and requested the Assistant Treasurer's advice.[2] The committee considered the Assistant Treasurer's response in *Scrutiny Digest 7 of 2021* and requested an addendum to the explanatory memorandum containing the key information provided by the Assistant Treasurer, including examples of the types of personal information that it is intended may be prescribed in the rules, be tabled in the Parliament as soon as practicable.[3]

1 Schedule 1, item 1, proposed subsection 57DB(4), proposed paragraph 57DB(6)(e) and proposed subsection 57DB(7). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 10–12.

3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2021*, pp. 13–14.

Assistant Treasurer's response

2.3 The Assistant Treasurer advised:

> I have considered the existing explanatory memorandum and consider that the information you have requested to be tabled is already sufficiently explained in the existing explanatory memorandum.
>
> Paragraph 1.141 of the explanatory memorandum explains that, for the purpose of assessing whether the person is a fit and proper person to access safety and security information, the types of personal information that may be prescribed by the scheme rules will take into consideration information that is already used for similar purposes in the motor vehicle industry and licensing regimes that exist in some states. This could include a criminal records check being required to access certain types of security information to help prevent vehicle theft and associated crime.
>
> The explanatory memorandum further explains at paragraph 1.143 that the scheme's rules may set out the types of offences that are relevant to the fit and proper person assessment. The scheme rules may set out what qualifications or workplace standards are required to access certain types of safety and security information (paragraphs 1.137 and 1.139)
>
> The scheme's rules may also set out the period for which any personal information provided remains valid before the data provider can ask for updated information. For example, the scheme's rules may only allow a criminal record check to be done every two years, with the person required to certify that no changes have occurred to information previously provided. If changes have occurred, the data provider may request updated information in order to reassess if the individual is a fit and proper person.
>
> Paragraph 1.144 of the explanatory memorandum makes it clear that the rules cannot prescribe 'sensitive information' under the *Privacy Act 1988,* other than a criminal records check. 'Sensitive information' is defined in section 6(1) of the *Privacy Act 1988.*
>
> Public consultation will be undertaken as part of the development of the scheme rules. This will include consultation on what personal information should be prescribed in the scheme's rules for the fit and proper person test. This consultation is expected to commence soon.

Committee comment

2.4 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that that the information the committee has requested to be tabled is already sufficiently explained in the existing explanatory memorandum.

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

Significant penalties[4]

2.6 The committee initially scrutinised this bill in *Scrutiny Digest 6 of 2021* and requested the Assistant Treasurer's advice.[5] The committee considered the Assistant Treasurer's response in *Scrutiny Digest 7 of 2021* and requested the Assistant Treasurer's further advice as to the justification for the significant penalty (120 penalty units) that may be imposed via infringement notice under table item 4 of proposed section 57G upon persons who are not body corporates.[6]

Assistant Treasurer's response[7]

2.7 The Assistant Treasurer advised:

> The majority of the infringement notices included in the Bill are consistent with the *Guide to Framing Commonwealth Offences* and with those for anti-competitive behaviour and failure to comply with consumer protections under the *Competition and Consumer Act 2010* (CCA). Infringement notices provide the ACCC with flexibility to use administrative action for alleged contravention of a civil penalty provision, as an alternative to court proceedings.
>
> The Bill contains only one instance of an infringement notice with penalty units that are higher than those recommended by the *Guide to Framing Commonwealth Offences.* This relates to a key obligation in the Bill, failing to supply scheme information within the required timeframe, which if not complied with by data providers would seriously undermine the Scheme. It is expected that most data providers will be large multinational motor vehicle manufacturers. In line with the *Guide to Framing Commonwealth Offences,* if the amount payable under an infringement notice is too low it is unlikely to be an adequate deterrent and may simply be paid as a cost of doing business. Therefore, in these circumstances I consider that the high penalty amounts for body corporates are justified. In order to prevent a potential avoidance mechanism, it is necessary to include proportionate penalties and infringement notices for individuals. Consistent with the *Guide to Framing Commonwealth Offences,* the level of penalties and infringement notices applied to individuals is set at one-fifth of the

4 Schedule 1, item 1, proposed section 57GB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 12–14.

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2021*, pp. 14–16.

7 The Assistant Treasurer responded to the committee's comments in a letter dated 27 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> corresponding amounts set for corporations. As such, I consider that the proposed level of infringement notice for individuals is also appropriate.
>
> If an infringement notice is issued, a person may elect not to pay the amount, in which case the ACCC may choose to pursue a civil penalty in court (see section 57GB of the Bill and section 51ACH of the CCA). The matter would then be heard by a court who could impose a penalty if they determine the person has contravened a civil penalty provision.
>
> The penalties are aimed at preventing the frustration of the objectives of the scheme through non-compliance by data providers. They will deter data providers from undertaking anti-competitive conduct that prevents consumers from using a mechanic of their choice to service their vehicle and deprive independent repairers of work opportunities.

Committee comment

2.8 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the bill contains only one instance of an infringement notice with penalty units that are higher than those recommended by the *Guide to Framing Commonwealth Offences.* The Assistant Treasurer advised that mostly large multinational motor vehicle manufacturers would be subject to this penalty.

2.9 The committee also notes the Assistant Treasurer's advice that in order to prevent a potential avoidance mechanism, it is necessary to include proportionate penalties and infringement notices for individuals. The Assistant Treasurer advised that, consistent with the *Guide to Framing Commonwealth Offences,* the level of penalties and infringement notices applied to individuals is set at one-fifth of the corresponding amounts set for corporations.

2.10 The committee reiterates its concerns that the penalties imposed by proposed section 57GB differ in their treatment of persons who are not body corporates when compared with other comparable provisions, including within the *Competition and Consumer Act 2010*. Where a higher level of penalty units is imposed upon a natural person within the *Competition and Consumer Act 2010*, this is not done under an infringement notice scheme.

2.11 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of imposing a significant penalty (120 penalty units) via infringement notice under table item 4 of proposed section 57G upon persons who are not body corporates.

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

Purpose	This bill seeks to establish a framework for making, varying, revoking, and applying National Environment Standards. It further seeks to establish an Environment Assurance Commissioner to undertake transparent monitoring and/or auditing
Portfolio	Environment
Introduced	House of Representatives on 25 February 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Exemption from disallowance[8]

2.12 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2021*, and requested the minister's advice.[9] The committee considered the minister's response in *Scrutiny Digest 6 of 2021* and requested the minister's further advice as to whether the bill can be amended to provide certainty in relation to the first standards made under proposed section 65C by:

- requiring the positive approval of each House of the Parliament before the first standards come into effect; or
- providing that the first standards do not come into effect until a disallowance period of five sitting days has expired.

2.13 If such an amendment is not considered appropriate, the committee also requested the minister's further advice as to whether, at a minimum, the bill can be amended to provide for the automatic repeal of the first standards following the first review of a standard undertaken in accordance with proposed subsection 65G(2).[10]

8 Schedule 1, item 6, proposed sections 65C and 65H, *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 1–4.

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 41–46.

Minister's response[11]

2.14 The minister advised:

> The Committee has requested advice as to whether the Bill could be amended to provide certainty to the first standards made under proposed section 65C by either, requiring the positive approval of each House of the Parliament before the first standards come into effect, or by providing that the first standards do not come into effect until a disallowance period of five sitting days has expired.
>
> At the National Cabinet meeting of 11 December 2020, all leaders reaffirmed their commitment to implement single touch environmental approvals and agreed the immediate priority was the development of standards that reflect the current requirements of the EPBC Act. Requiring the positive approval of each House of the Parliament before the first standards come into effect, or providing for a shorter period of disallowance after which the standards commence would delay the transition to single touch environmental approvals. This is because it would reduce the certainty required for the benchmarking of state and territory processes, the commitment states and territories must make to not act inconsistently with the standards, and agreement to the terms of approval bilateral agreements.
>
> The Committee has also requested advice as to whether, at a minimum, the Bill can be amended to provide for the automatic repeal of the first standards following the first review of a standard in accordance with proposed subsection 650(2).
>
> The automatic repeal of the first standards following a review would also create uncertainty and delay the transition to single touch environmental approvals. In addition, any instrument varying or remaking the first standards will be subject to disallowance as the exemption from disallowance only applies to the first standard made in relation to a particular matter (proposed subsection 65C(3)).
>
> The Bill requires the first review of a standard to be undertaken within 2 years of the standard commencing. As I committed during my second reading speech, I intend to use the interim standards and the goodwill of all stakeholders to drive change, and that this process will continue immediately following the passage of the legislation.

Committee comment

2.15 The committee thanks the minister for this response. The committee notes the minister's advice that the amendments suggested by the committee to provide

11 The minister responded to the committee's comments in a letter dated 10 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

certainty while also providing appropriate parliamentary scrutiny of the first standards are not appropriate because, if implemented, they would delay the introduction of 'single touch' environmental approvals by reducing the certainty needed to ensure agreement to the scheme by state and territory governments. The minister further advised that instruments varying or remaking the first standards will be disallowable and that the first review of a standard will be undertaken within 2 years of the commencement of the standard.

2.16 While noting this advice, the committee reiterates its concern that there is no requirement in the bill to vary or remake the first standards and that, as a consequence, the first national environmental standards could continue in existence for years following the completion of the first review without ever being subject to parliamentary oversight.

2.17 The committee also reiterates its consistent scrutiny view that exempting legislation from the usual parliamentary disallowance process, and therefore from democratic oversight by the Commonwealth Parliament, is only justified in exceptional circumstances. As noted in its previous comments on the bill, the committee does not consider that a desire for certainty or a short delay to the commencement of a new scheme is likely to be a sufficient justification for exempting delegated legislation from the parliamentary disallowance process. This is particularly so as there are range of legislative options for reducing uncertainty, such as those suggested by the committee. Consequently, the committee continues to have significant scrutiny concerns in relation to the exemption of the first national environmental standards from disallowance and notes that its scrutiny concerns have not been adequately addressed by the minister.

2.18 Additionally, the committee notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation Committee (Scrutiny of Delegated Legislation Committee) has also consistently raised concerns regarding exempting instruments from disallowance.[12] On 23 February 2021 the Senate adopted a resolution moved by the Chair and Deputy Chair of the Senate Delegated Legislation Committee which noted that an essential function of the Senate is to scrutinise the law-making power that the Parliament has delegated to the executive.

2.19 The committee also notes that on 16 June 2021 the Senate is scheduled to consider the adoption of recommendations 8 to 10 of the Scrutiny of Delegated Legislation Committee's final report of its inquiry into the exemption of delegated legislation from parliamentary oversight. This includes that the Senate adopt a

12 See Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, pp. 122–24; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 6–7; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, pp. 100–101.

resolution emphasising the importance of disallowance and sunsetting of delegated legislation to parliamentary scrutiny and noting that exemptions of delegated legislation from disallowance should be limited to cases where exceptional circumstances can be demonstrated. Noting the continued emphasis and commitment of this committee, the Scrutiny of Delegated Legislation Committee, and the Senate as a whole, to ensuring that delegated legislation made by the executive is subject to appropriate parliamentary oversight, the committee reiterates its view that the bill should be amended to provide that the first national environmental standards are subject to disallowance or an alternative form of parliamentary oversight.

2.20 In light of the importance of ensuring parliamentary scrutiny of delegated legislation and the committee's comments above, the committee requests that the bill be amended to provide certainty in relation to the first standards made under proposed section 65C by:

- **requiring the positive approval of each House of the Parliament before the first standards come into effect;[13] or**
- **providing that the first standards do not come into effect until a disallowance period of five sitting days has expired.[14]**

2.21 If such an amendment is not considered appropriate, the committee requests, at a minimum, that the bill be amended to provide for the automatic repeal of the first standards following the first review of a standard undertaken in accordance with proposed subsection 65G(2).

Incorporation of external materials existing from time to time [15]

2.22 In *Scrutiny Digest 6 of 2021* the committee requested that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in Parliament as soon as possible.[16]

13 See, for example, section 10B of the *Health Insurance Act 1973*.

14 See, for example, section 79 of the *Public Governance, Performance and Accountability Act 2013*.

15 Schedule 1, item 6, proposed subsection 65C(4), *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 46–47.

Minister's response

2.23 The minister advised:

> Following my advice regarding why it is necessary and appropriate for national environmental standards to incorporate documents as in force or existing from time to time, the Committee has requested that an addendum to the explanatory memorandum be tabled in the Parliament.
>
> In my view, an addendum to the explanatory memorandum is not required. I note my response to the Committee's questions in relation to the matter are publicly available in the *Scrutiny Digest 6 of 2021*.

Committee comment

2.24 The committee thanks the minister for this response. The committee notes the minister's advice that an addendum to the explanatory memorandum is not required given that the minister's previous advice on the appropriateness of incorporating external materials into the law, as existing from time to time, is publicly available in the *Scrutiny Digest 6 of 2021*.

2.25 While noting this advice, the committee does not consider that the mere fact that the relevant information is publicly available in *Scrutiny Digest 6 of 2021* means that it is not necessary to include the information in the explanatory memorandum to the bill. Explanatory memoranda are a key point of access in understanding the law for parliamentarians, officials and members of the public and serve as an important tool in assisting to interpret legislation. The committee considers that information that assists in explaining the intent and effect of a bill should be included in its explanatory memorandum as a matter of course.

2.26 The committee therefore reiterates its request that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to the incorporation of external materials be tabled in the Parliament as soon as practicable.

Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021

Purpose	This bill seeks to amend the Hazardous Waste (Regulation of Exports and Imports) Act 1989 to implement Australia's international obligations in relation to plastic wastes, align the regulatory powers under the Act with contemporary Commonwealth legislation, and improve administrative efficacy
Portfolio	Environment
Introduced	House of Representatives on 18 March 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[17]

2.27 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the following matters to delegated legislation:
  - the conduct of audits and the process to be followed after an audit has been completed;
  - record-keeping obligations, where a failure to comply with the obligations will be a strict liability offence;
  - matters that the minister must give notice of to export and transit countries; and
  - the grounds on which a permit may be revoked or varied; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[18]

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

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 15–17.

Minister's response[19]

2.28 The minister advised:

Conduct of audit and process to be followed after an audit has been completed

Proposed subsection 53(3) would allow the regulations to prescribe matters relating to the conduct of an audit and the process to be followed after an audit has been completed. Proposed subsection 53(4) would provide high-level guidance as to the matters that may be covered by the regulations, including information that must be provided to the relevant person for the audit before the audit, during the audit, or after the audit is completed, and requirements for reports, for example, including the auditor's name on reports .

Over time, the relevant conduct and processes of audits may need to change because of changes to the regulatory environment, changes in the content of Australia's international obligations, and changes in technology.

Allowing the regulations to prescribe such matters provides the necessary flexibility for the compliance framework in the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Act) to respond to such changing circumstances, thereby minimising the impact of hazardous waste on human health and the environment, and ensuring that the regulatory burden to industry is minimised so far as possible. For these reasons, I consider it is both necessary and appropriate to leave these matters to the regulations.

Record keeping

Proposed subsection 410(1) would allow the regulations to prescribe matters requiring records to be made and retained by a person who holds a permit under the Act, has been notified that a transit permit is not required for carrying out a transit proposal, or has been given an order under Part 3 of the Act. Proposed subsection 410(2) will provide high level guidance as to the matters that may be covered by the regulations, including the kind of records that must be made and retained, the form in which the records must be retained and the period for which records must be retained. Matters such as these are detailed and technical in nature, for example, the types of matters prescribed may be as detailed as the required font size of certain records.

Providing the details of record keeping in regulations rather than the bill would allow flexibility to prescribe specific record keeping requirements

19 The Assistant Treasurer responded to the committee's comments in a letter dated 5 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

for all the regulations covered by the Act, in line with good regulatory practice. The ability to ensure that a variety of records can be kept in a variety of forms and for specific requirements to be updated with changes in technology, is important in ensuring compliance with the Act, as well as ensuring that the regulatory burden for industry is minimised so far as possible. Having records which are relevant and up to date ensures that those regulated under the Act are held accountable for their acts or omissions and that any non-compliance with the Act can be dealt with appropriately.

Both the Basel Convention and the Act also allow Australia to enter into agreements with other countries to control movements of hazardous waste (for example the OECD Decision). Agreements entered into under these arrangements may have different obligations to the Basel Convention and therefore it is important that requirements for record keeping are sufficiently flexible to adapt to such arrangements as they are agreed or varied.

For these reasons, I consider it is both necessary and appropriate to leave record-keeping obligations to the regulations.

Notification of relevant competent authorities

Item 26 of Schedule 5 would insert new section 16A. New section 16A would provide for the decision period for a permit application to be extended for export permits where the competent authority of the receiving country, or of a transit country, has not yet given or refused consent to an export proposal. New subsection 16A(1) would require the Minister, within 21days after receiving an application for a Basel export permit, to notify the competent authority of the receiving country or a transit country of such information as is prescribed in the regulations.

Item 26 would not delegate any additional matters to delegated legislation than is currently the case under the Act. Existing subsection 15A{3) of the Act already allows the regulations to prescribe and allow the notification of such information. Item 26 does not seek to vary such matters but rather seeks to re-draft existing provisions to allow them to be more easily understood.

The regulations that are currently made under subsection 15A(3) will be taken to be made under new section 16A. The Bill makes no changes to the content of these regulations, and it is not anticipated that consequential regulation amendment s will be made to change this content.

Furthermore, the ability to establish notification requirements in regulations made under the Act is consistent with good regulatory practice and ensures continued compliance with Australia's international obligations under the Basel Convention. The Basel Convention (and

subsequently the Act) requires prior informed consent between parties on all transboundary movements of hazardous waste. Over time, information required for prior informed consent may change internationally (and, potentially, for particular countries on an individual basis) and domestic requirements will need to reflect this to support decision-makers and ensure minimal disruption to permit applicants. Continuing to allow the regulations to prescribe such matters provides the necessary flexibility to respond to changes in the international regulatory regime.

Grounds for revocation and variation

New sections 24 and 26H set out a number of grounds on which the Minister may revoke or vary a Basel permit respectively. This is an important safeguard to ensure that the holder of a Basel permit complies with the conditions of the permit and the requirements of the Act, and to ensure that a Basel permit has been granted on the basis of true and accurate information. Paragraphs 24(1)(e) and 26H(d) allow the regulations to prescribe addition grounds on which the Minister may decide to revoke, or vary, a permit respectively.

It is important to allow additional grounds to be able to be prescribed in the regulations, in order to ensure that the requirements to vary or revoke a permit can be adapted to quickly respond to:

- unexpected circumstances or potential harm that may damage Australia's international relations
- changes to Australia's international obligations concerning the import, export and transit of hazardous waste.

In addition, allowing the regulations to prescribe additional grounds on which a permit may be varied or revoked would provide the Minister with the ability to address a wide range of matters that relate to a permit and prescribe different grounds for different kinds of permit as necessary and appropriate.

While administrative flexibility is not generally considered by the Committee to be sufficient justification for including significant matters in delegated legislation, for the reasons set out above, flexibility in Australia's transboundary movement of hazardous waste regime is important. The ability to ensure sufficient grounds to revoke or vary permits quickly is necessary to effectively respond to and manage evolving environmental issues in order to protect Australia's environmental and human health, Australia's international relations, and to ensure continued compliance with Australia's international obligations.

Whether the bill can be amended to include at least high-level guidance

Over time, it is expected the regulations will be required to adapt to changing circumstances in the hazardous waste regulatory regime, both

> domestically and internationally. For the reasons outlined above, particularly the level of guidance already included in the Act and the need for flexibility to accommodate changing international obligations, I consider that it is not appropriate to include further high-level guidance in the bill regarding their content.

Committee comment

2.29 The committee thanks the minister for this response. The committee notes the minister's advice that it is necessary to leave requirements relating to audits, record-keeping, notification and grounds for variation and revocation to delegated legislation because doing so provides the flexibility needed to respond to changing circumstances, including potential changes to the regulatory environment, changes in the content of Australia's international obligations, and changes in technology.

2.30 The minister further advised that item 26 of Schedule 5 to the bill would not lead to the inclusion of any matters within delegated legislation which are additional to what is already included under the current scheme. Moreover, the bill makes no changes to the content of regulations made under proposed section 16A and no future changes are currently anticipated. Finally, the minister advised that allowing the regulations to prescribe additional grounds on which a permit may be varied or revoked would provide the minister with the ability to address a wide range of matters and to prescribe different grounds for different kinds of permit as necessary and appropriate.

2.31 As noted by the minister, 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. However, the committee notes the minister's advice that flexibility in Australia's transboundary movement of hazardous waste regime is necessary to protect Australia's environmental and human health, to prevent damage to Australia's international relations, and to ensure compliance with Australia's international obligations. Further to this, the committee notes that the regulations in question will be subject to disallowance and therefore to at least some level of parliamentary scrutiny.

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

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

Retrospective application[20]

2.34 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to apply the power to publish compliance related matters to offences committed, and orders given, before the commencement of the bill, and whether there may be any detrimental effect on individuals as a result of this retrospective application.[21]

Minister's response

2.35 The minister advised:

> The purpose of the proposed amendments to allow the publication of compliance-related matters, including the affected person's name, is to provide an important deterrent to future contraventions and assist with ensuring the integrity of the regulatory regime. This is because, where hazardous waste is not properly dealt with and non-compliance occurs, the adverse effects can subsist in the physical environment long-term and can have long-lasting impacts on environmental and human health.
>
> In order to achieve the intended deterrent effect, it is necessary and appropriate that the power to publish non-compliance be able to be used in respect of offences that were committed, or Ministerial orders that were given, before the commencement of the Bill. Such offences and orders may relate to ongoing investigations and environmental clean ups and, in the case of offences, convictions that are not secured until after the Bill has commenced due to the length of the criminal process. As such, confining the power to only allow the publication of non-compliance that itself occurs after the commencement of the Bill would reduce the effectiveness of the measure as a deterrent.
>
> It is unlikely that there would be any detrimental effect on individuals due to the application of this item. Publishing a person's non-compliance with the Act would not, of itself, create any additional legal obligations or consequences on the person under the Act, or under any other Commonwealth legislation. In respect of convictions for offences, such information is already publicly available. It is also expected that most persons whose name would be published will be body corporates, for which the Privacy Act obligations do not apply.
>
> In addition, the power for the Minister to publish non-compliance is discretionary; as such the Minister would retain the ability to decide not to publish any of the information set out above if they consider that, in the

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20 Schedule 5, items 34 and 35. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 17–18.

particular circumstances, the potential adverse consequences of publishing the information outweigh the intended deterrence effect. This includes the decision whether to publish non-compliance occurring before commencement of the Bill; in such cases, the Minister would be able to consider a broad range of factors prior to deciding whether to publish the information or not. This may include, but would not be limited to:

- the purpose and objects of the Privacy Act
- any potentially detrimental effect on the individual that may occur as a result of publication and whether it would outweigh the intended deterrence effect
- any potentially detrimental effect on environmental or human health, or Australia's continued compliance with international obligations, by not publishing the information
- the person's right to privacy and other relevant rights under international human rights law conventions to apply to Australia
- any other relevant public interest factors.

Committee comment

2.36 The committee thanks the minister for this response. The committee notes the minister's advice that it is necessary and appropriate to publish information relating to non-compliance that occurred prior to the commencement of the bill because doing so will achieve the intended deterrent effect and ensure the integrity of the hazardous waste scheme. The minister advised that offences and ministerial orders may relate to ongoing investigations and environmental clean-ups and, in the case of offences, convictions that are not secured until after the bill has commenced. The minister further advised that it would therefore reduce the effectiveness of the scheme to confine non-compliance information to non-compliance that occurs after commencement of the bill.

2.37 The minister further advised that there is unlikely to be any detrimental effect on individuals as a result of the retrospective application of information-publishing powers. To this end, the minister advised that publishing non-compliance information would not create new legal obligations, that information relating to convictions is already publicly available, and that the majority of affected persons will be body corporates to whom the *Privacy Act 2003* does not apply. The minister also advised that information-publishing powers are discretionary and that the minister would consider a broad range of factors before deciding whether to exercise the powers, including:

- the purpose and objects of the *Privacy Act 2003*;
- any potentially detrimental effect on the individual that may occur as a result of publication and whether it would outweigh the intended deterrence effect;
- any potentially detrimental effect on environmental or human health, or Australia's continued compliance with international obligations, by not publishing the information;
- the person's right to privacy and other relevant rights under international human rights law conventions to apply to Australia; and
- any other relevant public interest factors.

2.38 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*).

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

Migration Amendment (Clarifying International Obligations for Removal) Bill 2021

Purpose	This bill seeks to amend the *Migration Act 1958* to clarify that the Act does not require or authorise the removal of an unlawful non-citizen who has been found to engage protection obligations through the protection visa process unless the decision finding that the non-citizen engages protection obligations has been set aside, the minister is satisfied that the non-citizen no longer engages protection obligations or the non-citizen requests voluntary removal; and ensure that, in assessing a protection visa application, protection obligations are always assessed, including in circumstances where the applicant is ineligible for a visa due to criminal conduct or risks to security
Portfolio	Immigration, Citizenship, Migrant Services and Multicultural Affairs
Introduced	House of Representatives on 25 March 2021
Bill status	Received Royal Assent on 24 May 2021

Trespass on personal rights and liberties – indefinite detention[22]

2.40 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to the effectiveness of safeguards and other measures contemplated by the bill to ensure that the immigration detention of persons affected by the bill will not trespass unduly on fundamental personal rights and liberties.

2.41 The committee also requested the minister's detailed advice as to any other legislative or non-legislative options considered to address the government's concerns arising from the Federal Court's decisions in *DMH16 v Minister for Immigration and Border Protection*[23] and *AJL20 v Commonwealth*,[24] including any consideration by the minister of the extent to which an alternate option would impact personal rights and liberties.

2.42 To assist the committee in considering the minister's response to the above questions, the committee also requested the minister's advice as to how often

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

23 (2017) 253 FCR 576.

24 [2020] FCA 1305.

current and former ministers have exercised their personal discretionary powers under sections 195A (discretion to grant a detainee a visa) and 197AB (residence determination), and in particular, how many times these discretionary powers have been exercised in relation to persons in immigration detention to whom protection obligations are owed but are ineligible for a grant of a visa on character or other grounds.[25]

Minister's response[26]

2.43 The minister advised:

> In addition to the enclosed response, I wish to advise the Committee that on 12 May 2021, I moved amendments to the Bill, which seek to provide further assurance and safeguards for the effective implementation and operation of proposed provisions. These amendments will:
>
> - amend the Migration Act to provide access to merits review for certain individuals who were previously determined to have engaged protection obligations but are subsequently found by the Minister to no longer engage those obligations;
> - amend the Migration Act to ensure that an unlawful non-citizen will not be removed in accordance with section 198 of the Migration Act where the Minister has decided that the unlawful non-citizen no longer engages protection obligations before:
>   - the period within which an application for merits review of that decision under Part 7 of the Migration Act could be made has ended without a valid application for review having been made; or
>   - a valid application for merits review of that decision under Part 7 was made within the period but has been withdrawn; or
>   - the Minister's decision is affirmed or taken to have been affirmed upon merits review;
> - amend the *Intelligence Services Act 2001* to require the Parliamentary Joint Committee on Intelligence and Security to commence a review of the operation, effectiveness and implications of the provisions amended or inserted by Schedule 1 to the Bill, by the second anniversary of the commencement of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021.*

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 19–22.

26 The minister responded to the committee's comments in a letter dated 13 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

The committee requests the minister's detailed advice as to the effectiveness of safeguards and other measures contemplated by the bill to ensure that the immigration detention of persons affected by the bill will not trespass unduly on fundamental personal rights and liberties.

Detention remains a last resort

As the committee notes, detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. This includes individuals whose removal may not be practicable in the reasonably foreseeable future. The Government's preference is to manage non-citizens in the community wherever possible, subject to meeting relevant requirements, including not presenting an unacceptable risk to the safety and good order of the Australian community.

Amendments to section 197C of the *Migration Act 1958* (the Migration Act) made by this Bill would operate to protect unlawful non-citizens from removal in breach of *non-refoulement* obligations. Removal in such cases may become possible if, for example, the circumstances in the relevant country improve, such that the person no longer engages *non-refoulement* obligations, or if a safe third country is willing to accept the person. An unlawful non-citizen may also request in writing to be removed from Australia.

The Bill makes no change to the existing provisions of the Migration Act governing the detention of unlawful non-citizens. Under those provisions, Ministers have a personal discretionary power to intervene in an individual case and grant a visa, including a bridging visa, to a person in immigration detention, where it is in the public interest to do so. What is and what is not in the public interest is for the relevant Minister to decide.

As the Committee notes, Ministers also have a personal discretionary power to allow a detainee to reside outside of an immigration detention facility, at a specified address in the community (residence determination). While a residence determination permits an individual to be placed in the community subject to certain conditions, it continues to be an immigration detention placement.

These less restrictive community management options may be implemented for the person having regard to their circumstances, including *non-refoulement* obligations and potential risks to the Australian community.

Some unlawful non-citizens affected by the amendments made by the Bill may remain in an immigration detention centre while awaiting removal as any decision to not grant them a visa or place them under a residence determination will be made in consideration of their individual circumstances and the risk to the safety, security and good order of the Australian community. This helps to ensure that an immigration detention placement is reasonable, necessary and proportionate to individual circumstances and therefore it will not be arbitrary.

Conditions of immigration detention

The Governments takes the welfare of those in immigration detention very seriously. All people in immigration detention (detainees) are treated with respect, dignity and fairness. The Government is committed to ensuring detainees are provided with high quality services commensurate to Australian standards and that the conditions in immigration detention are humane and respect the inherent dignity of the person. The Government works closely with its service providers to ensure immigration detainees are provided with adequate accommodation, infrastructure, medical services, security services, catering services, programs, activities, support services and communication facilities.

Detainees are able to access legal representation in accordance with the Migration Act and the Government provides detainees with the means to contact family, friends and other support. The Government respects and caters for religious and cultural diversity. If a detainee requires an interpreter, the Australian Government will provide one.

Detainees who are unsatisfied with the conditions in immigration detention can raise concerns in person with Australian Border Force officers and service provider staff, or in writing or by telephone with the Department of Home Affairs or external scrutiny bodies.

Scrutiny and oversight

The length and conditions of immigration detention are subject to regular internal and external review. The Department and the Australian Border Force use internal assurance and external oversight processes to help care for and protect individuals and maintain the health, safety and wellbeing of all detainees.

The Department has a framework of regular reviews, escalation and referral points in place to ensure that people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department also maintains review mechanisms that regularly consider the necessity of detention and where appropriate, identify alternate means of detention or the grant of a visa.

Each detainee's case is reviewed monthly by a Status Resolution Officer to ensure that emerging vulnerabilities or barriers to case progression are identified and referred for action. In addition, the Status Resolution Officer also considers whether ongoing detention remains appropriate and refers relevant cases for further action. Monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each immigration detainee.

The Department proactively continues to identify and utilise alternatives to held detention. Status Resolution Officers use the Community Protection Assessment Tool to assess the most appropriate placement for

an unlawful non-citizen while status resolution processes are being undertaken. Placement includes looking at alternatives to an immigration detention centre, such as in the community on a bridging visa or under a residence determination. The tool also assesses the types of support or conditions that may be appropriate and is generally reviewed *every* three to six months and/or when there is a significant change in an individual's circumstances.

Using the Community Protection Assessment Tool, Status Resolution Officers assess and determine whether the detainee meets the legislative requirements and criteria for a bridging visa to allow the non-citizen to temporarily reside lawfully in the community while they resolve their immigration status. Status Resolution Officers identify cases where only the Minister has the power to grant the non-citizen a visa or to make a residence determination in order to allow an unlawful non-citizen to reside in community detention. Where the case is determined to meet the Ministerial Intervention Guidelines, the case is referred to the Minister for consideration under section 195A of the Migration Act for grant of a visa or under section 197AB of the Migration Act for placement in the community under residence determination arrangements.

The Office of the Commonwealth Ombudsman (the Ombudsman) and the Australian Human Rights Commission have legislative oversight responsibilities. These bodies conduct oversight activities, publish reports and make recommendations in relation to immigration detention.

In addition to these activities, under the Migration Act, the Secretary of the Department of Home Affairs, the Ombudsman and the Minister. have statutory obligations around the oversight of long-term immigration detainees. These provisions are intended to provide greater transparency in the management of long-term detainees through independent assessments by the Commonwealth Ombudsman.

The Secretary must provide reports to the Commonwealth Ombudsman on individuals who have completed a cumulative period of two years in immigration detention and then for *every* six months that they remain in detention. The Ombudsman must then provide an assessment of these individuals' detention to the Minister, which the Minister then tables in Parliament, including any recommendations from the Ombudsman.

Once all domestic remedies are exhausted, individuals may also submit a complaint to relevant United Nation bodies such as the United Nations Committee against Torture or the UN Human Rights Committee.

The committee also requests the minister's detailed advice as to any other legislative or non-legislative options considered to address the government's concerns arising from the Federal Court's decisions in DMH16 v Minister for Immigration and Border Protection and AJL20 v Commonwealth, including any consideration by the minister of the extent to which an alternative option would impact personal rights and liberties.

The Commonwealth has appealed the judgment of the Federal Court in *AJL20* to the High Court. The High Court's judgment is reserved. The High Court's judgment may provide clarity on the interpretation of the current section 197C of the Migration Act.

The interpretation of section 197C is continuing to evolve as reflected in the recent decision of the Full Federal Court in *WKMZ v Minister for Immigration Citizenship Migrant Services and Multicultural Affairs* [2020] FCAFC 55 which held that section 197C and the removal power in 198 do not preclude detention for a period of time so that the executive can genuinely consider an alternative possibility for an unlawful non-citizen to remain in Australia, or other options such as admission to a safe third country, to avoid a breach of Australia's *non-refoulement* obligations.

Alternatives to detention

As noted above, detention in an immigration detention centre is a measure of last resort. The Government's preference is to manage non-citizens in the community, where possible, on a visa or under residence determination arrangements.

To complement this Bill, the Government continues to explore ways to improve options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. For example, on 16 April 2021, amendments were made to the *Migration Regulations 1994* (the Migration Regulations) by the *Migration Amendment (Bridging* Visa *Conditions) Regulations 2021* to allow additional existing visa conditions to be imposed on certain Bridging visas granted under Ministerial Intervention powers. These amendments strengthen the community placement options available for detainees who may pose a risk to public safety. They are an additional safeguard designed to complement this Bill. An explanation of how these changes impact human rights is available in the Statement of Compatibility with Human Rights for those changes.

Refoulement

The Government has a long-standing policy position in relation to *non-refoulement* obligations. After commencement, the new provisions in section 197C would apply to all unlawful non- citizens who are subject to involuntary removal but engage protection obligations that have been assessed and accepted during the Protection visa process. This means first and foremost that officers will not be authorised or required to remove a person in breach of *non- refoulement* obligations.

The Bill clarifies and confirms Australia's commitment to meet its *non-refoulement* obligations and not remove unlawful non-citizens (UNCs) to a country where they face persecution or a real risk of torture, cruel, inhuman and degrading treatment or punishment, arbitrary deprivation of life or the death penalty.

If this Bill is not passed, the Migration Act may require or authorise the removal of certain unlawful non-citizens in breach of *non-refoulement* obligations, as soon as reasonably practicable.

To assist the committee in considering the minister's response to the above questions, the committee also requests the minister's advice as to how often current and former ministers have exercised their personal discretionary powers under sections 195A (discretion to grant a detainee a visa) and 197AB (residence determination), and in particular, how many times these discretionary powers have been exercised in relation to persons in immigration detention to whom protection obligations are owed but are ineligible for grant of a visa on character or other grounds.

Historical statistics relating to section 195A for this cohort group are below.

[To view table, see the Minister's full response on the Scrutiny Digest web page, alongside *Scrutiny Digest 8 of 2021*].

Information on the number of persons in detention (who have previously been found to be owed protection obligations or who arrived in Australia as refugee) whom the Minister has made residence determination is not available in departmental systems in a reportable format.

Committee comment

2.44 The committee thanks the minister for this response. The committee notes the minister's advice that detention in an immigration detention centre is a last resort for the management of unlawful non-citizens and that the government's preference is to manage non-citizens in the community wherever possible, subject to meeting relevant requirements, including not presenting an unacceptable risk to the safety and good order of the Australian community.

2.45 The committee also notes the minister's advice that there exist several processes by which the length and conditions of immigration detention are subject to regular internal and external review, including reviews by the department, the Commonwealth Ombudsman and the Human Rights Commission. The committee further notes the minister's advice that the government continues to explore ways to improve options for managing non-citizens in the community, including by amendments to regulations.

2.46 While noting this advice, the committee notes that the highly discretionary and non-compellable nature of the minister's powers means they cannot be relied upon to ensure that immigration detention is reasonable, necessary and proportionate in the cases contemplated by the bill. The committee notes that none of the internal or external review processes outlined in the response can require the minister to grant a visa or allow a person to reside outside of an immigration detention facility. The committee reiterates its concerns that the effective grounds of judicial review of the immigration detention of 'unlawful non-citizens' are very

limited. It therefore remains unclear to the committee that there are sufficient safeguards against the serious encroachment on personal rights and liberties imposed by the indefinite detention of a person under section 189 of the *Migration Act 1958* (the Migration Act).

2.47 The committee welcomes amendments to the bill that allow for increased access to merits review for individuals who were previously determined to have engaged protection obligations but are subsequently found by the minister to no longer engage those obligations.

2.48 However, the committee continues to have significant scrutiny concerns that the immigration detention of persons affected by the bill will unduly trespass on fundamental personal rights and liberties. In light of the fact that the bill has passed both Houses of the Parliament, the committee makes no further comment on this matter.

Significant matters in delegated legislation[27]

2.49 In *Scrutiny Digest 6 of 2021* the committee requested the minister's detailed advice as to why it is considered necessary and appropriate to provide for additional situations in which a 'protection finding' will be made in respect of a person in regulations.[28]

Minister's response

2.50 The minister advised:

> The amendments to section 197C would include a power to prescribe additional circumstances that constitute a protection finding in the Migration Regulations.
>
> A power to prescribe additional circumstances in the Migration Regulations is appropriate and necessary to preserve the Government's ability to meet its *non-refoulement* obligations in limited cases that may arise, which fall outside the circumstances enumerated in the Bill.
>
> Without such a provision, the Government may be required by law to remove unlawful non-citizens in breach of Australia's *non-refoulement* obligations.
>
> If Parliament passes the Bill, the Department will monitor the operation of the new framework and, if deemed desirable or necessary, extend the scope of 'protection finding' through amendments to the Migration

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

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 22–23.

Regulations. As amendments to these Regulations are disallowable, they will be accompanied by a Statement of Compatibility with Human Rights and subject to parliamentary scrutiny.

Committee comment

2.51 The committee thanks the minister for this response. The committee notes the minister's advice that a power to prescribe additional situations in which a 'protection finding' will be made in respect of a person in the Migration Regulations 1994 is appropriate and necessary to preserve the government's ability to meet its non-refoulement obligations in limited cases that may arise, which fall outside the circumstances enumerated in the bill. The minister also advised that without such a provision, the government may be required by law to remove unlawful non-citizens in breach of Australia's non-refoulement obligations.

2.52 The committee also notes the minister's advice that the department will monitor the operation of the new framework and extend the scope of 'protection finding' if necessary.

2.53 While noting the minister's advice, the committee does not consider that the response has provided a sufficient justification for allowing additional situations in which a 'protection finding' is made for a person to be prescribed in delegated legislation. The committee's concerns in this instance are heightened by the potential impact on personal rights and liberties of a person to whom these provisions apply, including being subject to indefinite immigration detention.

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

2.55 Noting the limited explanation provided in the explanatory materials and the minister's response, the committee continues to have scrutiny concerns regarding leaving the scope of 'protection finding' to be expanded by delegated legislation. However, 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.

Retrospective effect[29]

2.56 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to the impact of this bill on any persons involved in current litigation, or who have

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

been unlawfully detained based on the interpretation of sections 197C and 198 of the Migration Act in *AJL20 v Commonwealth* [2020] FCA 1305.[30]

Minister's response

2.57 The minister advised:

> Section 197C was never intended to operate to require the removal of a person who has been found to engage Australia's *non-refoulement* obligations. The purpose of the Bill is to clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach *non-refoulement* obligations, as identified in a protection visa assessment process.
>
> Subitem 4(3) relates closely to new subsections 197C(5) and (6). As explained in paragraphs 27 and 29 of the Explanatory Memorandum:
>
> > "27. The primary purpose of subsection 197C(5) is to ensure that protection findings are defined to include findings made by the Minister (or delegates of the Minister) in relation to protection visa applications decided prior to the commencement of these amendments and which may not use the precise wording of the current protection visa criteria, or reflect the order of consideration in new section 36A. This is to ensure that persons currently in Australia, and who have a protection finding from an earlier decision in respect of an application for a protection visa, are also protected by the amended section 197C from involuntary removal in circumstances that reflect Australia's *non-refoulement* obligations.
> >
> > 29. The purpose of new subsection 197C(6) is to ensure that a protection finding is made for a non-citizen where a protection finding has been made in respect of a country within the meaning of subsection 197C(4) or (5) as well where *non-refoulement* obligations are identified as in respect of another country where the Minister was satisfied that subsection 36(4), (5) or (5A) applied to the non-citizen so that subsection 36(3) did not apply in relation to that country that is to say that there is no other country in respect of which the non-citizen has taken all reasonable steps to enter or reside in because protection obligations are engaged with respect to that non-citizen in that country or because that country will return the non-citizen a country in contravention of Australia's *non-refoulement* obligations."

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 23–24.

In order for new subsections 197C(5) and (6) to operate as intended, protection findings made in relation to applications decided before the commencement of the amendments must be able to be considered.

Impact on AJL20 litigant

As noted above, the Commonwealth has appealed the judgment in *AJL20* in the High Court and judgment is reserved. If the Court accepts the Commonwealth's arguments, the Migration Act will have validly authorised *AJL20's* detention. In that case, the Bill will not have any effect on unlawful detention claims based on *AJL20.*

If *AJL20* is upheld, the Bill may *prospectively* validate a person's detention in analogous circumstances to *AJL20.* However, this will not have retrospective effect on any persons' unlawful detention claims.

It would not be appropriate to comment further on active litigation before the Courts.

Committee comment

2.58 The committee thanks the minister for this response. The committee notes the minister's advice that section 197C was never intended to operate to require the removal of a person who has been found to engage Australia's non-refoulement obligations. The committee also notes the minister's advice that the purpose of the bill is to clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach non-refoulement obligations, as identified in a protection visa assessment process.

2.59 The committee further notes the minister's advice that if the judgement in *AJL20 v Commonwealth* is overturned in the High Court, the bill will not have any effect on unlawful detention claims based on the case. The minister also advised that if the case is upheld, while the bill may prospectively validate a person's detention, it will not have a retrospective effect on any persons' unlawful detention claims.

2.60 The committee notes that it would have been helpful if the information provided by the minister was included in the explanatory memorandum. 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.

Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021

Purpose	This bill seeks to amend various legislation to allow for mitochondrial donation to be introduced into Australia for research and human reproductive purposes
Portfolio	Health
Introduced	House of Representatives on 24 March 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[31]

2.61 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to:

- how the amount of any fee charged will be calculated and how it will be ensured that a fee charged to a person will be necessary and appropriate; and
- whether the bill can be amended to provide at least high-level guidance regarding how fees will be calculated, including, at a minimum, a provision stating that the fee must not be such as to amount to taxation.[32]

Minister's response[33]

2.62 The minister advised:

> *Calculation of the fee and ensuring it is necessary and appropriate*
>
> The ability to make regulations prescribing fees for licences under existing provisions of the RIHE Act (namely, s20(2)(b)) is a long-standing feature of the Act. Since the commencement of the RIHE Act, a fee has never been prescribed for licence applications. The RIHE Act currently makes no provision for how any fee that might be prescribed is to be calculated, nor did the explanatory memorandum that accompanied the corresponding Bill indicate how this would be done. The existing provisions of the RIHE Act have generally operated successfully for many years, and have served

31 Schedule 1, item 17, proposed paragraph 28H(7)(d). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 25–26.

33 The minister responded to the committee's comments in a letter dated 10 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

as the basis for many of the amendments proposed by the Bill to legalise and regulate mitochondrial donation. Accordingly, the Bill has not proposed to deal expressly with how the amount of any fee charged will be calculated.

Section 28H(7)(d) of the RIHE Act would only allow 'fees' to be prescribed. The ordinary meaning of a 'fee' is a sum of money paid for services. That is to say, the reference to 'fee' in this provision implicitly restricts the level of any amount that might be prescribed, to a sum paid for services.

There is no plan to prescribe a fee for licence applications under this provision in the foreseeable future. However, decisions as to whether a fee should be prescribed, and if so, the amount of the fee, would be made in accordance with applicable policies such as the Australian Government Charging Framework (RMG 302) and the Australian Government Cost Recovery Guidelines (RMG 304) (the CRGs). The CRGs apply to all non-corporate Commonwealth entities, such as the Department of Health. Consistently with the CRGs, cost recovery fees can apply to regulatory activities such as licences. Under the CRGs, the amount of cost recovery fees is aligned with expenses incurred in providing the activity (such as processing applications for licences). That is to say, fees would be set at a cost-recovery level.

There is also a body of case law that would be applied in setting the level of any fee that might be prescribed, in order to ensure that it could properly be characterised as a fee for services. This body of case law would limit the amount of any fee that could be charged under this provision, and would ensure that any fee charged did not amount to a tax.

Taken together, there is an implicit limit on the level of a fee that could be prescribed for the purposes of existing s20(2)(b) of the RIHE Act, or for the purposes of proposed s28H(7)(d). This implicit limit stems from a mixture of government policy and law, and would serve to ensure that any fees that might be prescribed would be necessary and appropriate.

Amendment to the Bill regarding how fee will be calculated and stating that it must not amount to taxation

In light of the above comments, I consider that it is not necessary for the Bill to be amended to provide further guidance regarding how fees will be calculated.

The Committee has drawn my attention to paragraph 24 of the drafting direction, which refers to provisions that state that a fee must not be such as to amount to taxation. This drafting direction states that:

- there is no legal need for a provision of this kind, but
- a statement such as this can avoid confusion and emphasise that the provision is dealing with fees and not taxes, and warn administrators that there is some limit to the level and type of fee which may be imposed.

> My understanding is that, because of the lack of legal necessity for provisions of this kind, they are not routinely included in Commonwealth legislation. I further understand that ordinary constitutional law principles would preclude the prescription of a fee that amounts to taxation under a provision such as proposed s 28H(7)(d) of the RIHE Act, even without the inclusion of such a provision.
>
> Because of this, I do not consider it necessary for the Bill to be amended to deal with how fees will be calculated, nor do I consider it necessary for the Bill to be amended to state that prescribed fees must not be such as to amount to taxation.
>
> However, in view of the Committee's comments, I propose updating the explanatory memorandum to reflect my response.

Committee comment

2.63 The committee thanks the minister for this response. The committee notes the minister's advice that the ability to make regulations that prescribe fees is a longstanding feature of the *Research Involving Human Embryos Act 2002* (the RIHE Act) and that the RIHE Act does not currently provide guidance as to how those fees will be calculated. The minister also advised that the currently existing powers to prescribe fees for licence applications have never been exercised and that there is currently no plan to prescribe a fee under proposed paragraph 28H(7)(d) of the RIHE Act.

2.64 The committee further notes the minister's advice that, should a fee be prescribed, it will be made in accordance with applicable policies such as the *Australian Government Charging Framework (RMG 302)* and the *Australian Government Cost Recovery Guidelines (RMG 304)*. Relatedly, the minister advised that, because the ordinary meaning of 'fee' is a sum of money paid for services, proposed paragraph 28H(7)(d) is implicitly restricted to only providing a power to prescribe fees to this level.

2.65 While noting this advice, the committee reiterates its scrutiny concerns regarding the inclusion of a fee-making power within delegated legislation where the face of the bill contains no cap on the maximum fee amount or any information or guidance as to how a fee will be calculated. The committee has generally not accepted consistency with existing legislation, non-legislative policy guidance or a lack of current intention to prescribe a fee to be a sufficient justification for not including guidance on the calculation of fees on the face of the primary legislation.

2.66 In this context, the committee notes that it is quite common for bills allowing for the charging of fees within delegated legislation to include a provision noting that the fee must be not be such as to amount to taxation.[34] While there is no legal need

34 See, for example, subsection 399(3) of the *Export Control Act 2020* and subsection 32(4) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

to include such a provision, the committee considers that it is nonetheless important to include to avoid confusion and to emphasise the point that the amount calculated under the regulations will be a fee and not a tax. In addition, as set out in the OPC Drafting Direction, such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.

2.67 From a scrutiny perspective, the committee considers that the bill should be amended to provide, at a minimum, that a fee prescribed under proposed paragraph 28H(7)(d) must not be such as to amount to taxation.

2.68 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing delegated legislation to prescribe the amount of a mitochondrial donation licence application fee in circumstances where there is no guidance on the face of the bill regarding how the amount of any fee will be calculated.

2.69 The committee thanks the minister for his proposal to update the explanatory memorandum reflecting the advice provided to the committee and requests that an addendum containing the key information provided by the minister be tabled in the Parliament as soon as practicable.

2.70 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

Incorporation of external material into the law [35]

2.71 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave provisions defining the scope of the term 'proper consent' (proposed paragraph 28N(8)(b) and proposed subsection 24(9)) and requirements relating to the withdrawal of consent (proposed subsection 28N(9) to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.

2.72 The committee also requested the minister's advice as to:

- why it is considered necessary and appropriate to apply the ART Guidelines as in force or existing from time to time (noting that this means that future

35 Schedule 1, item 17, proposed subsections 28N(8) and (9). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

changes to the guidelines and therefore the definition of 'proper consent' will be incorporated into the law without any parliamentary scrutiny); and

- whether the bill could be amended to provide for the meaning of 'proper consent' on the face of the instrument or the bill, rather than relying on the incorporation of the ART Guidelines.[36]

Minister's response

2.73 The minister advised:

Why it is necessary and appropriate to rely on delegated legislation

Prescribing guidelines by regulation

Relying on guidelines issued by the CEO of the NHMRC to deal with the meaning of 'proper consent' is a long-standing feature of regulations made under the RIHE Act. The existing provisions of the RIHE Act have operated successfully for many years, and have served as the basis for many of the amendments proposed by the Bill to legalise and regulate mitochondrial donation. Accordingly, for provisions relating to mitochondrial donation, the Bill has similarly proposed to deal with the meaning of 'proper consent' through guidelines issued by the CEO of the NHMRC. As I understand it, the Committee has not raised concerns with this aspect of the Bill.

Under the *National Health and Medical Research Council Act 1992* (the NHMRC Act), the CEO of the NHMRC issues a range of guidelines. As the Committee notes, s24(9) of the RIHE Act would (as s8 currently does) define 'proper consent' for general licences in terms of guidelines that are prescribed by regulation. Paragraph (a) of the definition of 'proper consent' in s 28N(8) would provide similarly for mitochondrial donation licences. In each case, the regulation would make it clear which, out of the range of guidelines that may be issued by the CEO of the NHMRC, is relevant. Without this power, there might be doubt about this, and so this aspect of the regulation-making power simply operates to put this issue beyond doubt.

Delegated legislation provisions that deal with withdrawals of consent

With regard to withdrawal of consent, this has traditionally been dealt with fully by guidelines issued by the CEO of the NHMRC, and it is likely that such guidelines would continue to deal with this matter. That is to say, there is no current proposal to make regulations that deal with the matter referred to in paragraph (b) of the definition of 'proper consent' in proposed s28N(9) of the RIHE Act in the foreseeable future.

However, in view of the importance of 'proper consent', and withdrawals of consent, under the legislative scheme, this regulation-making power

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 26–28.

would ensure that the government would be able to legislate quickly to ensure that this issue is addressed fully, in the event that it was not dealt with adequately in guidelines issued by the CEO of the NHMRC.

Further, the Bill would amend the RIHE Act to enable new mitochondrial donation techniques to be prescribed, by amendments to regulations made under the RIHE Act, in the future (although none are currently proposed). For such new techniques, it is conceivable that there would be a need for new rules around when consent is withdrawn, which could hinge on technical details of the mitochondrial donation technique. Accordingly, this regulation-making power is thought to be a necessary incident of the power to prescribe, through regulations made under the RIHE Act, additional mitochondrial donation techniques.

Whether the Bill can be amended to include high-level guidance

In view of the above comments, I am of the view that it would not be appropriate for the Bill to be amended to include high-level guidance as to these matters. These regulation-making powers are primarily included to ensure that appropriate guidelines are referenced, and to ensure that the legislative scheme can respond appropriately to unforeseen technological advances, and to new mitochondrial donation techniques that might be developed and prescribed in regulations made under the RIHE Act in the future. It is necessary for there to be a reasonable degree of flexibility in order to ensure that this can properly be done.

Why it is necessary and appropriate to apply the ART Guidelines as in force or existing from time to time

I fully understand the basis of the Committee's concerns with regard to reliance on documents as existing from time to time, and generally speaking, I share the same concerns. However, for the purposes of the RIHE Act, it is necessary and appropriate for the ART Guidelines to be incorporated as existing from time to time, due to:

- the new and developing nature of mitochondrial donation, particularly as applied for human reproductive purposes, and
- the importance and centrality of the notion of 'proper consent' to the regulatory scheme, and the need to ensure that it reflects the most up-to-date guidelines and current best practice.

The Bill's explanatory memorandum already outlines general reasons for the appropriateness of the RIHE Act being able to rely on documents as in force or existing from time to time (paragraph 295, final bullet point, and paragraphs 306 to 314). Further to that, I note that, under the NHMRC Act, it is possible for the CEO of the NHMRC Act to issue guidelines, and to vary and revoke them, from time to time. In addition, the CEO of the NHMRC can issue interim guidelines, in urgent circumstances. Such guidelines can then be confirmed, varied or revoked, following a public consultation process, and can automatically be revoked after a period of time. Urgent

interim guidelines can be issued, and varied or revoked, in relatively short timeframes.

If there was a matter relating to 'proper consent' that the CEO of the NHMRC thought important enough to deal with in variations to the ART Guidelines, or in urgent interim ART Guidelines, it would be important that this be reflected in the ART Guidelines as applied under the RIHE Act. Further, if interim guidelines were to be varied or revoked, it would be important that the varied guidelines be applied under the RIHE Act, or that the revoked guidelines not be applied.

However, given the normal timeframes for amending Acts of Parliament or regulations, if the ART Guidelines were not applied as existing from time to time, there would be a significant risk that appropriate legislative amendments could not be implemented in time to reflect such changes to the ART Guidelines. As a result, guidelines would potentially be applied that were not up-to-date, or that did not reflect best practice. The proposed drafting would avoid this unwelcome outcome.

Whether the Bill could be amended to provide for the meaning of 'proper consent', rather than relying on delegated legislation

In view of the above comments, I am not of the opinion that the Bill could be amended to fully and comprehensively deal with the meaning of 'proper consent'. Rather, I consider that the currently proposed use of delegated legislation provides for an appropriate way of dealing with this important ethical issue.

However, in view of the Committee's comments, I propose updating the explanatory memorandum to reflect my response.

Committee comment

2.74 The committee thanks the minister for this response. The committee notes the minister's advice that defining 'proper consent' by reference to guidelines issued by the CEO of the National Health and Medical Research Council (NHMRC) is a long-standing feature of the regulations made under the RIHE Act. The minister advised that the intention of leaving the definition of 'proper consent' to delegated legislation is that the regulations will clarify which specific guidelines are relevant. Moreover, the minister advised that dealing with requirements relating to the definition of 'proper consent' in regulations would allow this issue to be legislated quickly, in the event that it is not dealt with adequately in guidelines issued by the CEO of the NHMRC.

2.75 Similarly, the committee notes the minister's advice that the requirements relating to the withdrawal of consent have previously been dealt with fully by reference to guidelines issued by the CEO of the NHMRC. As such, the minister advised that there is currently no proposal to make regulations that deal with the matter in proposed paragraph 28N(9)(b) of the RIHE Act (that is, specified circumstances where consent cannot be withdrawn). As with the definition of proper

consent, the minister advised that this regulation-making power would ensure that the government would be able to legislate quickly to ensure that this issue is addressed fully, in the event that it was not dealt with adequately in guidelines issued by the CEO of the NHMRC.

2.76 The committee notes that in the current ART Guidelines the definition of 'valid consent', which is used interchangeably with 'proper consent', includes a number of matters that could be included on the face of the primary legislation. For example, for consent to be valid the person giving consent must be considered to have the capacity to provide consent.[37] The committee notes that this requirement is unlikely to change and, as such, it remains unclear to the committee why at least high-level guidance regarding the definition of 'proper consent' cannot be provided on the face of the primary legislation.

2.77 The committee's scrutiny concerns in this instance are heightened by the fact that the definition of proper consent is contained in policy guidance and is therefore not subject to scrutiny by the Parliament. As a result, there is no opportunity for Parliament to scrutinise or have oversight of the definition of 'proper consent', which is a significant definition in relation to when mitochondrial donation will be appropriate.

2.78 The committee also reiterates its consistent scrutiny view that significant matters, such as when consent may be withdrawn, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for leaving significant matters to delegated legislation. The committee therefore does not consider that the minister's response has provided an adequate justification as to why the requirements relating to the withdrawal of consent should be left to delegated legislation.

2.79 In relation to the ART Guidelines,[38] the committee notes the minister's advice that it is necessary and appropriate to incorporate these guidelines as existing from time to time, because of the developing nature of mitochondrial donation and because of the need to provide an up-to-date definition of 'proper consent'. The minister advise that if the ART Guidelines were not applied as existing from time to time, there would be a significant risk that appropriate legislative amendments could not be implemented in time to reflect changes that may be needed to the ART Guidelines. As a result, if the ART Guidelines were not applied as existing from time

37 *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, issued by the CEO of the NHMRC under the *National Health and Medical Research Council Act 1992*, p. 10.

38 *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, issued by the CEO of the NHMRC under the *National Health and Medical Research Council Act 1992*.

to time, guidelines could potentially be applied that were not up-to-date, or that did not reflect best practice.

2.80 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the scope of 'proper consent', as well as requirements relating to the withdrawal of consent, to be left to delegated legislation and non-legislative policy guidance.

2.81 The committee thanks the minister for his proposal to update the explanatory memorandum reflecting the advice provided to the committee and requests that an addendum containing the key information provided by the minister be tabled in the Parliament as soon as practicable.

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

Privacy

Significant matters in delegated legislation [39]

2.83 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the scope of sensitive information-collection powers to delegated legislation; and
- whether the bill can be amended to include further guidance regarding these matters on the face of the primary legislation.[40]

Minister's response

2.84 The minister advised:

> **Why it is necessary and appropriate to leave this matter to delegated legislation**
>
> *Comments on proposed s28R(1)(e) of the RIHE Act*
>
> In relation to proposed s28R(1)(e) of the RIHE Act, questions about whether and what information about a mitochondrial donor should be made available to a person born of mitochondrial donation is a controversial ethical area.
>
> - Some consider that mitochondrial donors should be entirely anonymous, that is, that no information about mitochondrial

39 Schedule 1, item 17, proposed paragraphs 28R(1)(e), 28R(3)(d), 28S(3)(c) and subsections 28S(4) and 28S(8). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 28–29.

donors should be made available to persons born of mitochondrial donation. This is sometimes said to be on the basis that mitochondrial donation is akin to organ donation, and sometimes on the basis of a view that donated mitochondrial DNA makes a relatively small contribution to the identity of persons born as a result of mitochondrial donation.

- Others view mitochondrial donors as akin to ordinary gamete donors. For that reason, they consider that the same information about mitochondrial donors should be made available as is made available about ordinary gamete donors.

The Bill seeks to balance these competing views by adopting a 'middle ground', by ensuring that mitochondrial donation is not anonymous, but by limiting the kinds of information that can be obtained about a mitochondrial donor to an appropriate amount. However, the balance sought to be struck by proposed s28R(1)(e) is novel. It is possible that the way in which these competing ethical contentions should best be balanced might require fine tuning over time, in view of matters such as developments in mitochondrial donation technologies, developments in community attitudes to mitochondrial donation, and any new mitochondrial donation techniques that might be prescribed in the future in regulations made under the RIHE Act. This reflects the notion that mitochondrial donation is a relatively new technology, and its use in human reproduction even newer.

It is also important to bear in mind 2 additional factors.

The first is the serious manner in which the Bill would treat the privacy of mitochondrial donors:

- The Register would not be publicly available (s29A(3)).
- There would be criminal penalties for disclosing the information of the Register other than in accordance with the amended provisions of the RIHE Act (proposed s29A(7)).
- Amendments to the Freedom of Information Act 1982 would ensure that information on the Register could not be obtained under that Act.

That is to say, while the Bill would provide this regulation making power which would enable collection of additional personal information about mitochondrial donors, the Bill would also contain a range of provisions that would ensure that this information is treated very carefully, and not disclosed other than to its intended recipient.

The second is that mitochondrial donors would be voluntarily participating in this scheme, and would be fully aware of these arrangements (s28J(5)(f) of the RIHE Act). No question of compulsory collection of personal information would arise.

Comments on proposed s 28R(3)(d) of the RIHE Act

However, an important countervailing privacy concern is that information included on the Register about a mitochondrial donor should be released to a person born using that mitochondrial donor's donated human eggs, and to no other person.

The principal reason for requiring this personal information about persons born of mitochondrial donation to be collected under s 28R(3) is to ensure that, if a person were to make an application under s 29A(4), they could be reliably matched with an entry in the Register. That is to say, the information collected under s28R(3) would be important in protecting the privacy of mitochondrial donors, and ensuring that information about them is not disclosed inappropriately.

It is currently anticipated that the information specified in ss28R(3)(a), (b) and (c) would be enough to enable this matching to be undertaken with confidence. Because of that, there is no plan to prescribe further information for the purposes of s28R(3)(d) in the foreseeable future. However, the possibility cannot be ruled out that, in the future, it might become necessary to collect additional personal information about persons born as a result of mitochondrial donation, in order to ensure that persons making an application under s29A(4) can be matched reliably with an entry in the Register. This regulation making power would ensure that swift regulatory action could be taken if necessary so as to properly protect the privacy of mitochondrial donors.

Whether the Bill can be amended to include further guidance regarding these matters

Having regard to the above comments, I do not consider it possible at this stage for the Bill to include further guidance regarding what matters might be prescribed under these provisions. There is no current plan for additional matters to be prescribed, and anything that might be prescribed in the future would be in response to circumstances that are currently unforeseeable.

However, in view of the Committee's comments, I propose updating the explanatory memorandum to reflect my response.

Committee comment

2.85 The committee thanks the minister for this response. The committee notes the minister's advice that there are competing views as to the extent to which it is appropriate to make information available in relation to mitochondrial donors. The minister advised that the bill attempts to balance these competing views by limiting the kinds of information that can be obtained under the scheme while also ensuring that mitochondrial donation is not anonymous. The minister further advised that this approach to privacy may be subject to change over time as developments occur in

relation to mitochondrial donation techniques and in community attitudes to mitochondrial donation.

2.86 In addition, the minister advised that the bill contains a number of provisions that would protect privacy and that as mitochondrial donors would be voluntarily participating in this scheme no question of compulsory collection of personal information would arise. The minister advised that information collected under proposed subsection 28R(3) would be important in protecting the privacy of mitochondrial donors, and ensuring that information about them is not disclosed inappropriately because it would ensure that, if a person were to make an application under proposed subsection 29A(4), they could be reliably matched with an entry in the Register. While there are currently no plans to prescribe further information for the purposes of proposed paragraph 28R(3)(d), in the future it may be necessary to prescribe this additional information to ensure that persons making an application under subsection 29A(4) can continue to be matched reliably with an entry in the Register.

2.87 The committee thanks the minister for his proposal to update the explanatory memorandum reflecting the advice provided to the committee and requests that an addendum containing the key information provided by the minister be tabled in the Parliament as soon as practicable.

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

Mutual Recognition Amendment Bill 2021

Purpose	This bill seeks to amend the *Mutual Recognition Act 1992* to introduce a uniform scheme of automatic mutual recognition, which will enable an individual registered for an occupation in their home State to be taken to be registered to carry on, in a second State, the activities covered by their home State registration
Portfolio	Prime Minister
Introduced	House of Representatives on 18 March 2021
Bill status	Before the Senate

Exemption from disallowance[41]

2.89 The committee initially scrutinised this bill in *Scrutiny Digest 6 of 2021* and requested the Assistant Minister's advice.[42] The committee considered the Assistant Minister's response in *Scrutiny Digest 7 of 2021* and requested the Assistant Minister's further advice as to what safeguards are in place to ensure that the exercise of an instrument-making power by a state minister is subject to appropriate accountability or oversight at the state level.[43]

Assistant Minister's response[44]

2.90 The Assistant Minister advised:

> The Bill, the IGA [Intergovernmental Agreement on Automatic Mutual Recognition of Occupational Registration] and the Commonwealth *Legislation Act 2003* provide measures to maintain accountability and oversight of the instrument-making power by state Ministers.
>
> State Ministers must conduct appropriate consultation as required by the *Legislation Act 2003* before the making of a legislative instrument that imposes notification requirements or excludes certain occupational registrations from the automatic mutual recognition scheme.

41 Schedule 1, item 87. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 30–31.

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2021*, pp. 17–19.

44 The Assistant Minister responded to the committee's comments in a letter dated 29 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> The explanatory statement published with the legislative instrument must also provide a description of either the consultation process and outcomes, or the reasons for not consulting prior to making the instrument.
>
> The Bill requires that state Ministers must be satisfied that the making of an instrument to exclude an occupational registration is necessary because of a significant risk, arising from circumstances or conditions in the declaration State, to consumer protection, the environment, animal welfare or the health or safety of workers or the public. An explanation of the risk must be included in the instrument, while further detail on the risks will be described in the accompanying explanatory statement. The IGA also commits jurisdictions to only applying exemptions where the exemption is the most appropriate policy instrument to protect the community.
>
> Finally, the Bill contains limited sunsetting periods for instruments that exclude an occupational registration. Instead of the usual ten year period under the *Legislation Act 2003*, the Bill provides that temporary exclusions can last for a maximum of 12 months from commencement of the proposed Part 3A to support the transition to the new scheme.
>
> Exclusions because of a significant risk will cease to operate five years after they are registered, unless revoked earlier. Limited sunsetting periods will improve oversight as state Ministers are required under the *Legislation Act 2003* to review legislative instruments prior to renewal to ensure they remain fit-for-purpose.
>
> I trust the measures outlined above to provide accountability and oversight of legislative instruments made by a state Minister address the Committee's comments.

Committee comment

2.91 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that state ministers are required under the *Legislation Act 2003* to conduct appropriate consultation before making legislative instruments that impose notification requirements or exclude certain occupational registrations from the automatic mutual recognition scheme. Further, the Assistant Minister's advised that the outcomes of this consultation must be included in the instrument's explanatory statement.

2.92 The committee further notes the Assistant Minister's advice that state ministers must be satisfied that the exclusion of an occupational registration in the making of an instrument is justified due to a significant risk, and that an explanation of this risk must be included in the instrument. Further, under the Intergovernmental Agreement on Automatic Mutual Recognition of Occupational Registration, such exemptions are required to be applied only when they are the most appropriate policy instrument to protect the community.

2.93 Finally, the committee notes the Assistant Minister's advice that for temporary exclusions provided for by the bill, the sunsetting period can last for a maximum of 12 months from commencement of the proposed Part 3A. In addition, exclusions because of a significant risk will cease to operate after five years, unless revoked earlier.

2.94 While welcoming this advice and noting the mechanisms in place at a federal level, the committee reiterates its concerns that the power to make non-disallowable instruments is conferred on state ministers, without any opportunity for the exercise of these powers to be reviewable or subject to scrutiny by *state* parliaments.

2.95 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing state ministers with the power to make Commonwealth legislative instruments which are exempt from parliamentary disallowance and effective parliamentary accountability and oversight at either the Commonwealth or state level.

Sydney Harbour Federation Trust Amendment Bill 2021

Purpose	This bill seeks to address four recommendations from the *Independent Review of the Sydney Harbour Federation Trust 2020*. Technical amendments will also enable both the Act and regulations to be modernised and aligned with current drafting practices
Portfolio	Environment
Introduced	House of Representatives on 18 March 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[45]

2.96 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave requirements relating to offences and penalties and requirements relating to the removal and disposal of objects and other matter to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[46]

Minister's response[47]

2.97 The minister advised:

> *Retention of matters relating to offences and penalties and requirements relating to the removal and disposal of objects and other matters in regulations.*
>
> The Sydney Harbour Federation Trust Amendment Bill 2021 (the Bill) will amend provisions in the *Sydney Harbour Federation Trust 2001* (the Act) that relate to regulations that may be made under the Act.

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

46 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 32–33.

47 The Assistant Treasurer responded to the committee's comments in a letter dated 5 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

The *Sydney Harbour Federation Trust Regulations 2001* (the Regulations) contain a number of offences ranging from the damage or removal of things from land managed by the Sydney Harbour Federation Trust (Trust land), causing or allowing animals to enter onto Trust land, to compliance with vehicle parking requirements on Trust land.

The Regulations also prescribe powers to the Trust and to rangers appointed under the Regulations to remove and dispose of objects and other matter from Trust land. These powers enable the Trust to regulate the behaviour of visitors to Trust land and enforce commission of the offences.

The purpose of these offences and powers is to enable the Sydney Harbour Federation Trust (the Trust) to manage Trust land and regulate activities on it, in accordance with the objects of the Trust provided in section 6 of the Act. These objects include enhancing the amenity of the Sydney Harbour region, maximising public access to Trust land, the protection, conservation and interpretation of heritage values of Trust land and the management of suitable Trust land as a park on behalf of the Commonwealth government.

The offences in the Regulations are minor and have a single maximum penalty of either 5 or 10 penalty units. These penalties reflect the low seriousness of the offences, the low incentive of visitors to Trust land to commit them and the relatively minor consequences of the commission of the offences. The consequences of the offences are generally unlikely to cause serious danger or damage to Trust land or to visitors to it.

Given the minor and regulatory nature of the offences, their application in the context of the Trust's regulatory activities in accordance with the objects of the Trust under the Act, and the low penalties for the offences, it is appropriate that these offences are provided in the Regulations rather than in the Act. The powers of the Trust and rangers to remove and dispose of objects are concomitant with the offences in the Regulations. As such, it is appropriate that these are provided in the Regulations. In addition, it is expected that changes to the offences may be required to adapt to changing circumstances in the operations of the Trust in managing Trust land. Such changes are more easily and quickly made to Regulations, ensuring the regulatory framework remains current and fit for purpose, while also allowing for ongoing Parliamentary oversight (through the disallowance process).

The Regulations are readily available to the public as they are published on the Federal Register of Legislation. They are a disallowable legislative instrument for the purposes of the *Legislation Act 2003.*

Whether the bill can be amended to include at least high-level guidance

The Act makes express provision for the creation of the offences, penalties for them and their enforcement in section 73, as amended by the Bill. In particular, subsection 73(2) of the Act, as amended by the Bill, provides a

detailed and clearly defined list of regulation-making powers. This also provides high-level guidance as to matters that are prescribed in the Regulations.

It is not considered necessary to include further high-level guidance regarding these matters in the Regulations.

Committee comment

2.98 The committee thanks the minister for this response. The committee notes the minister's advice that the Sydney Harbour Federation Trust Regulations 2001 currently include several offences as well as several provisions providing powers to remove or dispose of objects. The minister advised that these offences and powers enable the Trust to manage Trust land in accordance with the objects of the Trust and that offences currently prescribed in the regulations are minor and regulatory in nature. As a result of the minor and regulatory nature of these offences, the minister advised that it is appropriate that the offences, along with associated regulatory powers, be provided for in the regulations rather than in primary legislation.

2.99 The minister further advised that it is necessary to leave requirements relating to offences and penalties, and requirements relating to the removal and disposal of objects and other matter, to delegated legislation because it would allow for changes to these requirements to be more easily and quickly made to respond to potentially changed circumstances in the management of Trust land.

2.100 While noting this explanation, the committee emphasises its long-standing scrutiny view that it does not consider administrative flexibility or convenience to be sufficient justification for leaving significant matters such as the details of offences and penalties to delegated legislation.

2.101 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving details relating to offences and penalties and requirements relating to the removal and disposal of objects and other matter to delegated legislation.

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

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 draws the following bill to the attention of Senators:

- Fuel Security Bill 2021 — clause 58.

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*.