

The Senate

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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

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

Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021

Purpose	This bill seeks to amend the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Land Rights Act) to: <ul style="list-style-type: none"> • establish the Northern Territory Aboriginal Investment Corporation; • streamlining the exploration and mining provisions of the Land Rights Act; • improve and clarify the land administration provisions of the Land Rights Act; and • align the Aboriginal Benefits Account with the Commonwealth's financial framework.
Portfolio	Indigenous Australians
Introduced	House of Representatives on 25 August 2021

No-invalidity clause¹

1.1 Schedule 1 to the bill seeks to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) to establish the Northern Territory Aboriginal Investment Corporation (NTAI Corporation). Proposed section 65BH provides that the NTAI Corporation must not make a particular investment that has a value of more than \$100 million, or a higher amount specified in the rules, without the written agreement of the minister. Proposed subsection 65BH(3) provides that a failure to comply with this requirement does not affect the validity of any transaction.

1.2 Additionally, item 25 of Schedule 3 to the bill seeks to insert proposed section 12D into the Land Rights Act to provide that Land Councils may enter into agreements with proponents in relation to land that is the subject of a deed held in

1 Schedule 1, item 6, proposed subsection 65BH(3) and Schedule 3, item 25, proposed subsection 12D(7). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

escrow. Proposed subsection 12D(4) provides that Land Councils must not enter into the agreement unless it is satisfied that the traditional owners consent to the proposed grant, adequate consultation has occurred and the terms and conditions on which the proposed grant is to be made are reasonable. Proposed subsection 12D(7) provides that a failure to comply with subsection 12D(4) does not invalidate the agreement.

1.3 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum.

1.4 In this instance, there is no justification in the explanatory memorandum for including a no-invalidity clause in either proposed subsection 65BH(3) or proposed subsection 12D(7).

1.5 The committee therefore requests the minister's advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsections 65BH(3) and 12D(7).

Significant matters in delegated legislation²

1.6 Item 6 of Schedule 1 to the bill seeks to insert Part VIA in relation to the NTAI Corporation into the Land Rights Act. A number of these provisions leave significant elements of the operation of the NTAI Corporation and its decision-making processes to the NTAI Corporation rules (the rules):

- proposed subsection 65BH(2) provides that the rules may increase the limit on the value of investments that the NTAI Corporation may make without the written agreement of the minister;
- proposed subsection 65BI(1) provides that the rules may prescribe limits or conditions on the making of loans by the NTAI Corporation;

2 Schedule 1, item 6, proposed subsections 65BH(2), 65BI(1), 65BJ(2) and 65BK(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- proposed subsection 65BJ(2) provides that the rules may prescribe the circumstances in which the NTAI Corporation may borrow money and limits or conditions on the borrowing of such money; and
- proposed subsection 65BK(3) provides that the rules may prescribe requirements relating to the granting of guarantees by the NTAI Corporation.

1.7 The committee has consistently drawn attention to framework provisions, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as key details regarding how the NTAI Corporation will operate, 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 regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.8 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.

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

- **why it is considered necessary and appropriate to leave key details regarding the operation of the NTAI Corporation 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.**

Instruments not subject to parliamentary disallowance³

1.10 Proposed section 65C seeks to provide that the Board of the NTAI Corporation must develop a strategic investment plan to set out the NTAI Corporation's priorities and principal objectives relating to payments and financial assistance to or for Aboriginal people living in the Northern Territory. While any strategic investment plan must be tabled in both Houses of the Parliament and published online and consultation with relevant stakeholders must occur, the strategic investment plan is not specified to be a legislative instrument.

3 Schedule 1, item 6, proposed section 65C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

1.11 The committee notes that, as a strategic investment plan is not a legislative instrument, it will not be subject to the tabling, disallowance or sunseting requirements that apply to legislative instrument. As such, there is no parliamentary scrutiny of non-legislative instruments. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why a strategic investment plan is not considered to be legislative in character.

1.12 The issue has been highlighted recently in the committee's review of the *Biosecurity Act 2015*,⁴ the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,⁵ and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.⁶

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

- **why a strategic investment plan made under proposed section 65C is not a legislative instrument; and**
- **whether the bill could be amended to provide that a strategic investment plan is a legislative instrument to ensure that they are subject to appropriate parliamentary oversight.**

Tabling of documents in Parliament⁷

1.14 Item 19 of Schedule 1 to the bill provides that the minister may, during the three-year period starting on the NTAI Corporation commencement day, request the Board of the NTAI Corporation prepare a progress report in relation to a strategic investment plan. Subitem 19(4) provides that the minister may cause any progress report to be published on the internet. There is no requirement that any progress report be tabled in both Houses of the Parliament. The committee notes that proposed subsection 65C(8) provides that a strategic investment plan itself is required to be tabled in both Houses of the Parliament and published online.

4 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-44.

5 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

6 *Journals of the Senate*, 16 June 2021, pp. 3581-3582.

7 Schedule 1, item 19. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

1.15 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. Additionally, making documents associated with review of investment schemes available online promotes transparency and accountability. As such, the committee expects there to be appropriate justification for failing to mandate tabling requirements. Additionally, it is unclear to the committee why it is not mandatory for any progress report to be published on the internet. In this instance, the explanatory memorandum contains no justification as to why there is no requirement to table any progress report on the strategic investment plan or why it is not mandatory for the minister to publish a copy of the report online.

1.16 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 any progress report on the strategic investment plan to be tabled in both Houses of the Parliament; and**
- **the minister *must* publish any progress report on the strategic investment plan on the internet.**

Significant matters in delegated legislation⁸

1.17 Item 4 of Schedule 3 to the bill seeks to insert proposed section 3AA into the Land Rights Act to set out the approval process for bodies to become approved entities to hold a township lease. Proposed paragraph 3AA(9)(a) provides that the minister may, by legislative instrument, determine the conditions that the minister must be satisfied of for the approval of an Aboriginal and Torres Strait Islander corporation as an approved entity under proposed subsection 3AA(2). Proposed paragraph 3AA(9)(c) provides that the minister may, by legislative instrument, determine the matters to which the minister must or may have regard to in deciding whether to approve a body as an approved entity under proposed subsection 3AA(6).

1.18 The committee's view is that significant matters, such as key details regarding the process for when a body will be an approved entity to hold a township lease, 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 regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

8 Schedule 3, item 4, proposed paragraphs 3AA(9)(a) and (c). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

1.19 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.

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

- **why it is considered necessary and appropriate to leave key details regarding the process for when a body will be an approved entity to hold a township lease 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.**

Biosecurity Amendment (Enhanced Risk Management) Bill 2021

Purpose	This bill seeks to amend the <i>Biosecurity Act 2015</i> (the Biosecurity Act) to enhance the ability to manage the risk of pests and diseases entering, emerging, establishing or spreading in Australian territory and causing harm to animal, plant and human health, the environment and the economy. It would strengthen the management of biosecurity risks posed by maritime and aviation arrivals, improve the efficiency and effectiveness of the administration of the Biosecurity Act, and increase a range of civil and criminal penalties to deter non-compliance and provide proportionate penalties.
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives on 1 September 2021

Coercive powers

Instruments not subject to parliamentary disallowance⁹

Background

1.21 Part 2 of Schedule 1 to the bill seeks to amend the *Biosecurity Act 2015* (the Biosecurity Act) to provide that a chief human biosecurity officer, or a human biosecurity officer, may make a human biosecurity group direction (a group direction). A group direction allows for quarantine directions to be imposed on classes of individuals. Currently, a human biosecurity control order made under Part 3 of Chapter 2 of the Biosecurity Act may only apply to individuals.

1.22 A group direction is made under proposed section 108B of the bill and may apply to a class of individuals who are on board an aircraft or vessel or who are at a landing place or port or other place that is in close proximity to a place where an aircraft or vessel has arrived. A group direction may only be made if a chief human biosecurity officer or a biosecurity officer is satisfied that one or more individuals exhibit symptoms of, or have been exposed to, a listed human disease.¹⁰ The period

9 Schedule 1, Part 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i), (iv) and (v).

10 Proposed subsection 108B(4).

during which the group direction is in force must be no longer than 8 hours,¹¹ unless varied such that the period is extended by an additional 4 hours.¹²

1.23 A group direction may provide that the group of individuals specified in the direction must comply with specified measures. These measures include several coercive powers, such as being required to provide contact information for other persons,¹³ being required to remain at a place or not to enter a place,¹⁴ being required to wear protective clothing and equipment,¹⁵ being required to unload, or not to unload, certain items,¹⁶ being required to undergo an examination,¹⁷ or being required to provide a body sample for diagnosis.¹⁸

1.24 The committee considers it essential that legislation that will, or may, unduly impact on individual rights and liberties be tightly controlled, with sufficient safeguards in place to protect individual rights and liberties. The committee welcomes the inclusion of a number of safeguards within the bill, such as providing that a group direction may only be in force for a limited period. However, while acknowledging these safeguards, the committee has scrutiny concerns in relation to several measures in the bill which appear to impact on individual rights and liberties without clearly defined safeguards included within the bill itself.

Coercive powers

1.25 Proposed section 108N provides that a direction which requires an individual to undergo an examination must specify the kind of examination the individual is required to undergo, as well as each kind of examination that requires consent and how that consent is to be given. Similarly, proposed section 108P provides that a group direction may specify the circumstances in which an individual who has undergone an examination is required to provide a body sample, as well as how consent in relation to giving a body sample is to be given. Proposed section 108R provides that a procedure undertaken in relation to either proposed sections 108N or 108P must be carried out in a manner consistent with appropriate medical and professional standards. The committee notes that neither the term 'examination' nor 'body sample' is defined in either the bill or the Biosecurity Act.

11 Proposed paragraph 108C(1)(f).

12 Proposed subsection 108F(3).

13 Proposed section 108K.

14 Proposed section 108L.

15 Proposed section 108M.

16 Proposed section 108Q.

17 Proposed section 108N.

18 Proposed section 108P.

1.26 In relation to which kinds of examinations may be specified within group directions, the explanatory memorandum states:

The intention is that new section 108N would allow for a specified examination to be undertaken, relating to the assessment and diagnosis of a listed human disease. For example, this may include requiring each individual in the class of individuals to undergo temperature checking (where fever is a sign or symptom of the specified listed human disease). Alternatively, it may be necessary to conduct a nasal or throat swab, and to collect a saliva sample (see new section 108P) in order to accurately diagnose the specified listed human disease. The method by which the examination will be undertaken will vary according to the listed human disease and in accordance with the available medical testing technology.¹⁹

1.27 Similarly, in relation to which kinds of body samples may be required under a group direction, the explanatory memorandum states:

The intention is that new subsections 108P(1) to (3) would allow for body samples to be provided during an examination under new section 108N, for the purposes of diagnosis of a listed human disease. For example, it may be necessary to require an individual to provide a saliva sample when conducting a nasal or throat swab in order to accurately diagnose a listed human disease.²⁰

1.28 In relation to including requirements for giving consent in a group direction, rather than within primary legislation, the explanatory memorandum states:

The method by which the examination will be undertaken will vary according to the listed human disease and in accordance with the available medical testing technology. Depending on the circumstances of the specified examination and consistent with relevant medical and other professional standards (see new section 108R), certain examinations would require consent. Where consent is required, this would be specified in the direction. This will ensure clarity around the examinations requiring consent and will ensure that individuals are aware of the requirement for consent.²¹

1.29 While acknowledging these explanations, it is not clear to the committee why it is not possible to include further high-level requirements relating to proposed sections 108N or 108P within the bill. For example, the bill does not make it clear whether a group direction could require an individual to undergo a procedure that involves breaking through the skin, such as blood test or biopsy.

1.30 Noting this, the committee considers that it would be appropriate to provide further guidance in the bill in relation to the measures provided for under proposed

19 Explanatory memorandum, p. 24.

20 Explanatory memorandum, p. 25.

21 Explanatory memorandum, p. 24.

sections 108N and 108P, including what examinations or sampling procedures may appropriately be included within a direction, in what circumstances it is appropriate to require an examination or body sample, when consent must be given, how consent is to be given, and what medical and professional standards will, or may, apply when undertaking a procedure under proposed sections 108N or 108P.

Parliamentary scrutiny

1.31 The committee's concerns in this case are heightened because a group direction is not a legislative instrument,²² and, as such, will not be subject to the usual parliamentary scrutiny processes. This issue has been highlighted recently in the committee's review of the Biosecurity Act,²³ the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,²⁴ and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.²⁵

1.32 Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to the bill to include a justification for why instruments made under proposed section 108B are not considered to be legislative in character. In this instance, the explanatory memorandum merely states that a human biosecurity group direction is administrative in nature.²⁶

1.33 The committee considers that it would be appropriate to provide for at least some level of parliamentary scrutiny over group directions within the bill. In this regard, the committee notes that there is no requirement in the bill to provide that group directions be published online or that information about group directions be published in the departmental annual report which is tabled in the Parliament.

Conclusion

1.34 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to include at least high-level guidance in relation to proposed sections 108N (requiring body examinations) and 108P (requiring body samples for diagnosis), including guidance in relation to:

22 Proposed section 108D.

23 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-44.

24 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

25 *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

26 Explanatory memorandum, p. 16.

- **what examinations or sampling procedures may be included within a human biosecurity group direction;**
- **in what circumstances it is appropriate to require an examination or body sample;**
- **when consent must be given and how consent is to be given; and**
- **what medical and professional standards will, or may, apply when undertaking a procedure under proposed sections 108N or 108P.**

1.35 The committee also requests the minister's advice as to whether the bill can be amended to include requirements that:

- **human biosecurity group directions made under proposed section 108B must be published online, and**
- **information about human biosecurity group directions, such as the total number of directions made in a year and high-level details as to the nature and contents of each direction, must be set out in the department's annual report prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013*.²⁷**

Significant matters in delegated legislation—notification requirements²⁸

1.36 Item 16 of Schedule 1 seeks to insert proposed section 108E into the Biosecurity Act to provide that, upon making a human biosecurity group direction, notice must be given of the direction, and its contents, to the class of individuals who are specified in the direction. Proposed subsection 108E(3) provides that this notice must be given in accordance with the regulations. Similarly, proposed subsection 108F(8) provides that notification of a variation of a human biosecurity group direction must be given in accordance with the regulations and proposed subsection 108G(6) provides that notification of a revocation must be given in accordance with the regulations.

1.37 A human biosecurity group direction, given under proposed section 108B, extends the direction powers that may currently be made in relation to individuals under Part 3 of Chapter 2 of the Biosecurity Act to groups of individuals. In addition, the bill seeks to include new measures to which a direction can relate, including

27 It is noted that an annual reporting requirement is appropriately included in relation to arrangements and grants for dealing with risks posed by diseases or pests (see Schedule 4, item 6, proposed section 614G).

28 Schedule 1, item 16, proposed subsections 108E(3), 108F(8) and 108G(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

requiring that a person undergo an examination,²⁹ provide body samples,³⁰ or to remain at, or go to, a specified place.³¹

1.38 The committee's view is that significant matters, such as notice requirements in relation to significant direction powers, 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:

It is intended that the regulations may provide for a range of different methods by which notification of the direction can be given, depending on what is most appropriate for the circumstances of each case and having regard to technological or operational requirements. For example, the regulations may require that the notification method would involve the contents of a human biosecurity group direction being read out to the class of individuals either in person or via the onboard communication system, or by distributing a written copy of the contents of the direction in person or electronically to the class of individuals. The regulations would also allow for consistent application of the notification requirements to the class of individuals.³²

1.39 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. 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. It is unclear to the committee why at least high-level guidance reflecting the guidance included in the explanatory memorandum cannot be provided on the face of the bill. In this instance, the committee's concerns are heightened given the impact that a human biosecurity group direction may have on individual rights or liberties.

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

- **why it is considered necessary and appropriate to leave notification requirements in relation to a human biosecurity group direction 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.**

29 Schedule 1, item 16, proposed section 108N.

30 Schedule 1, item 16, proposed section 108P.

31 Schedule 1, item 16, proposed section 108L.

32 Explanatory memorandum, p. 17.

Significant matters in delegated legislation—body samples for diagnosis³³

1.41 Proposed section 108P provides that a human biosecurity group direction may specify the circumstances in which individuals subject to the direction are required to provide body samples for diagnosis. Proposed subsection 108P(4) provides that the requirements for taking, storing, transporting, labelling and using these body samples must be prescribed in the regulations.

1.42 As noted above, the committee's view is that significant matters, such as requirements relating to the taking, storing and use of body samples, 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 regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.43 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.

1.44 While the committee acknowledges that proposed section 108R provides that a procedure to take a body sample must be carried out in a manner consistent with appropriate medical and professional standards, it is unclear to the committee why at least high-level guidance in relation to the storage and use of body samples cannot also be included on the face of the bill. For example, it is unclear why the bill cannot provide that samples must only be stored for as long as is strictly necessary and may only be used for the purpose for which the sample was taken.

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

- **why it is considered necessary and appropriate to leave requirements relating to the taking, storing and use of body samples to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding the storage and use of body samples on the face of the primary legislation.**

33 Schedule 1, item 16, proposed subsection 108P(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

Broad discretionary power

Parliamentary scrutiny—section 96 grants to the states³⁴

1.46 Item 6 of Schedule 4 to the bill seeks to insert proposed section 614B into the Biosecurity Act to provide that the Agriculture Minister or the Health Minister may make, vary or administer an arrangement to grant financial assistance for dealing with risks posed by diseases or pests, including to a state or territory. Proposed section 614C provides that the terms and conditions on which financial assistance is to be granted is to be set out in a written agreement between the Commonwealth and the grant recipient.

1.47 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 addition, the committee notes that section 96 of the Constitution confers on the Parliament the power to make grants to the states and to determine the terms and conditions attaching to them.³⁵ Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.48 In this regard, the committee is concerned that the bill contains no guidance on its face as to how the broad power to make arrangements and grants under proposed section 614B is to be exercised nor any information as to the terms and condition of the grants, other than that they must be set out in a written agreement.

1.49 The committee is also concerned that there is no requirement to table the written agreements between the Commonwealth and the states and territories in the Senate to ensure that senators are at least made aware of, and have an opportunity to debate, any agreements made under proposed section 614C of the bill. In this context, the committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

1.50 Where a bill provides for a broad discretionary power to make an arrangement for granting financial assistance, including to the states and territories, the committee expects the explanatory memorandum to justify why a broad discretionary power is necessary, to address what limits or terms and conditions will apply to the making of

34 Schedule 4, item 6, proposed sections 614B and 614C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

35 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'.

the grants, and to explain how an appropriate level of parliamentary scrutiny will be maintained. In this instance, the explanatory memorandum states:

Funding for these arrangements and grants of financial assistance would come from annual appropriations made through the Federal Budget process. Government decisions in relation to these activities would therefore still be subject to those requirements, including the Budget Process Operational Rules, and would be published in the Portfolio Budget Statements including Additional and Supplementary Statements. The Parliament would continue to have the ability to scrutinise expenditure on, and the operation of, arrangements and grants of financial assistance made under new section 614B, through regular parliamentary processes such as Senate Estimates.

...

Annual reports for Commonwealth entities are required to be presented in the Parliament by the responsible Minister under section 46 of the PGPA Act and are subject to parliamentary scrutiny by the Joint Committee of Public Accounts and Audit. The inclusion of information in the Annual Report relating to arrangements and grants of financial assistance made under section 614B would provide an additional mechanism for parliamentary scrutiny and ensure transparency on the arrangements and grants being made.³⁶

1.51 The committee 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 614G provides that the total amount paid under arrangements or grants, and the total number of arrangements and grants, must be detailed in the relevant 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 broad discretionary power to make agreements or grants will be exercised.

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

- **why it is considered necessary and appropriate to confer on the Agriculture Minister and the Health Minister 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 financial assistance may be granted; and**

36 Explanatory memorandum, pp. 77 and 80.

- **whether the bill can be amended to include a requirement that written agreements with the states and territories about grants of financial assistance made under proposed section 614C are:**
 - **tabled in the Parliament within 15 sitting days after being made; and**
 - **published on the internet within 30 days after being made.**

Crimes Amendment (Remissions of Sentences) Bill 2021

Purpose	This bill seeks to amend the <i>Crimes Act 1914</i> (Cth) to repeal section 19AA, which applies remissions or reductions granted under state or territory laws to federal sentences.
Portfolio	Attorney-General
Introduced	Senate on 25 August 2021

Retrospective application

Personal rights and liberties³⁷

1.53 Section 19AA of the *Crimes Act 1914* currently provides that where a state or territory law provides for the remission or reduction of state or territory prison sentences, this applies also to the remission or reduction of a federal sentence for prisoners in that state or territory. Remissions or reductions are usually granted in recognition of restrictions placed on prisoners that are necessary in various emergency circumstances, such-as restrictions on out-of-cell time as a result of natural disasters or staffing shortages. Generally, these remissions are automatically applied to reduce the federal offender's head sentence as soon as they have been granted.³⁸

1.54 Victoria is currently the only jurisdiction with laws providing significant remissions or reductions that are applicable to federal offenders' sentences. In Victoria these remissions are known as emergency management days (EMDs).

1.55 This bill seeks to repeal section 19AA of the *Crimes Act 1914* so that it would no longer apply reductions or remissions in sentences granted to prisoners serving periods of imprisonment for federal offences.³⁹ The bill would apply to federal offenders who are serving a sentence in a state or territory prison immediately before the date of commencement, meaning that any remissions or reductions they had already been granted is taken to be of no effect.⁴⁰ It does not apply to any federal offender already released from prison.

37 Schedule 1, item 11. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

38 Where remissions are granted as a result of industrial action by prison officers, the remissions are automatically applied to reduce the non-parole period or pre-release period of the federal offender, not the head sentence, in accordance with subsection 19AA(4) of the *Crimes Act 1914*.

39 Schedule 1, item 2.

40 Schedule 1, item 11.

1.56 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.

1.57 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 statement of compatibility states:

It may be perceived that the Bill infringes upon this right by removing remissions that have already been automatically applied under section 19AA to federal offenders who are serving a sentence in a state or territory prison immediately before the date of commencement. It may also be perceived that the Bill infringes upon the right in Article 15 as the Bill may be said to result in federal offenders incarcerated in Victoria serving a longer sentence of imprisonment than they may have done under the existing provisions of the Crimes Act. However, this is not the case.

The High Court has held that once a prisoner has been sentenced, the responsibility for the future of that prisoner passes to the executive branch. Remissions or reductions are not part of the sentencing determination made by the court, but are an executive function derived from the Royal prerogative of mercy or clemency. EMDs are not a right afforded to prisoners, and prisoners are not guaranteed to be granted EMDs for which they are eligible to be considered. While section 19AA of the Crimes Act currently automatically recognises remissions such as EMDs once they have been granted under state or territory laws, federal offenders cannot assume or expect that they will be granted remissions under state or territory laws, or even that such laws will continue to exist or be applied in their favour.

Importantly, removal of the opportunity to receive remissions, and the retrospective abolition of remissions already granted for those federal offenders still in prison immediately prior to the date of commencement, does not impose a heavier penalty than the one that was applicable at the time the criminal offence was committed. In particular, the Bill does nothing to disturb the sentence fixed by the sentencing court. Rather, the Bill ensures that federal offenders serve the sentence as set down by the sentencing court. Restoring the sentence as set down by the sentencing court does not make the nominal sentence 'more punitive or burdensome to liberty'.⁴¹

1.58 While acknowledging the explanation in the statement of compatibility, the committee notes that the effect of the bill is to deprive federal prisoners of a benefit

41 Statement of compatibility, p. 12.

which has previously accrued under the state legislation setting up the EMDs scheme and which has been automatically applied to their sentence under existing section 19AA of the *Crimes Act 1914*. The committee therefore considers that this is different to a parole scheme where there has been a change in policy before a prisoner comes up on parole, as in this case, the effect of the change is to frustrate reasonable expectations a prisoner might have in relation to EMDs which have accrued and been applied automatically on the basis of having endured tougher conditions in prison than expected due to the COVID-19 pandemic. While the committee acknowledges the policy intention behind this amendment, from a scrutiny perspective, the committee considers that where reasonable expectations are undermined in cases like this there is a risk that those affected and the public at large will perceive that the law is being applied arbitrarily.

1.59 Noting the above, the committee requests the Attorney-General's more detailed advice as to:

- **why it is considered necessary and appropriate to, in effect, retrospectively deprive prisoners of already accrued remission days; and**
- **whether the bill can be amended to provide that the repeal of section 19AA of the *Crimes Act 1914* only apply prospectively.**

Foreign Intelligence Legislation Amendment Bill 2021

Purpose	This bill seeks to amend the <i>Telecommunications (Interception and Access) Act 1979</i> and the <i>Australian Security Intelligence Organisation Act 1979</i> to address critical gaps in Australia's foreign intelligence warrant framework.
Portfolio	Home Affairs
Introduced	House of Representatives on 25 August 2021

Privacy

Administrative powers not defined with sufficient precision⁴²

1.60 Schedule 1 to the bill amends the *Telecommunications (Interception and Access) Act 1979* (the Telecommunications Act) to provide that the Director-General of Security may apply for a foreign communications warrant authorising the interception of domestic communications, where the purpose of the interception is to obtain foreign intelligence. Previously, the interception of any domestic communications was strictly prohibited.

1.61 Schedule 2 to the bill amends the Telecommunications Act and the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) to allow the Attorney-General to issue foreign intelligence warrants, telecommunications service warrants, named person warrants, and foreign communications warrants authorising the collection of foreign intelligence on Australian citizens or permanent residents, in circumstances where those persons are reasonably suspected of acting for, or on behalf of, a foreign power. Previously, requesting a warrant for the purpose of collecting information concerning an Australian citizen or permanent resident was prohibited in all circumstances.

1.62 The committee considers that the authorisation of these significant information collection powers may unduly trespass on personal rights and liberties. The committee notes that the need to properly scrutinise coercive powers authorised by warrant was the basis on which the Senate in 1978 moved towards establishing this committee.⁴³ As such, the committee considers it essential that legislation enabling coercive powers be tightly controlled, with sufficient safeguards to protect individual rights and liberties.

42 Schedules 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

43 Senate Standing Committee on the Scrutiny of Bills, *Twelfth Report of 2006: Entry, Search and Seizure Provisions in Commonwealth Legislation*, 4 December 2006, p. 317.

1.63 The committee welcomes the inclusion of a number of significant safeguards within the bill which protect domestic communications and guard against undue impact on individual privacy, such as the mandatory procedure for the screening and destruction of domestic communications.⁴⁴ However, while acknowledging these safeguards, the committee has scrutiny concerns in relation to the potentially broad scope given to certain key concepts within the bill. From a scrutiny perspective, the committee is concerned that this may undermine the value of these privacy safeguards.

1.64 For instance, an application for a foreign communications warrant that is issued in relation to an Australian citizen or permanent resident must include the grounds on which the Director-General suspects that a person is 'acting for, or on behalf of, a foreign power'.⁴⁵ Further, the Attorney-General must be satisfied that the person is, or is reasonably suspected of 'acting for, or on behalf of, a foreign power'.⁴⁶ A foreign power is defined within the ASIO Act as a foreign government, an entity that is directed or controlled by a foreign government or governments, or a foreign political organisation.⁴⁷

1.65 The committee notes that the meaning of terms such as 'foreign political organisation' could be broadly construed. In addition, there is no guidance in the bill as to when a person is considered to be acting for, or on behalf of, an entity listed under the definition of 'foreign power'. As a result, the committee is concerned that the bill may rely on the use of imprecise terms which grant a wide discretion to issue a foreign communications warrant in relation to a potentially wide range of people.

1.66 Insufficiently defined administrative powers, such as these, may be exercised arbitrarily or inconsistently and may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. The committee's concerns in relation to administrative powers that are not defined with sufficient precision will be heightened when, as in this case, the provision will, or might, impact on individual rights, liberties or obligations. As a result of these heightened concerns, and of the significant nature of the matters dealt with in the bill, the committee considers that it would have been appropriate to afford the committee more time to review the bill before its passage through the Parliament.

44 Summarised at pages 17-21 and 26-27 of the explanatory memorandum.

45 Schedule 2, item 2, proposed subsection 27A(9); item 4 proposed subsection 11A(2); item 5 proposed subsection 11B(3); item 6, proposed subsection 11C(3).

46 Schedule 2, item 2, proposed subsection 27A(9); item 4 proposed subsection 11A(2); item 5 proposed subsection 11B(3); item 6, proposed subsection 11C(3).

47 *Australian Security Intelligence Organisation Act 1979*, section 4.

1.67 The committee has scrutiny concerns in relation to provisions which may unduly trespass on an individual's privacy, in circumstances where key concepts within the bill may be broadly construed or rely on the use of imprecise terms.

1.68 In light of these significant scrutiny concerns, the committee considers that it would have been appropriate to afford the committee more time to review the bill before its passage through the Parliament.

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

Instruments not subject to parliamentary disallowance⁴⁸

1.70 Item 10 of Schedule 1 to the bill seeks to insert proposed subsection 11C(6) into the Act to provide that the Attorney-General must issue a mandatory procedure for screening and destroying any identified domestic communications that may have been incidentally intercepted under a warrant issued under section 11C of the Act. Proposed subsection 11C(11) provides that a mandatory procedure is not a legislative instrument.

1.71 The committee notes that, as a mandatory procedure made under proposed subsection 11C(6) is specified to not be a legislative instrument, it will not be subject to the tabling, disallowance or sunseting requirements that apply to legislative instruments. As such there is no parliamentary scrutiny of non-legislative instruments.

1.72 The committee notes that this issue has been highlighted recently in the committee's review of the *Biosecurity Act 2015*,⁴⁹ the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,⁵⁰ and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.⁵¹

1.73 The committee has significant scrutiny concerns in relation to proposed subsection 11C(11) of the bill which provides that the mandatory procedure for

48 Schedule 1, item 10, proposed subsection 11C(11). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

49 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-44.

50 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

51 *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

screening and destroying any identified domestic communications is not a legislative instrument and is therefore not subject to the tabling, disallowance and sunseting requirements that apply to legislative instruments. The committee's concerns are heightened in this instance given the mandatory procedure is one of the key measures in the bill safeguarding against undue impacts on individual rights and liberties.

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

Social Security Legislation Amendment (Remote Engagement Program) Bill 2021

Purpose	<p>Parts 1 and 2 of Schedule 1 to the Bill seek to amend the <i>Social Security Act 1991</i> and the <i>Social Security (Administration) Act 1999</i> to:</p> <ul style="list-style-type: none"> • establish a new payment under the remote engagement program, (i.e. the ‘remote engagement program payment’), which will be set at a rate between \$100 and \$190 per fortnight, for a maximum continuous period of 104 weeks; • establish high-level qualifying criteria for the remote engagement program payment; • establish that participation in the remote engagement placement is voluntary and a person can volunteer to leave the placement if they choose; and • enable the minister to make legislative instruments that specify additional qualification criteria, determine circumstance in which the remote engagement program payment is not payable, and fix the rate of the remote engagement program payment. <p>Parts 3 and 4 of Schedule 1 to the bill contain amendments to repeal or omit sections of the <i>Social Security Act 1991</i> applying to past Australian Government programs that have now closed.</p>
Portfolio	Indigenous Australians
Introduced	House of Representatives on 1 September 2021

Significant matters in delegated legislation⁵²

1.75 Item 7 to Schedule 1 to the bill seeks to insert Part 2.13 into the *Social Security Act 1991* to establish the remote engagement program payment. Proposed subsection 661A(1) sets out the circumstances where a person will qualify for a remote engagement program payment. This includes that the person satisfies the qualification requirements determined by the minister, by legislative instrument, under proposed paragraph 661A(2)(c).

⁵² Schedule 1, item 7, proposed paragraph 661A(2)(c) and proposed section 661C. The committee draws senators’ attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

1.76 Additionally, proposed section 661C provides that the minister may, by legislative instrument, specify the circumstances in which a remote engagement program payment is not payable to a person.

1.77 The committee's view is that significant matters, such as when a person will be eligible or ineligible for a payment, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In relation proposed subsection 661A(2), the explanatory memorandum states:

The purpose of this is to provide flexibility and enable further specificity in relation to the qualification criteria if required following the co-design process. Any additional criteria must be made by legislative instrument and will therefore be subject to the scrutiny of, and disallowance by, the Parliament.⁵³

1.78 In relation to proposed section 661C, the explanatory memorandum states:

The purpose of this section is to afford sufficient flexibility in the design of the remote engagement placement, to accommodate:

- the outcomes of the co-design process with community; and
- improvements in the design of the remote engagement placement, identified through feedback from participants and remote engagement program providers.⁵⁴

1.79 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. It is unclear to the committee why at least high-level guidance in relation to additional qualification requirements and the circumstances in which a remote engagement program payment will not be payable to a person cannot be provided on the face of the bill. Additionally, the committee considers that providing the minister with the ability to determine that a remote engagement program payment is not payable in circumstances where there is no guidance on the face of the primary legislation provides the minister with a broad discretionary power. 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.

1.80 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 relating to when a person will be eligible or ineligible for the remote engagement program payment to delegated legislation; and**

53 Explanatory memorandum, p. 9.

54 Explanatory memorandum, p. 11.

-
- **whether the bill can be amended to include at least high-level guidance in relation to:**
 - **what additional qualification requirements may be determined under proposed paragraph 661A(2)(c); and**
 - **what circumstances in which a remote engagement program payment will not be payable to a person may be specified in a legislative instrument made under proposed subsection 661C(2).**

Bills with no committee comment

1.81 The committee has no comment in relation to the following bills which were introduced into the Parliament between 30 August – 2 September 2021:

- Aged Care Amendment (Registered Nurses Ensuring Quality Care) Bill 2021
- Customs Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Bill 2021
- Customs Legislation Amendment (Commercial Greyhound Export and Import Prohibition) Bill 2021
- Customs Tariff Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Bill 2021
- Federal Environment Watchdog Bill 2021

Commentary on amendments and explanatory materials

Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021

1.82 On 2 September 2021, the Attorney-General (Senator Cash) tabled an addendum to the explanatory memorandum relating to the bill.

1.83 **The committee thanks the Attorney-General for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.**⁵⁵

Major Sporting Events (Indicia and Images) Protection and Other Legislation Amendment Bill 2021.

1.84 On 30 August 2021, the Senate agreed to the four government amendments to the bill. Additionally, the Minister for Emergency Management and National Recovery and Resilience (Senator McKenzie) tabled a supplementary explanatory memorandum relating to the government amendments to be moved to the bill.

1.85 **The committee welcomes these amendments which appear to address the committee's concerns.**⁵⁶

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

- Foreign Intelligence Legislation Amendment Bill 2021⁵⁷

55 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2021*, pp. 2-4.
On 2 September 2021, the Senate also agreed to four opposition amendments to the bill.

56 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2021*, pp. 21-23.

57 On 25 August 2021, the House of Representatives agreed to 2 government amendments to the bill, and the Assistance Minister for Regional Development and Territories (Mrs Marino) presented a supplementary explanatory memorandum to the bill.
On 26 August 2021, Senator Ruston tabled a revised explanatory memorandum relating to the bill.

- Paid Parental Leave Amendment (COVID-19 Work Test) Bill 2021⁵⁸
- Royal Commissions Amendment (Protection of Information) Bill 2021⁵⁹
- Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021⁶⁰
- Treasury Laws Amendment (2021 Measures No. 2) Bill 2021⁶¹

58 On 31 August 2021, the House of Representatives agreed to four government amendments to the bill, and the Assistant Minister for Regional Development and Territories (Mrs Marino) presented a supplementary explanatory memorandum to the bill.

On 1 September 2021, the Minister for Superannuation, Financial Services and the Digital Economy (Senator Hume) tabled a revised explanatory memorandum relating to the bill.

59 On 30 August 2021, the Assistant Minister for Regional Development and Territories (Mrs Marino) presented a revised explanatory memorandum to the bill.

60 On 1 September 2021, the Senate agreed to one government amendment to the bill, and the Attorney-General (Senator Cash) tabled a supplementary explanatory memorandum relating to the government amendment to the be moved to the bill.

On 2 September 2021, the Minister representing the Attorney-General (Mr Fletcher) presented a revised explanatory memorandum to the bill.

61 On 2 September 2021, the Attorney-General (Senator Cash) moved, at the request of the Leader of Pauline Hanson's One Nation (Senator Hanson) amendments to the bill. Additionally, the House of Representatives, agreed to Senate amendments.

Chapter 2

Commentary on ministerial responses

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

Charter of the United Nations Amendment Bill 2021

Purpose	This bill seeks to amend the <i>Charter of the United Nations Act 1945</i> to specify that counter-terrorism financial sanctions listings made under section 15 of the Act and revocations made under section 16 of the Act be made by legislative instrument. The bill also validates action that has been taken, or which may in the future be taken, in respect of conduct relating to existing listings that were made but not registered on the Federal Register of Legislation at the time of their making.
Portfolio	Foreign Affairs
Introduced	House of Representatives on 11 August 2021
Bill status	Finally passed both Houses

Retrospective validation¹

2.2 In [Scrutiny Digest 13 of 2021](#) the committee requested the minister's advice as to:

- whether any persons are likely to be adversely affected by the retrospective validation of listings made under subsection 15(1) or 15(3) of the *Charter of the United Nations Act 1945*, and the extent to which their interests are likely to be affected; and
- when and how the department became aware that it would be necessary to register the listings on the Federal Register of Legislation to ensure their enforceability.²

1 Schedule 1, item 6, proposed section 38A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 1-3.

Minister's response³

2.3 The minister advised:

Australia has an obligation under United Nations Security Council Resolution 1373 (2001) to prevent both assets being made available to terrorists, and the use of, or dealing with, assets owned by terrorists. This obligation is implemented in Australian law by listing persons and entities under section 15 of the *Charter of the United Nations Act 1945* (the Act) as subject to counter-terrorism financial sanctions (counter-terrorism listings).

Historically, counter-terrorism listings have been treated as administrative decisions that were not subject to registration requirements under the *Legislation Act 2003* (the Legislation Act). The Legislation Act requires legislative decisions be registered on the Federal Register of Legislation (FRL) to ensure their enforceability. Although the Department of Foreign Affairs and Trade was aware counter-terrorism listings had some legislative characteristics, it considered such listings were predominantly administrative in character, as, amongst other things, they concerned specific persons or entities listed pursuant to Australia's international obligations.

Australia's sanctions regimes are under constant review to ensure they are fit for purpose and in line with its international sanctions' obligations. Pursuant to this review process, on 26 May 2021, DFAT registered Australia's current counter-terrorism listings as legislative instruments on the FRL to put beyond doubt the enforceability of counter-terrorism listings, noting both their administrative and legislative characteristics. Following registration, the Government took steps to amend the Act to provide that future counter-terrorism listings be made as legislative instruments in order to protect counter-terrorism listings in the event a court were to determine they are legislative rather than administrative decisions. The Bill also includes transitional provisions to preserve the previous operation of the counter-terrorism listing framework.

Counter-terrorism listings under section 15 are valid if made in accordance with the requirements of the Act. The Bill does not seek to retrospectively validate counter-terrorism listings that were not made validly in accordance with the requirements of the Act at the time.

The Bill does not impose any new or different obligations retrospectively. The retrospectivity only applies in so far as the listings were not registered on the FRL, noting that they have always been publicly available (published in the Commonwealth Gazette and in the Consolidated List available on DFAT's website). It does not alter the sanctions scheme established by the

3 The minister responded to the committee's comments in a letter dated 2 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 15 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Act or its review processes. The Bill merely establishes a new process by which counter-terrorism listings are made and includes transitional arrangements to put beyond legal doubt any questions of the enforceability of listings previously made by gazette notice for the period that they were not registered on the FRL.

The Bill does not disadvantage persons (past, present, or future) who have been, or who may be, prosecuted under the Act. There are no current or pending prosecutions under the Act. The new section 38A proposed by the Bill will mean that three people who received suspended sentences for providing funds to a listed terrorist entity cannot successfully contest those convictions solely on the grounds that the counter-terrorism listing relevant to the conviction was published in the Commonwealth Gazette rather than being registered on the FRL. The Bill will also mean that if authorities were to become aware that a person committed a sanctions offence at a time before the relevant listing was registered on the FRL, they could still be held accountable for their actions.

The Bill protects the integrity of Australia's counter-terrorism sanctions regime. It will ensure that persons who fund terrorists continue to be held accountable for offences which are known and accessible. It will also ensure that Australia continues to comply with its international sanctions' obligations, notwithstanding a change in listing procedure.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that, while there are no current or pending prosecutions under the *Charter of the United Nations Act 1945* (the Act), the bill will mean that three people who received suspended sentences for providing funds to a listed terrorist entity will be unable to contest those convictions on the grounds that the counter-terrorism listing relevant to the conviction was published in the Commonwealth Gazette rather than being registered on the Federal Register of Legislation.

2.5 The committee reiterates the importance of the counter-terrorism financial sanctions regime and its concern about the significant delay in registering the listings made under subsection 15(1) or 15(3) of the Act. The committee notes the minister's advice that Australia's sanctions regimes are under constant review and that the listings were registered on the Federal Register of Legislation pursuant to this review process. While acknowledging this, the committee does not consider that the minister's response fully addresses the committee's question about when and how the department became aware that it would be necessary to address the registration issue, particularly noting that some listings were made up to 20 years ago.

2.6 In light of the committee's ongoing scrutiny concerns, the committee requests the minister's further advice as to when and how the department became

aware that it would be necessary to register the listings on the Federal Register of Legislation to ensure their enforceability.

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:

- Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021—Schedule 4 (amends and continues in existence the Aboriginals Benefit Account).

Senator Helen Polley
Chair

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

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).