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.

Australian Federal Integrity Commission Bill 2021

Australian Federal Integrity Commission Bill 2021 (No. 2)

Purpose	These bills seek to establish an Australian Federal Integrity Commission as an independent public sector anti-corruption commission for the Commonwealth.
Sponsor	Senator Rex Patrick Dr Helen Haines MP [No. 2 Bill]
Introduced	Senate on 20 October 2021 House of Representatives on 25 October 2021 [No. 2 Bill]

1.2 The committee commented on similar bills in *Scrutiny Digest 15 of 2018*. The committee reiterates a number of its previous scrutiny concerns in relation to these bills as set out below.

1.3 References below are to both the Australian Federal Integrity Commission Bill 2021 and the Australian Federal Integrity Commission Bill 2021 (No. 2), or to the explanatory materials to both bills, unless otherwise stated.

Fair hearing[1]

1.4 Both bills provide that a Federal Integrity Commissioner may conduct an investigation into whether a public official has engaged or may engage in corrupt conduct. Clause 66 provides that after completing an investigation the Federal Integrity Commissioner must prepare a report of the investigation. The report must set out the Federal Integrity Commissioner's findings, the evidence and other material on which those findings are based, any action that the Federal Integrity Commissioner has taken or proposes to take, and any recommendations that the Commissioner sees

1 Subclause 64(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

fit to make.[2] Clause 64 provides that the Federal Integrity Commissioner must not include in the report an opinion or finding that is critical of a Commonwealth agency or a person unless the Federal Integrity Commissioner has first given the head of the agency or the person an opportunity to be heard.

1.5 However, subclause 64(2) provides that a hearing is not required if the Federal Integrity Commissioner is satisfied that:

- a person may have committed a criminal offence, contravened a civil penalty provision, or engaged in conduct that could be subject to disciplinary proceedings or provide grounds for the termination of employment; and
- affording the person or the head of the agency the opportunity to be heard may compromise the effectiveness of either the investigation of a corruption issue or an action taken as a result of such an investigation.

1.6 In effect, subclause 64(2) attempts to exclude an obligation to give a person the right to be heard prior to the completion of a report. This is despite the fact that subclause 66(3) expressly provides that a report may recommend terminating a person's employment, taking action against a person with a view to having the person charged with an offence, and initiating disciplinary proceedings. This raises questions as to whether subclause 66(2) unduly trespasses on the right to a fair hearing. The committee notes that the explanatory memorandum provides no justification for limiting the right to a fair hearing. It merely sets out the operation and effect of the relevant provisions.[3]

1.7 The committee also notes that while clause 66 would allow the Federal Integrity Commissioner to exclude 'sensitive information' from a report, it would not require the Federal Integrity Commissioner to do so. Additionally, while sensitive information excluded from a report must be included in a supplementary report, it is only the primary report that must be tabled in Parliament.[4]

1.8 Given the capacity of findings and opinions mentioned in subclause 64(2) to adversely affect a person's reputation,[5] and the characterisation of the right to be heard as a fundamental common law right, the bill may, without further clarification, give rise to considerable interpretive difficulties in the courts. For example, it may be that a court could imply a right to be heard prior to the Minister tabling a report in Parliament in relation to any critical findings or opinions that had not been disclosed

2 Subclause 66(2).

3 Explanatory memorandum, pp. 20-21.

4 See clause 236 of the Australian Federal Integrity Commission Bill 2021 and clause 233 of the Australian Federal Integrity Commission Bill 2021 (no. 2).

5 See *Ainsworth v Criminal Justice Commission (Qld)* (1992) 175 CLR 564.

pursuant to subclause 64(2) and which was not excluded from the report as 'sensitive' information.

1.9 The committee also notes that, under paragraph 64(7)(c), a person appearing before the Federal Integrity Commissioner to make submissions in relation to an adverse finding or opinion may be represented by another person, but only with the Federal Integrity Commissioner's approval. This would appear to give the Federal Integrity Commissioner the power to refuse to allow a person to be represented—including by their lawyer. Given the nature of the rights and interests at stake and the potential complexity of the issues that may be raised, the committee considers that there may be circumstances in which a person's right to a fair hearing may be compromised if the Commissioner refuses to allow that person to be represented.

1.10 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of:

- **effectively excluding the right to a fair hearing for persons who, in the view of the Federal Integrity Commissioner, may have engaged in unlawful conduct, or conduct that could give rise to disciplinary proceedings or provide grounds for the termination of employment; and**
- **giving the Federal Integrity Commissioner the power to approve whether a person appearing before the Federal Integrity Commissioner to make a submission in relation to an adverse finding or opinion may be represented (rather than giving the person a right to be represented).**

Coercive powers[6]

1.11 Clause 76 of both bills seeks to provide that, for the purposes of investigating a corruption issue, the Federal Integrity Commissioner may, by notice in writing, require a person to give information, or produce documents or things, if the Federal Integrity Commissioner has reasonable grounds to suspect that the information, documents or things will be relevant to the investigation of a corruption issue. Clause 81 seeks to make if an offence to fail to comply with a notice, punishable by imprisonment for two years.

1.12 Clause 86 also seeks to provide that the Federal Integrity Commissioner may summon a person to attend a hearing at a time and place specified in the summons, and to give evidence and produce documents or things, if the Federal Integrity Commissioner has reasonable grounds to suspect that the evidence, documents or things will be relevant to the investigation of a corruption issue or the conduct of a

6 Clauses 76, 86, and 88. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

public inquiry. Clause 96 seeks to make it an offence to fail to attend a hearing, to answer a question or to produce a document or thing. These offences would be punishable by imprisonment for between 12 months and two years.

1.13 As set out below at [1.27] to [1.35], the bill also provides that a person is not excused from answering a question or producing a document when served with a notice or summoned to attend on the ground it may incriminate the person or expose them to a penalty. This thereby abrogates the common law privilege against self-incrimination.

1.14 Each bill further proposes to allow the Federal Integrity Commissioner to take action in circumstances where the Federal Integrity Commissioner considers that a person is in contempt of the Australian Federal Integrity Commission (the Commission) in relation to a hearing. Clause 97 provides that a person is in contempt of the Commission if (among other matters) the person fails to attend a hearing as required by a summons, refuses or fails to answer a question, or knowingly gives evidence that is false or misleading in a material particular. Clause 98 provides that, if the Federal Integrity Commissioner is satisfied that a person is in contempt of the Commission in relation to a hearing, the Federal Integrity Commissioner may apply either to the Federal Court or the Supreme Court of the State or Territory in which the hearing is held for the person to be dealt with in relation to the contempt.

1.15 Where a bill seeks to confer coercive powers on persons or bodies, the committee would expect the explanatory materials to provide a sound justification for the conferral of such powers, by reference to principles set out in the *Guide to Framing Commonwealth Offences*.[7] In this instance, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.[8]

1.16 The committee also notes that, under clause 88, a person appearing at a hearing, but not giving evidence, may be represented by a legal practitioner only if the Federal Integrity Commissioner considers it is necessary for that person to be involved in the hearing. Given the nature of the rights and interests at stake and the potential complexity of the issues that may be raised, the committee considers that there may be circumstances in which a person's right to a fair hearing may be compromised if the Federal Integrity Commissioner refuses to allow that person to be represented. The committee notes that the explanatory memorandum does not explain why this provision is considered necessary and appropriate, nor does it provide examples of the special circumstances which might justify legal representation.

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7 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Chapters 7-10.

8 Explanatory memorandum, pp. 19, 23 and 32.

1.17 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of conferring on the Federal Integrity Commissioner broad coercive powers to require persons to give information, answer questions, and produce documents and things.

Arrest and search warrants[9]

1.18 Clause 108 of the bills seeks to provide that an authorised officer may apply to a judge for a warrant to arrest a person, if the authorised officer believes on reasonable grounds that:

- the person has been ordered to deliver their passport to the Federal Integrity Commissioner, and is likely to leave Australia for the purposes of avoiding giving evidence at a hearing before the Federal Integrity Commissioner;
- the person has been served with a summons under clause 86, and has absconded, is likely to abscond, or is otherwise attempting, or is likely to attempt, to evade service of the summons; or
- the person has committed an offence under subclause 96(1) (which relates to failures to attend hearings, produce evidence or answer questions), or is likely to commit such an offence.

1.19 Clause 109 seeks to provide that, for the purposes of executing an arrest warrant, the authorised officer may (among other matters) break into and enter relevant premises. This power is subject to a number of limitations, including a prohibition on entering premises during night hours, a requirement to inform the person of the reasons for the arrest, and a prohibition on subjecting the arrestee to greater indignity than is reasonable and necessary in the circumstances.

1.20 Proposed Division 3 of Part 6 further provides for that an authorised officer may apply for a number of different kinds of search warrant. These include warrants to search premises and to conduct an ordinary search or a frisk search of a person.[10] Under such warrants, an authorised officer would be permitted to (among other matters) search premises, vehicles and vessels for evidential material, seize such things as are considered relevant to the investigation, and conduct search and frisk

9 Clauses 108 and 109; and proposed Division 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

10 Clause 116.

procedures.[11] These powers are subject to the limitation that a search warrant may not authorise a strip search or a search of a person's body cavities.[12]

1.21 The committee further notes that the *Guide to Framing Commonwealth Offences* indicates that any new powers to search persons require a strong justification.[13] While noting that there may be some circumstances in which the granting of new powers to search persons can be justified, the committee would expect an explanation as to why these powers are considered necessary and appropriate to be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no such explanation, merely restating the operation and effect of the relevant provisions.[14]

1.22 Clause 125 further provides that, in executing a search warrant, an authorised officer may obtain such assistance, and use such force against persons and things, that is necessary and reasonable in the circumstances. Where a person assisting an authorised officer is also an authorised officer or a police constable, that person would be permitted to use such force against persons and things as is reasonable and necessary in the circumstances. Otherwise, the person assisting would be permitted only to use such force against things (not persons).

1.23 The committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion in a bill of any use of force power for the execution of warrants should only be allowed where a need for such powers can be identified. In this regard, it states that a use of force power should be accompanied by an explanation and justification in the explanatory materials, as well as a discussion of proposed accompanying safeguards that the agency intends to implement.[15] In this instance, the explanatory memorandum states that:

> The Authorised Officer is given the discretion to use the necessary force needed which allows for the Authorised Officer to protect him or herself and others assisting in the execution of a warrant. The requirement of having only Authorised Officers or a constable taking part in searches and arrests is to ensure that these procedures are carried out by persons who have been provided with training and fulfilled the requirements to ensure that care, professionalism and diligence is present.[16]

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11 Clauses 120 and 121.

12 Clause 122.

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

14 Explanatory memorandum, pp. 43-44.

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

16 Explanatory memorandum, p. 46.

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

1.25 The committee further notes that the explanatory memorandum does not explain why it is considered necessary and appropriate for an authorised officer to obtain assistance, nor does it provide any examples of the persons who may be called on to assist or the circumstances in which assistance may be necessary. The committee also notes that neither bill appears to place any limits on the persons who may assist authorised officers in executing powers under a warrant, or impose any requirements as to those persons' qualifications or expertise.

1.26 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of:

- **allowing persons other than police officers to execute search warrants, which include powers to use force and to conduct personal searches, with no specific requirements as to those persons' qualifications or expertise; and**
- **allowing authorised officers to obtain assistance in the execution of search warrants, with no requirements that persons assisting have appropriate qualifications, experience or expertise.**

Privilege against self-incrimination[17]

1.27 As outlined above, clause 76 seeks to allow the Federal Integrity Commissioner to give a written notice to any person, requiring that person to give the Federal Integrity Commissioner such information, documents or things as are specified in the notice. Clause 86 seeks to allow the Federal Integrity Commissioner to summon a person to attend a hearing, to give evidence, and to produce such documents or things as are specified in the summons. Subclauses 83(1) and 105(1) provide that a person is not excused from complying with a notice or summons on the grounds that to do so would tend to incriminate that person or expose them to a penalty.

1.28 Subclauses 83(1) and 105(1) would therefore override the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material which may tend to incriminate them.[18]

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17 Subclauses 83(1) and 105(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

18 *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

1.29 The committee recognises that there may be certain circumstances in which the privilege against self-incrimination can be overridden. However, abrogating this privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the common law privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss of personal liberty, in light of any relevant information in the explanatory materials.

1.30 In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will also consider the extent to which the abrogation is limited by a 'use' or 'derivative use' immunity. A 'use' immunity generally provides that information or documents produced in response to a statutory requirement will not be admissible in evidence against the person that produced it. A 'derivative use' immunity generally provides that anything obtained as a direct or indirect consequence of the production of the information or documents will not be admissible in evidence against that person.

1.31 In this respect, the committee notes that 'use' immunities are provided in subclauses 83(3) and 105(4). Those subclauses provide that, where a person gives information, answers questions, or provides a document or a thing, pursuant to a notice under clause 76 or a summons under clause 86, the information, answers, documents and things are not admissible as evidence against that person. However, 'derivative use' immunities (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person) have not been included.

1.32 In addition, the committee notes that subclauses 83(3) and 105(4) set out a number of proceedings in which the 'use' immunity would not be available. These include proceedings for the confiscation of property, certain criminal proceedings and, where the person is a Commonwealth employee, disciplinary proceedings. The committee further notes that, for the 'use' immunity in subclause 105(4) to apply, the person would have to claim that giving the relevant answer, or producing the document or thing, might tend to incriminate the person or expose them to a penalty before doing so. This has the potential to mean that the 'use' immunity may become unavailable merely because the person has not had adequate legal advice prior to answering a question, or producing a document or thing, and was therefore unaware of the need to make a claim of self-incrimination.

1.33 The committee is also notes that subclauses 83(2) and 105(3) provide that the relevant 'use' immunities would not apply to the production of a document that is, or forms part of, a record of existing or past business.

1.34 The explanatory memorandum provides no explanation as to why derivative use immunities have not been provided, nor does explain why it is considered

necessary or appropriate to abrogate the privilege against self-incrimination. It merely restates the operation and effect of the relevant provisions.[19]

1.35 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination.

Legal professional privilege[20]

1.36 Clause 102 seeks to provide that a person must not refuse or fail to answer a question at a hearing on the ground that the answer would disclose a communication that is subject to legal professional privilege. Clause 103 similarly seeks to provide that a person must not refuse or fail to produce a document or thing at a hearing on the ground that the document or thing is subject to legal professional privilege. A person would commit an offence of strict liability if they refuse or fail to answer a question, or to produce a document or thing.[21]

1.37 The provisions identified above would appear to abrogate legal professional privilege. As recognised by the High Court,[22] 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 therefore considers that privilege should only be abrogated or modified in exceptional circumstances. Where a bill seeks to abrogate legal professional privilege, the committee would expect a sound justification for any such abrogation to be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no such justification—merely restating the operation and effect of the relevant provisions.[23]

1.38 Additionally, the committee considers that, where legal professional privilege is abrogated, 'use' and 'derivative use' immunities should ordinarily apply to documents or communications revealing the content of legal advice, in order to minimise harm to the administration of justice and to individual rights. As outlined above at [1.31], 'use' immunities are provided in relation to the information, answers to questions, documents and things given pursuant to a notice or a summons. However, the bill does not contain 'derivative use' immunities. The explanatory

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19 Explanatory memorandum, pp. 26 and 37.

20 Paragraph 83(4)(c), clauses 102 and 103, paragraph 105(5)(c). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

21 Clause 104. The offence would be punishable by imprisonment for 6 months or 10 penalty units.

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

23 Explanatory memorandum, p. 37.

memorandum provides no explanation as to why such immunities have not been included.

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

Evidentiary certificate constitutes prima facie evidence[24]

1.40 Clause 98 seeks provide that, if the Federal Integrity Commissioner is of the opinion that a person is in contempt of the Commission in relation to a hearing, the Federal Integrity Commissioner may apply either to the Federal Court or the Supreme Court of the State or Territory in which the hearing is held for the person to be dealt with in relation to the contempt.

1.41 Subclause 98(3) provides that the application must be accompanied by a certificate that states the grounds for making the application, and the evidence in support of the application. Subclause 99(3) provides that, in proceedings relating to the application, a certificate under subclause 98(3) is prima facie evidence of the matters specified in the certificate.

1.42 The committee notes that where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceeding. While a person still retains the right to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The use of evidentiary certificates therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common-law right to be presumed innocent until proven guilty. Consequently, the committee would expect a detailed justification for any proposed powers to issue or use evidentiary certificates to be included in the explanatory materials. In this instance, the explanatory memorandum provides no justification for allowing evidentiary certificates to be used in proceedings relating to contempt of the commission, merely restating the operation and effect of the relevant provisions.[25]

1.43 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states, in relation to criminal proceedings, that evidentiary certificates:

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24 Subclauses 98(3) and 99(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

25 Explanatory memorandum, p. 36.

> are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.[26]

1.44 The *Guide to Framing Commonwealth Offences* further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.[27]

1.45 In this instance, it appears that the matters that may be included in a certificate given in accordance with subclause 98(3) could cover the entirety of the Commissioner's evidence as to why a person should be held in contempt. Consequently, the committee considers it unlikely that a certificate would cover only formal or technical matters sufficiently removed from the relevant proceedings—such as might make its use appropriate.

1.46 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing that a certificate provided in accordance with subclause 98(3) is prima facie evidence of the matters specified in the certificate (noting that such a certificate may cover most if not all of the evidence provided by the Commission as to why a person should be held in contempt).

Reversal of evidential burden of proof[28]

1.47 A number of clauses in the bills seek to create offences, and a number of these include offence-specific defences, which reverse the evidential burden of proof.

1.48 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[29] 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

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26 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 54.

27 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 55.

28 Subclauses 80(2), 80(4), 81(2), 95(2), 95(4), 104(3), 104(5), 107(3) of both bills and subclauses 241(1), (2), (3) and (5) of the Australian Federal Integrity Commission Bill 2021 and subclauses 238(1), (2), (3) and (5) of the Australian Federal Integrity Commission Bill 2021 (No. 2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

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

1.49 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to raise evidence to positively prove the matter), the committee expects any reversal of the evidential burden of proof to be justified. In these instances, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.

1.50 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including a number of offence-specific defences (which reverse the evidential burden of proof).

Strict liability offence[30]

1.51 Subclause 104(1) would make it an offence for a person who has been served with a summons to attend a hearing or produce a document or thing to refuse or fail to answer a question or produce a document or thing in circumstances where subclause 102(2) or 103(2) (which provide for legal professional privilege for communications in relation to appearances before the Commissioner) do not apply. Subclause 104(2) would make this an offence of strict liability, subject to a penalty of imprisonment for up to 6 months or 10 penalty units.

1.52 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on person who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent.

1.53 As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[31] In this

30 Subclause 104(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

instance, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.[32]

1.54 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[33] In this instance, the bills propose applying strict liability to an offence that is subject to up to 6 months imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

1.55 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying strict liability to the offence at clause 104, particularly as it is subject to a custodial penalty.

Investigations and inquiries by Whistleblower Protection Commissioner[34]

1.56 Part 9 of each bill also seeks to provide for whistleblower protection and Division 3 of Part 10 seeks to provide for the appointment of a Whistleblower Protection Commissioner. Clause 181 provides that if the Whistleblower Protection Commissioner is investigating or conducting a public inquiry, Parts 5, 6 and 7 of the bills would apply to such an investigation or inquiry as if a reference to the Federal Integrity Commissioner were a reference to the Whistleblower Protection Commissioner and a reference to a corruption issue were a reference to a whistleblower protection issue.

1.57 As such, all of the committee's scrutiny concerns outlined above regarding the potential for the powers of the Federal Integrity Commissioner to unduly trespass on personal rights and liberties would apply equally to the powers of the Whistleblower Protection Commissioner.

1.58 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring all of the coercive investigation and inquiry powers outlined above on the Whistleblower Protection Commissioner.

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32 Explanatory memorandum, pp. 37-38.

33 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

34 Clause 181. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Immunity from civil liability[35]

1.59 Clause 277 of the Australian Federal Integrity Commission Bill 2021 and clause 274 of the Australian Federal Integrity Commission Bill 2021 (No. 2) seeks to confer immunity from civil liability on certain persons performing functions under or in relation to the bills. These include:

- staff members of the Commission, in relation to actions taken in good faith in the performance or purported performance, or exercise or purported exercise, of the staff member's functions, powers or duties;
- persons whom the Federal Integrity Commissioner has requested in writing to assist a staff member of the Commission, in relation to actions taken in good faith for the purpose of assisting the staff member; and
- persons producing information, evidence, documents or things to the Commission.

1.60 These immunities 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.

1.61 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, the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.62 The committee expects that, if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.[36]

1.63 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring an immunity from civil proceedings on a broad range of persons.

35 Subclause 277(1). In the Australian Federal Integrity Commission Bill 2021 (No. 2) the equivalent provision is subclause 274(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

36 Explanatory memorandum, p. 87.

Customs Amendment (Controlled Trials) Bill 2021

Purpose	This bill seeks to amend the *Customs Act 1901* to facilitate time-limited trials with approved entities in a controlled regulatory environment.
Portfolio	Home Affairs
Introduced	House of Representatives on 24 November 2021

Significant matters in delegated legislation[37]

1.64 The bill seeks to amend the *Customs Act 1901* to insert proposed Part XB to facilitate time-limited trials of trade and customs practices with approved entities in a controlled regulatory environment. Proposed section 179K provides that the Comptroller-General may, by legislative instrument, determine qualification criteria that entities must meet in order to participate in any controlled trial.

1.65 The committee's consistent scrutiny view is that significant matters, such as the qualification criteria for participation in controlled trials, should be included in the primary legislation unless a sound justification is provided for the use of delegated legislation. In this instance, the explanatory memorandum states:

> Such qualification criteria could be requirements similar to what is used in Part 2 of the Customs (Australian Trusted Trader Programme Rule) 2015.
>
> Examples of qualification criteria could be that an entity is able to pay all of its debts as they become liable, the entity satisfactorily complies with Customs-related laws, or that corporate entities have a registered ABN. This provision has effect of ensuring a degree of consistency and transparency in the expectations common for all trials.[38]

1.66 Noting the information provided in the explanatory memorandum, it is unclear to the committee why these matters could not be included on the face of the primary 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.

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

- **why it is considered necessary and appropriate to leave the qualification criteria for participation in controlled trials to delegated legislation; and**

37 Schedule 1, item 4, proposed section 179K. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

38 Explanatory memorandum, p. 12.

- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Electoral Legislation Amendment (Candidate Eligibility) Bill 2021

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918*, to simplify the Qualification Checklist and to clarify when a response to a question is mandatory.
Sponsor	Assistant Minister for Electoral Matters
Introduced	House of Representatives on 25 November 2021

Privacy[39]

1.68 The bill seeks to amend the *Commonwealth Electoral Act 1918* (Electoral Act) to clarify when a response to a question in the Qualification Checklist, which must be completed by all candidates seeking to nominate for a federal election, is mandatory or optional. The Qualification Checklist was introduced into the Electoral Act by the *Electoral Legislation Amendment (Modernisation and Other Measures) Act 2019* (the 2019 Act). The Qualification Checklist includes questions relating not only to the applicant seeking nomination, but also to the citizenship and birth places of the applicant's parents, grandparents (including biological or adoptive parents or grandparents) and former or current spouses or similar partners.[40]

1.69 The committee commented on the bill that became the 2019 Act in *Scrutiny Digest 15 of 2018* and *Scrutiny Digest 1 of 2019*. The committee raised scrutiny concerns in relation to that bill, noting that publishing the personal information of third parties on a public website without their consent has the potential to unduly trespass on personal rights and liberties, in particular the right to privacy. The committee continues to have these scrutiny concerns in relation to the amendments made by this bill, noting that the bill makes it mandatory for a candidate to provide this information.

1.70 The committee reiterates its previous scrutiny concerns and leaves to the Senate as a whole the appropriateness of requiring the publication on a public website of a potentially substantial amount of third-party personal information without the relevant person's consent.

39 Schedule 1, item 13, proposed Form DB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

40 Schedule 1, item 13.

Migration Amendment (Protecting Migrant Workers) Bill 2021

Purpose	This bill seeks to the *Migration Act 1958* to introduce new offences and related civil penalty provisions for employers, labour hire intermediaries and other persons in the employment chain who coerce or exert undue influence or undue pressure on a non-citizen to accept or agree to an arrangement in relation to work: • involving a breach of a work-related condition applying to the non-citizen; or • to satisfy a work-related visa requirement; or • to avoid an adverse effect on the non-citizen's immigration status.
Portfolio	Home Affairs
Introduced	House of Representatives on 24 November 2021

Procedural fairness—right to a fair hearing[41]

1.71 This bill seeks to amend the *Migration Act 1958* (the Act) to strengthen the legislative framework protecting non-citizen workers from unscrupulous practices in the workplace, including by declaring a person to be a 'prohibited employer'. Item 9 of Schedule 1 to the bill seeks to add proposed Subdivision E at the end of Division 12 of Part 2 of the Act to deal with prohibited employers. Proposed section 245AYG provides the minister with the power to declare a person to be a prohibited employer if they are subject to a specified migrant worker sanction. Once declared to be a prohibited employer additional non-citizens are prevented from working for that employer for a specified period,[42] certain information relating to the employer is required to be published online including the person's name, ABN and a summary of the migrant worker sanction applying to the person,[43] and the person is subject to increased

41 Schedule 1, item 9, proposed section 245AYK. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

42 Proposed subsection 245AYA(4).

43 Proposed section 245AYI.

reporting requirements once they are no longer a prohibited employer.[44] A prohibited employer may also be subject to civil penalties for certain actions.[45]

1.72 Proposed section 245AYK provides that proposed Subdivision E and sections 494A and 494D of the Act (which relate to the giving of documents), in so far as they relate to proposed Subdivision E, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

1.73 The committee notes that the natural justice hearing rule, which requires that a person be given an opportunity to present their case, is a fundamental common law principle. The committee also notes that the courts have consistently interpreted procedural fairness obligations flexibly based on specific circumstances and the statutory context. The committee considers that any attempt to abrogate or limit a person's fundamental right to natural justice should be thoroughly justified in a bill's explanatory memorandum, including an explanation as to why this level of flexibility would not adequately deal with situations where it would be impractical or inappropriate to grant a reasonable opportunity to be heard. The committee notes that proposed Subdivision E could operate to exclude aspects of the natural justice hearing rule, such as the requirement to disclose adverse information which is not part of the proposed reasons for a decision, in circumstances where compliance with the rule is necessary to assure fairness to affected persons.

1.74 In this instance, the explanatory memorandum merely states:

> The purpose of this amendment is to provide a clear legislative statement that the provisions in new Subdivision E are an exhaustive and comprehensive statement of the of the requirements of the natural justice hearing rule in relation to the matters they deal with.[46]

1.75 The committee notes that this explanation does not address why it is necessary to limit the natural justice hearing rule in relation to the matters set out in proposed Subdivision E, nor why the level of flexibility traditionally applied by the courts in relation to natural justice is not sufficient in this instance.

1.76 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to provide that proposed Subdivision E of Division 12 of Part 2 of the *Migration Act 1958* and sections 494A and 494D of that Act, in so far as they relate to proposed Subdivision E, are taken to be an exhaustive

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44 Proposed subsection 245AYA(5).

45 See, for example, proposed section 245AYH which provides that a person is subject to a civil penalty if the person is a prohibited employer who allows a non-citizen to begin work or has a material role in a decision to allow a non-citizen to work, where that non-citizen does not hold a visa or holds a visa other than a permanent visa.

46 Explanatory memorandum, p. 38.

statement of the requirements of the natural justice hearing rule in relation to the matters they deal with, including why the level of flexibility traditionally applied by the courts in relation to natural justice is not sufficient in this instance.

Migration Amendment (Strengthening the Character Test) Bill 2021

Purpose	This bill seeks to amend the *Migration Act 1958* to ensure that non-citizens who are convicted of certain serious offences, and pose a risk to the safety of the Australian community, do not pass the character test and may be appropriately considered for visa refusal or cancellation.
Portfolio	Home Affairs
Introduced	House of Representatives on 24 November 2021

1.77 The committee commented on a similar bill in *Scrutiny Digest 13 of 2018*, the committee reiterates its previous scrutiny concerns as set out below.

Broad discretionary power

Trespass on personal rights and liberties[47]

1.78 Section 501 of the *Migration Act 1958* (the Act) provides both compulsory and discretionary powers to the minister to cancel a visa issued to, or refuse to issue a visa to, a person who does not meet the 'character test'.[48] Subsection 501(6) of the Act sets out a range of circumstances under which a person will not be considered to pass the 'character test'. The bill seeks to add an additional element by providing that a person does not pass the character test if they have been convicted of a 'designated offence'.[49] The bill defines a designated offence as an offence against a law in force in Australia or a foreign country that satisfies two conditions. First, the offence must have one or more physical elements involving:

- violence against a person;
- non-consensual conduct of a sexual nature;
- breaching an order made by a court or tribunal for the personal protection of another person;
- using or possessing a weapon; or

47 Schedule 1, items 5 and 6. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

48 *Migration Act 1958*, subsections 501(1) to (3A).

49 Schedule 1, item 5, proposed paragraph 501(6)(aaa).

- aiding, abetting, counselling or procuring; inducing; conspiring; or being knowingly concerned in, or a party to, the commission of one of the above offences.[50]

1.79 Second, the offence must be punishable by imprisonment for two years or more, regardless of whether the person actually received that sentence.[51] The minister's power to refuse or cancel a visa with respect to a person who does not meet the character test by reason of being convicted of a designated offence would be discretionary.[52]

1.80 The Act currently enables a visa to be refused or cancelled where a person has failed the character test because they have a 'substantial criminal record',[53] which is defined as including any person who has been sentenced to a total term of imprisonment of 12 months or more.[54] The Act also enables the minister to exercise discretionary visa refusal and cancellation powers where a person is not of good character, having regard to their past and present criminal conduct and general conduct.[55]

1.81 The statement of compatibility explains that the proposed amendments are intended to ensure that the character test 'aligns directly with community expectations, that non-citizens who commit offences such as murder, assault, sexual assault or aggravated burglary will not be permitted to remain in the Australian community.'[56] It states that the practical effect of the amendments will be greater numbers of people being liable for consideration of refusal or cancellation of a visa as they would not meet, or would no longer meet, the relevant character requirements.[57] As such, the amendments are likely to result in more people being held in immigration detention, removed from Australia and potentially separated from their family.[58] This raises scrutiny concerns as to whether the measures proposed in the bill unduly trespass on personal rights and liberties.

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50 Proposed subparagraphs 501(7AA)(a)(i) to (viii).

51 Proposed paragraph 501(7AA)(b). If the offence is an offence against a law in force in a foreign country, in order to be a 'designated offence' the act or omission constituting the offence must constitute an offence against a law in force in the Australian Capital Territory (ACT) and be punishable by imprisonment for two years or more were it to have taken place in the ACT. See Schedule 1, item 6, proposed paragraph 501(7AA)(c).

52 *Migration Act 1958*, subsections 501(1) to (3).

53 *Migration Act 1958*, paragraph 501(6)(a).

54 *Migration Act 1958*, subsection 501(7).

55 *Migration Act 1958*, paragraph 501(6)(c).

56 Statement of compatibility, p. 13.

57 Statement of compatibility, p. 13.

58 Statement of compatibility, p. 14.

1.82 The committee notes that in providing a basis for cancelling or refusing a visa that is not based on the length of sentence a person has actually received, the proposed amendments would allow the minister the discretion to cancel or refuse to issue a visa to a person who has been convicted of a designated offence but who may have received a very short sentence or no sentence at all. For example, a person carrying pepper spray may be convicted of possession of a weapon,[59] and although the person may only be given a minor fine, this conviction would empower the minister to cancel their visa, leading to their detention and removal from Australia. As the power to cancel would be based simply on the fact of conviction, there is nothing in the legislation that would require the minister to consider the person's overall good character, their family or other connections to Australia or the length of their stay in Australia (noting that this could apply to permanent residents who have lived in Australia for many years).

1.83 The committee also notes that subsection 501(5) of the Act provides that neither the code of procedure for dealing with visa applications,[60] nor the rules of natural justice apply to decisions to refuse or cancel a visa made under subsections 501(3) and (3A). Under subsection 501(3) the minister has a discretionary power to cancel a visa if the minister reasonably suspects that a person does not pass the character test—including, under the proposed amendments, because the person has been convicted of a designated offence—and the minister is satisfied that cancellation is in the 'national interest'. As a result, the minister in acting under this power is not required to give the affected person an opportunity to present their case before making the decision.

1.84 In addition, while decisions made by a delegate of the minister to cancel or refuse a visa under section 501 are generally subject to merits review by the Administrative Appeals Tribunal (AAT), the minister has the power to overturn the AAT's decision if the minister is satisfied it is in the national interest to do so. Further, there is no right to merits review where the minister personally exercises a visa cancellation or refusal power under section 501 or a related power.[61]

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59 See, for example, section 5AA of the *Control of Weapons Act 1990* (Vic) and Schedule 3, item 21 of the Control of Weapons Regulations 2011, which makes it an offence, punishable by up to two years imprisonment, to possess, use or carry a prohibited weapon, including an article 'designed or adapted to emit or discharge an offensive, noxious or irritant liquid, powder, gas or chemical so as to cause disability, incapacity or harm to another person'. See also proposed subparagraph 501(7AA)(a)(iv) which states that using or possessing a weapon is a designated offence.

60 *Migration Act 1958*, Part 2, Division 3, Subdivision AB.

61 See paragraph 501A(1)(b) (allowing applications for AAT review to only be made in relation to decisions of the delegates of the minister) and subsections 501A(7), 501B(4) and 501BA(5) of the *Migration Act 1958*.

1.85 The committee notes that it has previously raised scrutiny concerns about the existing framework, noting that the broadly framed powers under section 501 are not, as a practical matter, constrained by law 'due to the breadth of discretion, the absence of procedural fairness obligations, the fact that merits review is unavailable, or a combination of these factors'.[62]

1.86 The committee notes that in light of the already broad discretionary powers available for the minister to refuse to issue or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill. The explanatory memorandum states that the new provisions, in stating that a designated offence must be one punishable by a period of two years imprisonment, sets an objective standard 'based on established criminal law and law enforcement processes in states and territories', ensuring discretionary decisions are based on objective standards of criminality and seriousness.[63] However, the committee notes that section 501,[64] already gives a power for the minister to cancel a visa if a person has been sentenced to a term of imprisonment for 12 months or more. Including a new power to cancel a visa based on conviction for an offence punishable by two years or more, does not take into account the individual circumstances of that conviction. As noted by the statement of compatibility, the amendments 'expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct'.[65] As such it leaves a broad discretion to the minister or their delegate, unconstrained by any legislative requirement to consider individual circumstances and without appropriate procedural safeguards.

1.87 The committee notes that section 501 of the *Migration Act 1958* already gives the minister a broad discretionary power to refuse or cancel a visa in the absence of procedural fairness obligations and where merits review is largely unavailable. The committee considers, in these circumstances, expanding powers to empower the minister to cancel a visa (which could lead to the detention and removal of a non-citizen), raises scrutiny concerns as to whether the measure unduly trespasses on rights and liberties.

1.88 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of amending the character test set out under the section 501 of the *Migration Act 1958*.

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62 See Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2016*, 16 March 2016, p. 306. See also Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, 19 November 2014, pp. 891-907.

63 Explanatory memorandum, p. 8.

64 See paragraph 501(6)(a) and subsection 501(7) of the *Migration Act 1958*.

65 Statement of compatibility, p. 14.

Religious Discrimination Bill 2021

Religious Discrimination (Consequential Amendments) Bill 2021

Purpose	The Religious Discrimination Bill 2021 seeks to introduce federal protections to prohibit discrimination on the basis of a person's religious belief or activity in a wide range of areas of public life, including in relation to employment, education, access to premises, goods, services and facilities, and accommodation. The Religious Discrimination (Consequential Amendments) Bill 2021 seeks to amend the *Australian Human Rights Commission Act 1986* and other existing federal legislation to ensure that discrimination on the basis of religious belief or activity under the Religious Discrimination Bill is treated in the same manner as discrimination under the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1986*.
Portfolio	Attorney-General
Introduced	House of Representatives on 24 November 2021

Significant matters in delegated legislation—publicly available policies[66]

1.89 Clause 7 of the Religious Discrimination Bill 2021 (the Religious Discrimination Bill) sets out the circumstances in which a religious body's conduct is not discrimination. Subclause 7(6) provides that if a religious educational institution engages in certain conduct in relation to employment, this must be in accordance with a publicly available policy. Subclause 7(7) provides that the minister may, by legislative instrument, determine requirements for the policy, including in relation to its availability.

1.90 Clause 9 provides circumstances in which the conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers is taken not to be discrimination under the bill. Subclause 9(3) provides that conduct is taken not to be discrimination in relation to employment and partnerships where that conduct is undertaken in good faith that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of the religion, and in accordance with a publicly available policy.

66 Subclauses 7(7), 9(7), 40(3) and 40(6) of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

Subclause 9(5) provides a similar exception where the person engages, in good faith, in the conduct to avoid injury to the religious susceptibilities of adherents of the person's religion.

1.91 Subclause 9(7) provides that the minister may, by legislative instrument, determine requirements for the policy, including in relation to its availability.

1.92 Clause 40 provides specific exceptions from the prohibition on the provision of accommodation set out in clause 27. Subclauses 40(2) and (5) provide that it is not unlawful for a religious camp or conference site to discriminate against another person on the ground of religious belief or activity in the provision of accommodation or other facilities by engaging in conduct in good faith that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of the religion, and in accordance with a publicly available policy. Subclause 40(5) provides a similar exception where the person engages, in good faith, in the conduct to avoid injury to the religious susceptibilities of adherents of the person's religion.

1.93 Subclauses 40(3) and (6) provide that the minister may, by legislative instrument, determine requirements for the policy, including in relation to its availability.

1.94 The committee's consistent scrutiny view is that significant matters, such as the requirements for policies relevant to the application of discrimination law, should be included in the primary legislation unless a sound justification is provided for the use of delegated legislation. In this instance, no explanation for the use of delegated legislation is provided in the explanatory memorandum in relation to subclauses 7(7), 9(7), 40(3) and (6), other than noting that including requirements in delegated legislation could provide further clarity for religious bodies in relation to the nature and scope of the policy requirement.[67] The explanatory memorandum also notes the importance of the publicly available policy as an important safeguard noting that it will 'increase certainty and transparency'.[68]

1.95 Noting the importance of the policy as a safeguard, it is unclear to the committee why the requirements for the policy, including how it is to be made publicly available, are not included on the face of the primary legislation. The committee considers that at least high-level guidance could be provided on the face of the primary legislation in relation to this matter. The committee notes that delegated legislation, made by the executive, is not subject to the same level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.96 In light of the above, the committee requests the Attorney-General's advice as to:

67 Explanatory memorandum, p. 49.

68 See, for example, explanatory memorandum, p. 93.

- **why the requirements for certain policies relevant to the application of discrimination law, including how the policies are to be made publicly available, have been left to delegated legislation; and**
- **whether the bill could be amended to include at least high-level guidance in relation to this matter on the face of the primary legislation.**

Significant matters in delegated legislation—overriding state or territory laws in relation to employment by religious educational institutions[69]

1.97 Clause 11 provides that a religious body that is an educational institution does not contravene a prescribed state or territory law if, when engaging in conduct relating to employment, the body gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity and the conduct is in accordance with a publicly available policy setting out the matters at paragraph 11(1)(b). Subclauses 11(2) and 11(3) provide that the regulations may prescribe a law of a state or territory for the purposes of clause 11.

1.98 As noted above, the committee's consistent scrutiny view is that significant matters, such as key details relating to the application of discrimination law, including the overriding of relevant state or territory laws, should be included in primary legislation unless a sound justification has been provided for the use of delegated legislation. In this instance the explanatory memorandum does not justify why it is necessary to include these significant matters within delegated legislation, nor which state or territory laws it is intended will, or may, be prescribed within the regulations. Rather, the explanatory memorandum merely re-states the effect of the provision.[70]

1.99 The committee requests the Attorney-General's advice as to:

- **why the power to prescribe certain state and territory laws under clause 11 is left to delegated legislation; and**
- **which state or territory laws, if any, are currently intended to be prescribed within regulations made under subclause 11(3).**

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69 Clause 11 of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

70 Explanatory memorandum, pp. 52-53.

Significant matters in delegated legislation—general exception for acts done in compliance with certain Commonwealth, state and territory laws[71]

1.100 Clause 37 provides a general exception from the prohibition on discrimination for acts done in compliance with certain Commonwealth, state and territory legislation. Subclause 37(1) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if the conduct constituting the discrimination is in direct compliance with a provision of a Commonwealth law, or instrument, which is not prescribed by the regulations.

1.101 Subclause 37(3) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if the relevant conduct was in direct compliance with a provision of a state or territory law which is not prescribed by the regulations.

1.102 The committee's consistent scrutiny view is that significant matters, such as key matters relating to general exceptions to the religious discrimination framework, should be included in primary legislation unless a sound justification has been provided for the use of delegated legislation. In relation to subclause 37(3), the explanatory memorandum states:

> This provision allows the Commonwealth to prescribe state or territory laws which would not be protected by this exception. This is a safeguard in the event that a state or territory passed a law which authorised or required discriminatory conduct. For example, if a state or territory passed a law which provided that all people of a particular religious belief or activity could not be educated in public schools, the Commonwealth could prescribe this legislation in the regulations and any conduct done in direct compliance with that legislation would be excluded from this exception and would therefore be unlawful.[72]

1.103 While the committee acknowledges this explanation, the committee considers that further guidance in relation to the circumstances in which laws may be prescribed under subclauses 37(1) and 37(3) should be included on the face of the bill. The committee notes that delegated legislation, made by the executive, is not subject to the same level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.104 The committee requests the Attorney-General's advice as to:

71 Clause 37 of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

72 Explanatory memorandum, p. 85.

- **why the power to exclude certain Commonwealth, state and territory laws from being exempt from the provisions of the bill is left to delegated legislation; and**
- **whether the bill could be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.**

Broad discretionary power[73]

1.105 Clause 44 of the Religious Discrimination Bill provides that the Commission may, by notifiable instrument, exempt a person or body from their obligations under Division 2 or 3 of the bill. Paragraph 44(2)(c) provides that this exemption must be granted for a specified period which must not exceed 5 years. Clause 47 of the bill provides that the Commission or the Minister may, by notifiable instrument, vary or revoke an exemption granted under clause 44.

1.106 The committee notes that clauses 44 and 47 would provide the Commission and the Minister with a broad power to grant, vary or revoke an exemption to a person or body. The committee notes that insufficiently defined administrative powers, such as those granted under clauses 44 and 47, 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 expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum and that guidance in relation to the exercise of the power should be included within the primary legislation. In this instance, the explanatory memorandum does not provide any explanation for the broad discretionary power and no guidance is included on the face of the bill.

1.107 From a scrutiny perspective, the committee is concerned that without guidance on the face of the bill as to how the exemption power may be exercised it would be possible for broad-ranging or long-standing exemptions to be made by the minister which would undermine the religious discrimination framework enshrined in primary legislation passed by the Parliament.

1.108 In light of the above, the committee requests the Attorney-General's advice as to:

- **why it is considered necessary and appropriate to provide the Commission with a broad power to grant, vary or revoke exemptions to Divisions 2 or 3 of the bill under clauses 44 and 47;**

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73 Clauses 44 and 47 of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

- **why it is considered necessary and appropriate to provide the Minister with a broad power to vary or revoke exemptions to Divisions 2 or 3 of the bill under clause 47; and**
- **whether the bill can be amended to include guidance on the exercise of the power on the face of the primary legislation, noting the potential for a broad, unconstrained exemption power to undermine the religious discrimination framework.**

Broad delegation of administrative power[74]

1.109 Subclause 69(1) of the Religious Discrimination Bill provides that the Commission may, in writing, delegate all or any of its functions or powers to the Commissioner, a member of the staff of the Commission or any other person or body of persons. Subclause 69(2) provides that the Religious Discrimination Commissioner may delegate all or any of the Commissioner's functions or powers to an approved member of the staff of the Commission or any other person or body of persons approved by the Commission.

1.110 In addition, item 4 of Schedule 1 to the Religious Discrimination (Consequential Amendments) Bill 2021 (the Consequential Amendments Bill) seeks to insert proposed paragraph 8(1)(h) into the *Australian Human Rights Commission Act 1986* (the AHRC Act). Proposed paragraph 8(1)(h) would provide that Religious Discrimination Commissioner is a member of the Australian Human Rights Commission. Under existing section 19 of the AHRC Act a member of the Australian Human Rights Commission may delegate their functions or powers conferred under that Act to another member of the Commission, a staff member or any other person or body.

1.111 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. The explanatory memorandum to the Consequential Amendments Bill provides no justification for the broad

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74 Subclause 69(1), and 69(2) of the Religious Discrimination Bill 2021; Schedule 1, item 4, proposed paragraph 8(1)(h) of the Religious Discrimination (Consequential Amendments) Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

delegation of administrative powers conferred by item 4 of Schedule 1. In relation to clause 69 of the Religious Discrimination Bill, the explanatory memorandum states:

> This broad power of delegation is necessary to enable the Commission to carry out the wide range of functions conferred on it by this Bill. This broad power also recognises that in certain circumstances, the Commission may consider it necessary to delegate to a person or body external to the Commission, such as a barrister, certain functions, such as in relation to the grant of exemptions or the preparation of reports, where there may be a conflict of interest with the Commission. This power is consistent with delegation powers in existing federal anti-discrimination legislation and in the AHRC Act.[75]

1.112 While noting this explanation, the committee has generally not accepted consistency with existing legislation to be a sufficient justification for allowing a broad delegation of administrative powers to a large class of persons. From a scrutiny perspective, the committee continues to have concerns given the breadth of the power conferred by clause 69 of the Religious Discrimination Bill and existing section 19 of the AHRC Act to confer functions or powers on *any* staff member or other person or body of persons.

1.113 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the powers and functions of the Commission or the Commissioner to be delegated to any staff member of the Commission or to any other person or body of persons.

Immunity from civil liability[76]

1.114 Subclause 72(2) of the Religious Discrimination Bill provides that the Commission, the Commissioner, or another member of the Commission is not liable to an action or other proceeding for damages in relation to the performance or exercise, in good faith, of their functions or powers conferred by the bill. In addition, subclauses 72(3) and (4) provide that a person is immune to an action, suit or proceeding in respect of loss, damage or injury of any kind suffered by another person in relation to the making of a submission or the giving of a document, information or evidence to the Commission by reason only that the submission was made, or the document, information or evidence was given.

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75 Explanatory memorandum, pp. 108-109.

76 Subclause 72(2) of the Religious Discrimination Bill 2021; Schedule 1, item 4, proposed paragraph 8(1)(h) of the Religious Discrimination (Consequential Amendments) Bill 2021. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.115 In addition, as noted above, item 4 of Schedule 1 to the Consequential Amendments Bill seeks to insert proposed paragraph 8(1)(h) into the AHRC Act. Proposed paragraph 8(1)(h) would provide that Religious Discrimination Commissioner is a member of the Australian Human Rights Commission. Under existing section 48 of the AHRC Act a member of the Australian Human Rights Commission, or a person acting on their behalf, is protected from civil actions related to the performance or exercise of their functions or powers conferred under that Act that are done in good faith.

1.116 Clause 72 of the Religious Discrimination Bill and existing section 48 of the AHRC Act 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 personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.117 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum to both bills provides no explanation for this provision, merely restating the terms of the provision.

1.118 The committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to provide the Commission, the Commissioner, or another member of the Commission with civil immunity under clause 72 of the Religious Discrimination Bill 2021 and the Commissioner, or a person acting on their behalf, with civil immunity under section 48 of the *Australian Human Rights Commission Act 1986* so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

Reversal of the evidential burden of proof[77]

1.119 Subclause 74(1) of the Religious Discrimination Bill makes it an offence for a person who is, or has been, an entrusted person to disclose protected information acquired as an entrusted person to another person. The offence carries a maximum penalty of 2 years imprisonment. Subclause 74(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the conduct is authorised by a law of the Commonwealth, state or territory; or if the conduct is

77 Subclause 74(2) of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

engaged in during the performance of a function under or in connection with the bill, in the exercise of a power conferred on the Commission or the Commissioner by the bill, or in accordance with an arrangement in force under section 16 of the AHRC Act. A defendant bears an evidential burden in relation to these defences.

1.120 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[78] 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.

1.121 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.

1.122 The committee notes that no explanation has been provided in the explanatory memorandum regarding why is appropriate to reverse the evidential burden of proof in relation to the matters in subclause 74(2).

1.123 **As the explanatory materials do not address this issue, the committee requests the Attorney-General's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.**[79]

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

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

Bills with no committee comment

1.124 The committee has no comment in relation to the following bills which were introduced into the Parliament between 22 – 25 November 2021:

- Autonomous Sanctions Amendment (Thematic Sanctions) Bill 2021
- Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2021 (No. 2)
- Electoral Legislation Amendment (Annual Disclosure Equality) Bill 2021
- Fair Work Amendment (Same Job, Same Pay) Bill 2021
- Health Insurance Legislation Amendment (Transparent Patient Outcomes) Bill 2021
- Human Rights Legislation Amendment Bill 2021

Commentary on amendments and explanatory materials

Social Security Legislation Amendment (Remote Engagement Program) Bill 2021

1.125 On 22 November 2021, Senator Seselja tabled an addendum to the explanatory memorandum relating to the bill.

1.126 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.[80]

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

- Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021[81]
- Electoral Legislation Amendment (Political Campaigners) Bill 2021 [Finance][82]
- Independent National Security Legislation Monitor Amendment Bill 2021[83]
- Security Legislation Amendment (Critical Infrastructure) Bill 2021[84]

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80 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021*, pp. 104 - 107.

81 On 22 November 2021, Senator Seselja tabled a revised explanatory memorandum relating to the bill.

82 On 22 November 2021, the Assistant Minister to the Minister for Industry, Energy and Emissions Reduction (Mr T. R. Wilson) presented a supplementary explanatory memorandum to the bill and moved one amendment. On 24 November 2021, Senator Duniam tabled a revised explanatory memorandum relating to the bill.

83 On 23 November 2021, the Assistant Minister to the Attorney-General (Senator Stoker) tabled a supplementary explanatory memorandum relating to the government amendments to be moved to the bill. On 24 November 2021, Senator Patrick and all Australian Greens senators agreed to 7 Government amendments to the bill.

84 On 22 November 2021, the Minister for Families and Social Services (Senator Ruston) tabled a correction to the revised explanatory memorandum relating to the bill.

Chapter 2

Commentary on ministerial responses

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

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/Sponsor	Finance
Introduced	House of Representatives on 11 May 2021
Bill status	Act

Parliamentary scrutiny—measures marked 'not for publication'[1]

2.2 The committee initially scrutinised this bill in *Scrutiny Digest 8 of 2021*.[2] The committee considered the minister's first response in *Scrutiny Digest 13 of 2021* and requested the minister's advice.[3] The committee considered the minister's second response in *Scrutiny Digest 16 of 2021* and requested the minister's further advice as to whether future Department of Finance guides on preparing portfolio budget statements can include guidance that:

- as a default, the full amount of funding allocated to each Budget measure should be published within the statements;
- any decision not to publish the total amount for a Budget measure must be weighed against the significance of abrogating Parliament's fundamental

1 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).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 11-12.

3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 21-23.

scrutiny role over the appropriation of money from the Consolidated Revenue Fund; and

- where a measure is marked as NFP, at least a high-level explanation should be included within the portfolio budget statements for why this is appropriate.

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

- why it is not possible to provide at least a high-level indication of the amount of funding allocated to an NFP measure; and
- the rationale for not publishing the full amount of funding in relation to the Rum Jungle Rehabilitation project or the Independent Review into Commonwealth Parliamentary Workplaces.

Minister's response[4]

2.4 The minister advised:

The committee therefore requests the minister's advice as to whether future Department of Finance guides on preparing portfolio budget statements can include guidance that:

- *as a default, the full amount of funding allocated to each Budget measure should be published within the statements;*
- *any decision not to publish the total amount for a Budget measure must be weighed against the significance of abrogating Parliament's fundamental scrutiny role over the appropriation of money from the Consolidated Revenue Fund; and*
- *where a measure is marked as 'nfp', at least a high-level explanation should be included within the Portfolio Budget Statements (PBS) for why this is appropriate.*

The Department of Finance will update its guidance to entities on the preparation of the PBS to reflect the Committee's comments.

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

- *why it is not possible to provide at least a high-level indication of the amount of funding allocated to a 'nfp' measure; and*
- *the rationale for not publishing the full amount of funding in relation to the Rum Jungle Rehabilitation project or the Independent Review into Commonwealth Parliamentary Workplaces.*

This general issue has been addressed twice already by the Minister for Finance in correspondence on 3 August 2021 and 9 September 2021.

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4 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> Identifying an indicative amount in relation to measures marked 'nfp' would risk potentially misrepresenting the amount of funding that the Government is prepared to spend or receive. This could unduly influence potential suppliers when responding to a tender request, diminishing the capacity of the Commonwealth to achieve a value for money outcome.
>
> As an example, if the Government disclosed an amount greater than what it was prepared to pay, there is a risk that tenderers might increase their bids accordingly. Where these responses exceeded available funding, the Government would be forced to choose between diverting funding from other priorities or discontinuing the tender process, wasting its own resources and those of tenderers. This would be an unsatisfactory outcome.
>
> Alternatively, if the Government disclosed an amount less than what it was prepared to fund, there is a likelihood that tenderers might not bid due to the project being considered uneconomical or the expectations of the Commonwealth being considered unrealistic.
>
> Funding for the Rum Jungle Rehabilitation project and the Independent Review into Commonwealth Parliamentary Workplaces was disclosed as 'nfp' due to commercial sensitivities associated with these projects.
>
> Further to the questions, the committee may note that while their report identifies the term 'nfp' appearing 229 times in the 2021-22 Budget Paper 2, those entries relate to only 18 measures in that Budget classified in this way. A word count is not a useful indicator, because Budget Paper 2 uses that abbreviation up to 11 times for each measure (every measure has its own narrative description plus a financial table covering the current financial year and the forward estimate years and the same data entries are repeated in a summary table). Some measures also are listed against more than one agency, where there are shared administrative responsibilities. It remains the case that nfp entries are only used for a very small number of Budget measures and that will continue to be the case.

Committee comment

2.5 The committee thanks the minister for this response. The committee welcomes the minister's advice that the Department of Finance will update its guidance to entities on the preparation of the portfolio budget statements (PBS) to reflect the committee's comments.

2.6 The minister also advised that identifying an indicative amount in relation to measures marked not for publication (NFP) was not appropriate as doing so could potentially misrepresent the amount of funding that the government is prepared to spend or receive. The minister advised that this could unduly influence potential suppliers when responding to a tender request, diminishing the capacity of the Commonwealth to achieve a value for money outcome. To this end, the minister advised that, for example, providing a high-level indication of the amount of funding allocated to a measure could encourage tenderers to increase their bids, thereby forcing the government to choose between diverting funding from other priorities or

discontinuing the tender process, wasting its own resources and those of tenderers. The minister advised that, alternatively, if the government disclosed an amount less than what it was prepared to fund, there is a likelihood that tenderers might not bid due to the project being considered uneconomical or the expectations of the Commonwealth being considered unrealistic.

2.7 The minister also advised that funding for the Rum Jungle Rehabilitation project and the Independent Review into Commonwealth Parliamentary Workplaces was disclosed as NFP due to commercial sensitivities associated with these projects.

2.8 Finally, the minister advised that while NFP appears 229 times in the 2021-22 Budget Paper No. 2, those entries relate to only 18 measures which are classified as not for publication. The minister advised that a word count is not a useful indicator, because Budget Paper No. 2 uses the abbreviation NFP up to 11 times for each measure and measures can be listed against more than one agency where administrative responsibilities are shared. The minister advised that NFP entries are only used for a very small number of Budget measures and that this will continue to be the case into the future.

2.9 While acknowledging this advice, the committee reiterates its concerns that there has been a significant upwards trend in the number of NFP measures being included in Budget Paper No. 2 and the PBS. An examination of either the number of references to NFP made within the Budget papers or to the number of individual measures within each Budget makes this clear. For example, the minister noted that 18 individual measures within Budget Paper No. 2 for the 2021-22 Budget are marked as NFP. However, there appear to be 20 individual measures within Budget Paper No. 2 for the 2021-22 Budget for which at least some of the total funding amount over the forward estimates is classified as not for publication.[5] In any event, by contrast, there were a total of 21 individual measures marked as NFP within the six Budget Paper No. 2 documents between the 2002-03 and 2007-08 budgets. In many cases, Budget

5 The following is a complete list of every measure for which at least some of the total funding amount is listed as 'not for publication' in Budget Paper No. 2 for the 2021-22 Budget: A Roadmap for Respect — Respect@Work response implementation; Adult Migrant English Program — new delivery model; Cashless Debit Card — Jobs Fund and Income Management extension; Child Migrant Litigation Claims — contribution; COVID-19 Response Package — aviation and tourism support — continued; COVID-19 Response Package — vaccine purchases and rollout; COVID-19 Vaccine Manufacturing Capabilities; Decommissioning Costs — Laminaria-Corallina oil fields and associated infrastructure; Enhanced Trade and Strategic Capability; Garden Point Mission — settlement of claims; GovERP — Common Corporate Australian Public Service System; Global Service Centre — continuation; Improving Access to Medicines — Pharmaceutical Benefits Scheme new and amended Listings; Murray-Darling Basin — managing water resources; National Redress Scheme — further support; Oil Stocks and Refining Capacity in Australia; Parliamentary Staff and Parliamentarians — Independent Review into Commonwealth Parliamentary Workplaces and additional support measures; Progressing the Davis Aerodrome Project; Rum Jungle Rehabilitation Project; SME Recovery Loan Scheme.

documents from this earlier period contained only a single measure marked as NFP while recent Budget documents have contained a significantly higher number.

2.10 The committee reiterates its comments that the mere existence of a commercial element in relation to a Budget measure is likely not sufficient, of itself, as a justification for not publishing any of the funding amount for that measure. The lack of detailed explanation makes it difficult for the Parliament and others to interrogate the rationale behind the classification of a measure as NFP. The committee considers that high-level explanations as to why a measure may be marked as NFP, beyond simply stating that commercial elements apply, could be included within the Budget documents without compromising commercial sensitivities.

2.11 The committee also notes that it remains unclear why it is not appropriate to publish a high-level indication of the amount of funding set aside for the Rum Jungle Rehabilitation project and the Independent Review into Commonwealth Parliamentary Workplaces. While acknowledging the minister's advice in relation to this matter, the committee considers that it would be possible to introduce broad categories indicating at a high level how much funding is being allocated to a NFP measure without compromising the tendering process. Broad categories indicating funding ceilings that apply generally to the Budget papers as a whole and with disclaimers attached explaining the meaning behind each given figure would not compromise the tendering process but would provide some level of scrutiny to the Parliament over the amounts of appropriation that Parliament is being asked to authorise. In addition, these disclaimers could be communicated directly to tenderers during the tendering process.

2.12 The committee welcomes the minister's undertaking to update future guidance to entities on the preparation of the portfolio budget statements to reflect the committee's scrutiny concerns as outlined at paragraph 2.50 of *Scrutiny Digest 16 of 2021*. Specifically, that future Department of Finance guides on preparing portfolio budget statements include guidance that:

- **as a default, the full amount of funding allocated to each Budget measure should be published within the statements;**
- **any decision not to publish the total amount for a Budget measure must be weighed against the significance of abrogating Parliament's fundamental scrutiny role over the appropriation of money from the Consolidated Revenue Fund; and**
- **where a measure is marked as NFP, at least a high-level explanation should be included within the portfolio budget statements for why this is appropriate.**

2.13 The committee will continue to consider this important matter in its scrutiny of future Appropriation bills.

2.14 In relation to these particular bills, in light of the fact that both bills have already passed both Houses of the Parliament the committee makes no further comment on this matter.

Charter of the United Nations Amendment Bill 2021

Purpose	This bill seeks to amend the *Charter of the United Nations Act 1945* 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 will also confirm the validity of action that has been taken, or which may in the future need to 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/Sponsor	Foreign Affairs
Introduced	House of Representatives on 11 August 2021
Bill status	Received the Royal Assent on 13 September 2021

Retrospective validation[6]

2.15 The committee initially scrutinised this bill in *Scrutiny Digest 13 of 2021* and requested the minister's advice.[7] The committee considered the minister's response in *Scrutiny Digest 15 of 2021* and requested 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.[8]

Minister's response[9]

2.16 The minister advised:

> As advised in my letter of 2 September 2021, the Department of Foreign Affairs and Trade (the Department) keeps Australia's sanctions regimes under review to ensure they are fit for purpose. As part of this review process, the Department sought advice on the legislative status of CT listings, noting that such listings have both administrative and legislative characteristics.

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

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

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 30-33.

9 The minister responded to the committee's comments in a letter dated 19 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> Following receipt of advice on 17 March 2021, the Department took action to amend COTUNA to put beyond doubt the enforceability of CT listings. The amendments to COTUNA, which provide that CT listings are to be made by legislative instrument, align with the process by which listings are made under the Autonomous Sanctions Regulations 2011.
>
> The amendments do not substantively change the operation of Australia's UN counter-terrorism sanctions framework, nor create any new rights or obligations. Rather, they provide that CT listings, once made, will be registered on the Federal Register of Legislation as legislative instruments, rather than published as Commonwealth Gazette Notices. This change is designed to better reflect the mixed character of these listings as both administrative and legislative in nature. It was not the result of any question as to the legality or validity of Australia's counter-terrorism listings, now or previously.
>
> It is a widely accepted principle that the law be clear, known and enforced, and that all persons are subject to and accountable to the law. The transitional measures incorporated into COTUNA ensure that past enforcement action cannot be challenged solely on the grounds that listings were not registered on the Federal Register of Legislation. This protects the integrity and efficacy of Australia's UN counter-terrorism sanctions framework by putting beyond doubt the enforceability of validly made listings that have always been readily accessible to the public.

Committee comment

2.17 The committee thanks the minister for this response. The committee notes the minister's advice that, following a review into whether Australia's sanctions regimes were fit for purpose, the department sought advice into the legislative status of the counter-terrorism financial sanctions regime listings. Subsequent to receiving this advice on 17 March 2021, the department took action to ensure the listings were registered on the Federal Register of Legislation.

2.18 The committee also notes the minister's advice that the retrospective validation of the listings does not substantively change the operation of Australia's counter-terrorism sanctions framework, nor does the bill create any new rights or obligations. The minister advised that, rather, the bill is designed to better reflect the mixed character of the listings as both administrative and legislative in nature. The minister further advised that amendments made by the bill are not the result of any question as to the legality or validity of Australia's counter-terrorism listings. Instead, the minister advised that the bill is intended to put beyond doubt the enforceability of validly made listings that have always been readily accessible to the public.

2.19 It is unclear to the committee why the minister has advised that no rights or obligations have been affected by the retrospective validation of the listings when the minister's previous advice acknowledged that, as a result of amendments introduced by the bill, three persons will be unable to contest criminal convictions on the grounds

that the listing relevant to their conviction was not registered. The committee expects the explanatory memorandum to bills which retrospectively alter the law to explain whether any individual rights may, or will be, affected and to justify the retrospective application of the bill in light of this actual or potential impact on individual rights. The committee notes that it would have been helpful had the explanatory memorandum to the bill included the information provided by the minister and then justified the retrospective effect of the bill in light of that additional information. In this regard, the committee notes that the retrospective effect of a bill may be justified in light of, for example, the significant regulatory effect of a law on matters of national security.

2.20 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.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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

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