

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

General information

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

Chapter 1

Initial scrutiny

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

Aged Care Amendment (Implementing Care Reform) Bill 2022

Purpose	This bill seeks to amend the <i>Aged Care Act 1997</i> to implement a series of measures intended to enable meaningful, practical improvements to the delivery of aged care services, to improve the means for care recipients and their families to assess the relative quality of service delivery by care providers and at individual care facilities, and to provide greater oversight and understanding of what funds are being used for.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 27 July 2022

Significant matters in delegated legislation

Broad discretionary power¹

1.2 Item 2 of Schedule 1 to the bill seeks to insert proposed subsection 54-1A(2) into the *Aged Care Act 1997* (Aged Care Act) to require an approved provider to ensure that at least one registered nurse is on site, and on duty, at all times at a residential facility. This new requirement would apply to all approved providers who are providing residential care,² or flexible care,³ at a residential facility.

1.3 The bill provides that the Quality of Care Principles (the Principles) may set out several key details relating to this requirement. The Principles are a legislative instrument made by the Minister responsible for administering the Aged Care Act under section 96-1 of that Act. Proposed subsection 54-1A(3) of the bill enables the Principles to provide for the granting of exemptions to the new requirement in proposed subsection 54-1A(2). Proposed subsection 54-1A(4) further states that the

1 Schedule 1, item 2, proposed subsections 54-1A(3) and (4). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii) and (iv).

2 Defined by 41-3 of the Aged Care Act.

3 As specified in the Quality of Care Principles.

Principles may, among other things, set out the circumstances in which an exemption may be granted, the conditions that may apply to an exemption and the requirements relating to exemption applications. However, the bill does not set out any further criteria limiting this broad instrument making power, nor does the bill include any guidance as to how the power may be exercised.

1.4 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Broad powers allowing exemptions to be granted to significant regulatory requirements are one such matter. In this instance, the explanatory memorandum provides the following justification for the use of delegated legislation:

The inclusion of an exemption from the registered nurse responsibility is consistent with the Recommendation 86 of the Royal Commission. The Royal Commission recommended that approved providers should be able to apply for an exemption in certain circumstances, including for residential care facilities that are co-located with a health service where registered and enrolled nurses are present, and for facilities in regional, rural and remote areas where the provider has been unable to recruit sufficient numbers of staff with the requisite skills.⁴

1.5 The committee acknowledges the advice in the explanatory statement about the need for exemptions to the new requirement. However, the committee is concerned about the use of delegated legislation to provide for such exemptions, particularly noting the limited guidance in the bill about how the exemptions framework will operate. As drafted, it appears that the minister will have a broad discretionary power to determine, via delegated legislation, when the requirements relating to registered nurses in residential facilities would no longer apply. In this regard, the committee notes that delegated legislation is not subject to the same level of parliamentary scrutiny as amendments to primary legislation.

1.6 While the committee welcomes the inclusion of information within the explanatory memorandum setting out the possible circumstances in which an exemption may be granted, it considers that it would have been more appropriate to include this detail within the bill itself. At a minimum, the committee considers that it would be beneficial if the bill included an inclusive list of criteria specifying circumstances in which an exemption may be granted and general guidance in relation to the conditions which may apply to an exemption.⁵ For example, the bill could

4 Explanatory memorandum, p. 8.

5 See, for example, Part 2 of Chapter 2 of the *Export Control Act 2020* which provides high-level guidance as to the circumstances in which an exemption may be granted alongside a general rule-making power, including setting out high-level circumstances in which an exemption may be granted and a requirement that an application for a new exemption must be made where changes to the exemption are required.

provide that an exemption is no longer valid if the circumstances under which it was originally granted no longer exist.

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

- **why it is considered necessary and appropriate to provide a broad power to make provision for, or in relation to, the granting of an exemption from proposed section 54-1A in delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which an exemption may be granted and general guidance in relation to the conditions which may apply to an exemption.**

Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022

Purpose	This bill seeks to amend the <i>Aged Care Act 1997</i> , the <i>Aged Care Quality and Safety Commission Act 2018</i> , the <i>Aged Care (Transitional Provisions) Act 1997</i> , the <i>National Health Reform Act 2011</i> , the <i>Veterans' Entitlements Act 1986</i> , the <i>Military Rehabilitation and Compensation Act 2004</i> , and the <i>Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988</i> to implement several time critical aged care measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety Final Report: Care, Dignity and Respect.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 27 July 2022

Broad delegation of administrative powers⁶

1.8 Item 53 of Schedule 1 to the Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022 (the Aged Care Bill 2022) seeks to insert proposed subsection 96-2(15A) into the *Aged Care Act 1997* (the Aged Care Act) to provide that the Secretary may delegate all of their powers under subsection 44-3(2) of the Aged Care Act to a Senior Executive Service (SES) officer or acting SES officer in the department.

1.9 The committee raised scrutiny concerns in *Scrutiny Digest 16 of 2021*⁷ in relation to a similar provision of the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021⁸ (the Aged Care Bill 2021) which sought to empower the Secretary to delegate powers to a larger class of persons.⁹

1.10 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

6 Schedule 1, item 53, proposed subsection 96-2(15). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

7 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 16 of 2021](#), 21 October 2021, pp. 1–2. See the committee's comments on item 51 of Schedule 1 to the bill.

8 Introduced into the House of Representatives on 1 September 2021 and lapsed upon dissolution of the Parliament.

9 Proposed subsection 96-2(14) sought to permit the Secretary to delegate all or any of their powers under Part 2.3 of the Aged Care Act to persons making assessments for the purposes of section 22-4 of that Act.

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 SES.

1.11 In its previous comments, the committee requested the minister's advice as to whether the Aged Care Bill 2021 could be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated. New subsection 96-2(15A) of the Aged Care Act as inserted by the bill addresses the committee's concerns in this instance by limiting the class of people to whom the powers might be delegated to SES officers.

1.12 The committee welcomes provisions in the new bill which set a limit on the categories of people to whom the Secretary's functions and powers might be delegated.

1.13 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Significant matters in delegated legislation¹⁰

1.14 Schedule 3 to the bill seeks to amend the *Aged Care Quality and Safety Commission Act 2018* (Aged Care Quality and Safety Act) to introduce a Code of Conduct that will apply to approved providers and their aged care workers and governing persons. Much of the detail related to the Code of Conduct is to be set out in the rules.

1.15 The committee raised scrutiny concerns in relation to similar provisions in the Aged Care Bill 2021 in *Scrutiny Digest 16 of 2021*, *Scrutiny Digest 17 of 2021* and *Scrutiny Digest 1 of 2022*.¹¹ The committee was concerned that these provisions left significant matters to delegated legislation by allowing key details related to the Code of Conduct to be set out in the rules, with little guidance within the bill as to how the

10 Schedule 3, item 9, proposed section 18A; Schedule 3, item 10, proposed subsections 21(3A) and 21(3B); Schedule 3, item 11, proposed section 74AE. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

11 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 16 of 2021](#), 21 October 2021, pp. 4–5; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 51–53; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 1 of 2022](#), 4 February 2022, pp. 27–29. See the committee's comments on item 9 of Schedule 3 to the bill.

rule-making power could be used. The committee reiterates those comments in relation to this bill.

1.16 In addition, the committee notes that item 10 of Schedule 3 to the Aged Care Bill 2022 seeks to insert proposed subsection 21(3B) to provide that the rules may make provision for matters relating to compliance with the Code of Conduct. The committee welcomes this additional detail.

1.17 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Broad discretionary power

Significant penalties¹²

1.18 Item 26 of Schedule 3 to the bill seeks to amend the Aged Care Quality and Safety Act to provide new powers for the Aged Care Quality and Safety Commissioner (the Commissioner) to impose banning orders on aged care workers and governing persons of approved providers.

1.19 This item appears to be identical to item 25 of Schedule 3 to the Aged Care Bill 2021. The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 16 of 2021* and *Scrutiny Digest 17 of 2021*.¹³ The committee was concerned that the relevant provisions gave the Commissioner a broad discretionary power to impose conditions on banning orders with no guidance on the face of the bill as to how or when the power should be exercised. The committee reiterates those comments in relation to this bill.

1.20 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Significant matters in delegated legislation

Privacy¹⁴

1.21 Item 26 of Schedule 3 to the bill seeks to insert proposed section 74GI into the Aged Care Quality and Safety Act to require the Commissioner to establish and maintain a register of banning orders, including banning orders that are no longer in

12 Schedule 3, item 26, proposed subsections 74GC(2) and 74GD(1). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (ii).

13 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 16 of 2021](#), 21 October 2021, pp. 5–6; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 59–60.

14 Schedule 3, item 26, proposed section 74GB. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

force. Proposed subsection 74G(7) also provides that the rules may make provision for making the register, or other specified information, publicly available. The rules may also make provision for any other matters relating to the administration or operation of the register. The rules are disallowable instruments made by the Minister under section 77 of the Aged Care Quality and Safety Act.

1.22 The committee previously raised similar scrutiny concerns in relation to item 25 of Schedule 3 to the Aged Care Bill 2021 in *Scrutiny Digest 16 of 2021* and *Scrutiny Digest 17 of 2021*.¹⁵ The committee was concerned that these provisions left significant matters relating to privacy to delegated legislation by allowing key details related to the register to be set out in the rules, with little guidance within that bill as to how the rule-making power could be used. The committee reiterates those comments in relation to the most recent bill.

1.23 The committee's consistent scrutiny view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. These include potential impacts on an individual's right to privacy. In this instance, the explanatory memorandum to the Aged Care Bill 2022 states:

It is not anticipated that the matters which may be included in the register prescribed by the rules will extend to any highly sensitive or highly personal information about the person subject to the banning order. However, in some instances, such as where an individual or business has a common name, it may be necessary to include further information, to publish an amount of information that is sufficient to ensure the person 76 can be identified. This would not extend, for example, to the nature of the incident/s that prompted the making of the banning order.

The purpose of this provision is to make information about banned individuals accessible to the public, including future employers of such individuals in the aged care sector. This aims to ensure the safety of care recipients by putting employers on notice of individuals who were found unsuitable to provide aged care or specified types of aged care services. This provision aligns with the approach taken under the NDIS (see section 73ZS of the NDIS Act) Publication of this information is considered reasonable, necessary and proportionate in order to protect the safety of vulnerable older Australians.¹⁶

1.24 While these comments indicate that it is not 'anticipated' that the rules will require highly personal or highly sensitive information to be included in the register, the committee notes that there is nothing on the face of the bill which would prevent

15 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 16 of 2021](#), 21 October 2021, pp. 7–8; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 58–59.

16 Explanatory memorandum, pp. 75–76.

this. As the rules are a legislative instrument, the committee is concerned that the potential disclosure of information regarding persons subject to banning orders will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.25 In addition, while acknowledging that this provision aligns with the approach taken in section 73ZS of the *National Disability Insurance Scheme Act 2013*, the committee notes that it raised similar concerns in relation to that provision.¹⁷ Moreover, the committee does not generally consider consistency with existing provisions to be a sufficient justification for including significant matters in delegated legislation.¹⁸

1.26 The committee does, however, welcome the inclusion of proposed subsections 74GI(3) and (6) in item 26 of Schedule 3 to the Aged Care Bill 2022, which further clarify the scope of proposed section 74GI. Proposed subsection 74GI(3) provides that proposed subsection 74GI(1) does not apply in relation to banning orders which have been revoked or which have been set aside on reconsideration of the decision, or on review. Proposed subsection 74GI(6) provides that the rules must make provision for, or in relation to, the correction of information that is included in the register.

1.27 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Reversal of the evidential burden of proof¹⁹

1.28 Item 66 of Schedule 8 to the bill seeks to insert proposed section 215A into the *National Health Reform Act 2011*. This provision permits an official of the Pricing Authority to disclose certain information to the Aged Care Advisory Committee or a committee established under section 205 of that Act. Proposed subsection 215A(2) makes it an offence for an official to use such information or disclose it to another person, punishable by two years' imprisonment or a fine or both imprisonment and a fine. Proposed subsection 215(3) creates a defence to the offence if the disclosure is for certain purposes. This item appears to be identical to item 78 of Schedule 8 to the Aged Care Bill 2021.

17 See Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 8 of 2020](#), 17 June 2020, pp. 8–9; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 9 of 2020](#), 6 August 2020, pp. 42–44.

18 See Senate Standing Committee for the Scrutiny of Bills, [Guidelines](#), 2nd edition, July 2022, pp. 18–19 for further guidance.

19 Schedule 8, item 66, proposed section 215A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

1.29 The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 16 of 2021* and *Scrutiny Digest 17 of 2021*.²⁰ The committee was concerned that the offence-specific defence relating to the authorised use or disclosure of information inappropriately imposed an evidential burden on the defendant. The committee reiterates those comments in relation to this bill.

1.30 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Immunity from civil or criminal liability²¹

1.31 Item 3 of Schedule 9 to the bill seeks to insert proposed section 54-11 into the Aged Care Act to provide immunity from civil and criminal liability in relation to the use of restrictive practices in certain circumstances set out in delegated legislation. This item appears to be identical to item 3 of Schedule 9 to the Aged Care Bill 2021.

1.32 The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 17 of 2021* and *Scrutiny Digest 1 of 2022*.²² The committee was concerned that the relevant provision inappropriately provided immunity from civil and criminal liability, noting that the immunity related to the use of rights restrictive measures and relevant circumstances were set out in delegated legislation. The committee reiterates those comments in relation to this bill.

1.33 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 59–60.

21 Schedule 9, proposed subsection 54-11(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

22 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 43–45; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 1 of 2022](#), 4 February 2022, pp. 29–30.

Defence, Veterans' and Families' Acute Support Package Bill 2022

Purpose	This bill seeks to amend the <i>Veterans' Entitlements Act 1986</i> , <i>Military Rehabilitation and Compensation Act 2004</i> and <i>Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988</i> to extend eligibility to veterans and their family members covered by the three Acts, who are at risk of or in crisis, whether or not the veteran is participating in a rehabilitation program or has rendered warlike service.
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 3 August 2022

Broad delegation of administrative functions or powers²³

1.34 Item 14 of Schedule 1 to the bill seeks to insert proposed subsection 152(1A) into the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (SRC Act). Proposed subsection 152(1A) empowers the Military Rehabilitation and Compensation Commission to, by resolution, delegate any of its functions or powers under an acute support package instrument to a member of the Commission, a person assisting a member, a consultant, or a public servant or Defence Force member whose duties relate to matters to which the provision relates.²⁴

1.35 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 that a limit is set on either 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 a bill nevertheless provides for broad delegations, the committee considers that the explanatory memorandum should explain why this is considered necessary.

1.36 In this instance, the explanatory memorandum states that:

These delegations will be limited to the DVA team directly administering the program. This team may comprise Australian Public Service (APS)

²³ Schedule 1, item 14. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

²⁴ Acute support package instruments are legislative instruments made by the Commission under proposed section 41B of the bill. Persons to whom functions or powers may be delegated are set out in section 384 of the *Military Rehabilitation and Compensation Act 2004*.

employees and non-APS contracted staff. The delegations will provide these professionals with the necessary powers and functions to provide key services and decision-making that will assist the Commissions in fulfilling their roles.

This ability to delegate functions or powers is consistent with delegation powers available to the Commission for the purposes of administering other programs and packages delivered by DVA, including programs administering the payment of compensation and income support.²⁵

1.37 The committee notes the advice that these delegation powers are consistent with the existing powers of the Commission. However, the committee does not generally consider consistency with existing provisions to be sufficient justification for allowing a broad delegation of administrative powers.²⁶ In this case, the committee considers that it would be more appropriate to amend the existing broad delegation powers of the Commission rather than introduce new delegation powers.

1.38 While the committee welcomes the advice that, in practice, delegations will be limited to members of the team directly administering the program in the Department of Veterans' Affairs, the committee considers that it would have been more appropriate to include this limitation in the bill itself. In the absence of such an express statutory limitation, the committee is particularly concerned that the bill could enable the Commission's functions or powers to be delegated to a consultant.

1.39 The committee's scrutiny concerns are further heightened noting the broad scope of the functions or powers that might be delegated. In this regard, the committee notes that the explanatory memorandum provides no information about why it is considered necessary to allow the Military Rehabilitation and Compensation Commission to delegate all or any of its functions or powers to persons listed at section 384 of the *Military Rehabilitation and Compensation Act 2004*. The committee considers that guidance as to the scope of the functions or powers that might be delegated should be provided on the face of the primary legislation to enable greater parliamentary scrutiny.

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

- **why it is considered necessary and appropriate to empower the Military Rehabilitation and Compensation Commission to delegate any or all of its functions or powers to such a broad class of people; and**
- **whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated and to limit the categories of people to whom those powers might be delegated.**

25 Explanatory memorandum, p. iii.

26 See Senate Standing Committee for the Scrutiny of Bills, [Guidelines](#), 2nd edition, July 2022, p. 11 for further guidance.

Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2022

Purpose	This bill seeks to amend the <i>Health Insurance Act 1973</i> , the <i>National Health Act 1953</i> , and the <i>Dental Benefits Act 2008</i> to protect the integrity of Medicare.
Portfolio	Health and Aged Care
Introduced	Senate on 3 August 2022

Reversal of the evidential burden of proof²⁷

1.41 The Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021 (the 2021 bill) was introduced in the House of Representatives on 21 October 2021 in the previous Parliament and lapsed at dissolution. The Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2022 (the 2022 bill) has now been introduced in identical form in the Senate. The committee previously commented on item 34 of Schedule 1 to the 2021 bill in its [Scrutiny Digest 17 of 2021](#).²⁸

1.42 Item 34 of Schedule 1 to the 2022 bill seeks to insert proposed section 105AA into the *Health Insurance Act 1973* (the Act). Proposed subsection 105AA(1) provides that it is a strict liability offence for an individual under review to fail to appear at a hearing, or to appear at a hearing but refuse or fail to give evidence or to answer questions. The offence carries a maximum penalty of 30 penalty units.

1.43 In line with the committee's expectations, the explanatory memorandum to the bill clarifies that the common law privilege against self-incrimination is not abrogated for individuals who are giving evidence or answering questions at a hearing.²⁹

1.44 Proposed subsection 105AA(2) provides an exception to the offence if existing paragraphs 104(5)(a), 104(5)(b) and 104(5)(c) of the Act apply to the person. That is, a person is not liable for an offence under proposed subsection 105AA(1) where the person has notified the Professional Services Review Committee (the Review Committee) that they have a medical condition which prevents them from appearing, giving evidence or answering questions; the person has complied with any reasonable

27 Schedule 1, item 34. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

28 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 25–26.

29 Explanatory memorandum, p. 18.

requirements of the Review Committee that they undergo medical examination to establish the existence and extent of the medical condition; and the results of the medical examination indicate that the person has a medical condition preventing them from appearing or giving evidence or answering questions.

1.45 A defendant bears an evidential burden in relation to the defences in proposed subsection 105AA(2). At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.³⁰ 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, interfere with this common law right.

1.46 The committee welcomes the detailed justification in the explanatory memorandum as to the reversal of the evidential burden of proof in proposed subsections 105AA(2). The explanatory memorandum states that:

Although the prosecution is likely to have knowledge of one aspect of the offence-specific defence, that is, whether the defendant notified the Committee as required, information relating to the medical condition of the defendant and the results of any medical examination(s) would not be available to the prosecution in all cases. Details as to the existence and extent of a medical condition would therefore be matters peculiarly within the knowledge of the defendant. Conversely, it would be difficult for the prosecution to prove, in all cases, that the defendant did not have a medical condition preventing them from appearing at a hearing or giving evidence as required.

In circumstances where a defendant notifies the Committee that the defendant has a medical condition preventing them from appearing at a hearing and then does not provide any evidence that the defendant has undergone a medical examination, the defendant would be the only person with any evidence of such medical examination and the results of the examination. If the defendant is then prosecuted under subsection 105AA(1), it would only be the defendant that holds the evidence necessary to successfully raise the offence-specific defence in subsection 105AA(2).³¹

1.47 Nevertheless, the committee notes that the *Guide to Framing Commonwealth Offences* states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and

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

31 Explanatory memorandum, p. 17.

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.³²

1.48 In this case, the committee accepts that some of the details as to the existence and extent of a medical condition would be matters peculiarly within the knowledge of the defendant. However, it is not apparent that the matters in paragraph 104(5)(a) of the Act are matters *peculiarly* within the defendant's knowledge. Specifically, it appears that members of the Review Committee would know whether a person has notified the Review Committee of a medical condition preventing them from appearing, giving evidence or answering questions. In addition, is it not apparent that it would be significantly more difficult or costly for the prosecution to establish these matters than it would be for the defendant to disprove them. These matters may therefore be more appropriate to be included as an element of the offence, rather than as an exception to the offence.

1.49 The committee considers it is not appropriate to reverse the evidential burden of proof in relation to matters that are not peculiarly within the knowledge of the defendant. The committee therefore requests the minister's advice as to whether proposed section 105AA can be amended to include the matters set out in paragraph 104(5)(a) of the *Health Insurance Act 1973* as an element of the offence.

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

Narcotic Drugs (Licence Charges) Amendment Bill 2022

Purpose	This bill seeks to amend the <i>Narcotic Drugs (Licence Charges) Act 2016</i> to provide greater flexibility for regulations to prescribe charges that are imposed on a licence holder, and to support the effective recovery of costs associated with regulating Australia's medicinal cannabis industry.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 3 August 2022

Charges in delegated legislation³³

1.50 Item 4 of Schedule 1 to the bill seeks to insert three new subsections into section 6 of the *Narcotic Drugs (Licence Charges) Act 2016* which relate to the imposition of a charge. Proposed subsection 6(3) of the bill provides that a charge may be imposed on each matter prescribed by the regulations that relates to a licence. To this end, proposed subsection 6(4) provides that regulations may be made prescribing different matters in relation to different classes of licence or licences of the same class that authorise different activities. This will allow, through regulations, the imposition of multiple separate charges on a licence holder for multiple discrete matters. Proposed subsection 6(5) provides that subsection 6(3) imposes a charge only so far as that charge is neither a duty of customs nor a duty of excise within the meaning of section 55 of the Constitution.

1.51 Section 8 of the *Narcotic Drugs (Licence Charges) Act 2016* currently provides that regulations made under that Act may prescribe the amount of a charge imposed on a licence. Items 8 and 9 of Schedule 1 to the bill seek to amend this process to allow the regulations to either set out the amount of the charge payable, or a method for working out an amount.

1.52 The committee's consistent view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is offered. These include prescribing the amount of a charge or the method for working out such an amount. The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. The committee's longstanding view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, where there is any possibility that a charge could be characterised as general taxation, the committee considers that guidance in relation to the level of

33 Schedule 1, item 4, proposed subsections 6(3), 6(4) and 6(5); Schedule 1, items 8 and 9. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

a charge should be included on the face of the primary legislation to enable greater parliamentary scrutiny.

1.53 In this instance, the explanatory memorandum does not provide an explicit justification for using delegated legislation to prescribe the charge. It simply states that the effect of the amendments is 'to enable greater flexibility in the manner in which charges are prescribed, so costs may be effectively recovered for the matters the charges relate to'.³⁴

1.54 The committee does not generally consider consistency with existing provisions or a desire for flexibility is sufficient justification for including significant matters in delegated legislation.³⁵ In addition, while the explanatory memorandum indicates that the charges will be limited to cost recovery,³⁶ the committee notes that there is no guidance on the face of the bill limiting the imposition of the charge in this way, nor are maximum charges specified.

1.55 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the amount of a charge and the method of calculation to delegated legislation, in circumstances in which there is no cap on the amount of the charge or guidance about the method of calculation in the primary legislation.

34 Explanatory memorandum, p. 6.

35 See Senate Standing Committee for the Scrutiny of Bills, [Guidelines](#), 2nd edition, July 2022, pp. 18–19 for further guidance.

36 Explanatory memorandum, p. 6.

Public Sector Superannuation Salary Legislation Amendment Bill 2022

Purpose	This bill seeks to amend the Superannuation (Salary) Regulations to regularise the long-standing administrative practice of Commonwealth employers and employees by ensuring that rent-free housing does not form part of an eligible employee's salary for the purposes of superannuation calculations under the <i>Superannuation Act 1976</i> .
Portfolio	Finance
Introduced	Senate on 3 August 2022

Retrospective commencement³⁷

1.56 Item 1 of Schedule 1 to the bill repeals paragraph 5(e) of the Superannuation (Salary) Regulations (Superannuation Regulations). Paragraph 5(e) previously provided that the value of rent-free housing made available to an eligible employee during the course of their work could be treated as part of that employee's salary for the purposes of the *Superannuation Act 1976* (Superannuation Act). The explanatory memorandum explains that some individuals have consequently claimed the right to additional superannuation contributions on the basis of this income calculation.³⁸

1.57 Schedule 1 to the bill commences on 1 July 1986. This ensures that paragraph 5(e) of the Superannuation Regulations is repealed from the date of the introduction of the fringe benefits tax regime. The explanatory memorandum explains that the introduction of fringe benefits tax 'meant that it was no longer necessary for employers to identify the value of rent-free housing in pay slips issued to their employees'.³⁹ As a result, superannuation contributions based on income received from the value of rent-free housing would likely not have been made after this point.⁴⁰ By retrospectively repealing paragraph 5(e), the bill provides that eligible persons can no longer claim they are entitled to have the value of rent-free housing treated as salary for the purposes of the Superannuation Act where that housing was provided on, or after, 1 July 1986.

37 Schedule 1. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

38 Explanatory memorandum, p. 3.

39 Explanatory memorandum, p. 3.

40 Explanatory memorandum, p. 7.

1.58 The committee has long-standing scrutiny concerns about provisions which apply retrospectively. Such provisions challenge the basic rule of law principle that the law should be capable of being known in advance. Underlying this principle is the importance of enabling people to rely on the law at the time of a relevant action or decision and protecting those affected by government decisions from arbitrary decision-making. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

1.59 Generally, where proposed legislation will have a retrospective effect, the committee expects the explanatory materials to set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and, if so, the extent to which their interests are likely to be affected. If an individual's interests will, or may, be affected by the retrospective application of a provision, the explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity.

1.60 In this instance, the explanatory memorandum states that:

Retrospectively repealing paragraph 5(e) of the Regulations regularises the past administrative practice of employers and employees by effectively restoring the position with respect to rent-free housing that all relevant parties have treated as governing these highly complex schemes since 1986. It avoids the unintended and inconsistent outcomes for the Commonwealth, Commonwealth entities and individuals that would arise if the Federal Court decides in *Peace* that rent-free housing provided to the applicants is a superannuable allowance. Specifically, it will ensure that Commonwealth employees in otherwise similar circumstances do not receive wildly disparate superannuation outcomes, with some employees receiving large windfalls, others incurring unexpected debts, and still others experiencing poor returns as a result of the need of the CSS and PSS to cover the lost earnings on late paid employer contributions.

The repeal of paragraph 5(e) of the Regulations will commence from the date of the introduction of the fringe benefits tax regime, and therefore to regularise the change in practice that apparently occurred after that time. Employees who received rent-free housing before 1 July 1986 would have been required to pay income tax on the value of that housing, which would have minimised the potential for the value of rent-free housing to be overlooked.⁴¹

1.61 Based on this advice, the committee notes that the retrospective repeal of paragraph 5(e) of the Superannuation Regulations effectively removes a right to bring a claim before the court in relation to superannuable income accumulated as a result of that provision. However, in accordance with the committee's expectations, the explanatory memorandum explains that interfering with this right is justified because

41 Explanatory memorandum, pp. 5–6.

retrospectively repealing paragraph 5(e) cures what would otherwise be an unintended, arbitrary and disparate result.

1.62 The committee further notes that Schedule 2 to the bill modifies the retrospective application of Schedule 1 with respect to certain individuals. This exemption will apply where both the employer and employee understood that the value of the rent-free housing received by the employee was to be included in their superannuation salary and acted accordingly.⁴² The explanatory memorandum states that this is appropriate because:

...unlike the cases in which the repeal of paragraph 5(e) will apply, if the paragraph applied in those cases, rather than correcting a mistake it would disturb the basis upon which the parties to the employment relationship actually conducted that relationship.⁴³

1.63 Consistent with rule of law principles, this exemption ensures that the reasonable expectations of affected individuals are not frustrated by the retrospective commencement of Schedule 1 to the bill.

1.64 Finally, the committee welcomes the inclusion of the relevant provisions within a bill, rather than regulations, to ensure an appropriate level of parliamentary scrutiny of these issues.

1.65 The committee reiterates its long-standing view that provisions with retrospective commencement challenge the basic rule of law principle that, in general, laws should be capable of being known in advance. Retrospective commencement, when used too widely or insufficiently justified, can work to diminish respect for the rule of law and its underlying values.

1.66 In this instance, the committee welcomes the detailed justification provided in the explanatory memorandum outlining the exceptional circumstances that are said to justify the use of retrospectivity and the inclusion of the exemption set out in Schedule 2 to the bill.

1.67 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

42 Explanatory memorandum, p. 6.

43 Explanatory memorandum, p. 8.

Private senators' and members' bills that may raise scrutiny concerns

1.68 The committee notes that the following private senators' and members' bills may raise scrutiny concerns under Senate standing order 24. Should these bills proceed to further stages of debate, the committee may request further information from the bill proponent.

Bill	Relevant provisions	Potential scrutiny concerns
Customs Legislation Amendment (Commercial Greyhound Export and Import Prohibition) Bill 2021*	Schedule 1, item 1, proposed subsections 9ABA(2) to (7), 9ABA(15) and Schedule 1, item 2, proposed subsections 4WA(2) to (8) and 4WA(14)	These provisions may raise scrutiny concerns under principle (ii) in relation to the inclusion of a broad authorization of administrative power.
Ending Indefinite and Arbitrary Immigration Detention Bill 2022	Clause 15	The provision may raise scrutiny concerns under principle (ii) in relation to the inclusion of a broad discretionary administrative power.
	Clause 19	The provision may raise scrutiny concerns under principle (iv) in relation to the inclusion of significant matters in delegated legislation.
Fair Work Amendment (Equal Pay for Equal Work) Bill 2022*	Schedule 1, item 1, proposed subsection 333B(4)	The provision may raise scrutiny concerns under principle (v) in relation to the incorporation of external material as existing from time to time.
Federal Environment Watchdog Bill 2021*	Schedule 1, item 260, proposed subsection 520(9)	The provision may raise scrutiny concerns under principle (v) in relation to the incorporation of external material as existing from time to time.

Bill	Relevant provisions	Potential scrutiny concerns
Landholders' Right to Refuse (Gas and Coal) Bill 2015*	Subclause 10(3)	The provision may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof.
Live Performance Federal Insurance Guarantee Fund Bill 2021*	Subclause 3(2)	The provision may raise scrutiny concerns under principle (iv) in relation to the inclusion of significant matters in delegated legislation.
Social Services Legislation Amendment (Enhancing Pensioner and Veteran Workforce Participation) Bill 2022	Subclause 4(5)	The provision may raise scrutiny concerns under principle (v) in relation to an exemption from sunseting.

* Bill restored to *Notice Paper* between 26 July and 4 August 2022.

Bills with no committee comment

1.69 The committee has no comment in relation to the following bills which were introduced into the Parliament between 26 July and 4 August 2022:

- Australian Education Legislation Amendment (Prohibiting the Indoctrination of Children) Bill 2020*
- Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Bill 2022
- Broadcasting Services Amendment (Audio Description) Bill 2019*
- Climate Change Bill 2022
- Climate Change (Consequential Amendments) Bill 2022
- Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018*
- Customs Amendment Bill 2022
- Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020*
- Electric Vehicles Accountability Bill 2021*
- Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021*
- Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020
- Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022
- Jobs and Skills Australia Bill 2022
- Jobs and Skills Australia (National Skills Commissioner Repeal) Bill 2022
- Military Rehabilitation and Compensation and Other Legislation Amendment (Incapacity Payments) Bill 2022
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Benefit to Australia) Bill 2020*
- Plebiscite (Future Migration Level) Bill 2018*
- Restoring Territory Rights Bill 2022
- Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022
- Social Security and Other Legislation Amendment (Self-Employment Programs and Other Measures) Bill 2022
- Social Services and Other Legislation Amendment (Lifting the Income Limit for the Commonwealth Seniors Health Card) Bill 2022

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- Snowy Hydro Corporatisation Amendment (No New Fossil Fuels) Bill 2021 [No. 2]*
 - Treasury Laws Amendment (2022 Measures No. 1) Bill 2022
 - Treasury Laws Amendment (2022 Measures No. 2) Bill 2022
 - Treasury Laws Amendment (Electric Car Discount) Bill 2022
 - United Nations Declaration on the Rights of Indigenous Peoples Bill 2022

* Bill restored to *Notice Paper* between 26 July and 4 August 2022.

Commentary on amendments and explanatory materials

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

- Climate Change Bill 2022⁴⁴
- Climate Change (Consequential Amendments) Bill 2022⁴⁵
- Treasury Laws Amendment (2022 Measures No. 1) Bill 2022⁴⁶

44 On 4 August 2022, the House of Representatives agreed to nine non-government amendments to the bill.

45 On 4 August 2022, the House of Representatives agreed to two non-government amendments to the bill.

46 On 4 August 2022, the Senate agreed to four Australian Greens amendments 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.

2.2 The committee has not received any responses since the tabling of *Scrutiny Digest 3 of 2022* on 30 March 2022.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

3.4 The committee draws the following bill to the attention of Senators:

- Defence, Veterans' and Families' Acute Support Package Bill 2022 – Schedule 1, item 15, proposed subsection 160(1B).³

Senator Dean Smith
Chair

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

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills, [Fourteenth Report of 2005](#), 30 November 2005.

3 This proposed subsection would allow for the Consolidated Revenue Fund to be appropriated for the purposes of paying assistance or benefits made under section 41B.