

The Senate

Standing Committee for the
Scrutiny of Bills

Annual Report 2022

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MEMBERSHIP OF THE COMMITTEE

Senator Sean Smith (Chair) (1.08.2022 – present)	LP, Western Australia
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Senator Raff Ciccone (Deputy Chair) (28.07.2022 – present)	ALP, Victoria
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Senator Nick McKim (26.07.2022 – present)	AG, Tasmania
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Senator Paul Scarr 1.08.22 – present)	LP, Queensland
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Senator Tony Sheldon (28.07.2022 – present)	ALP, New South Wales
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Senator Jess Walsh (28.07.2022 – present)	ALP, Victoria
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Members – 46th Parliament during 2022

Senator Helen Polley (Chair)	ALP, Tasmania
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Senator Dean Smith (Deputy Chair)	LP, Western Australia
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Senator Kim Carr	ALP, Victoria
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Senator Perin Davey	NATS, New South Wales
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Senator Janet Rice	AG, Victoria
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Senator Paul Scarr	LP, Queensland
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Contents

MEMBERSHIP OF THE COMMITTEE.....	iii
Chapter 1— Introduction.....	1
Chapter 2— The committee's mode of operation.....	3
Chapter 3— Work of the committee in 2022	7
Chapter 4— Case Studies	11
Appendix 1— The committee's scrutiny principles in detail	15
Appendix 2— List of the committee's regular publication during 2022.....	27

Chapter 1

Introduction

- 1.1 Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan 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, or to scrutinise Acts of the Parliament, to determine whether they:
- (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.
- 1.2 The work of the committee may be broadly described as an assessment of bills against a set of non-partisan accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny.

Overview of the Annual report

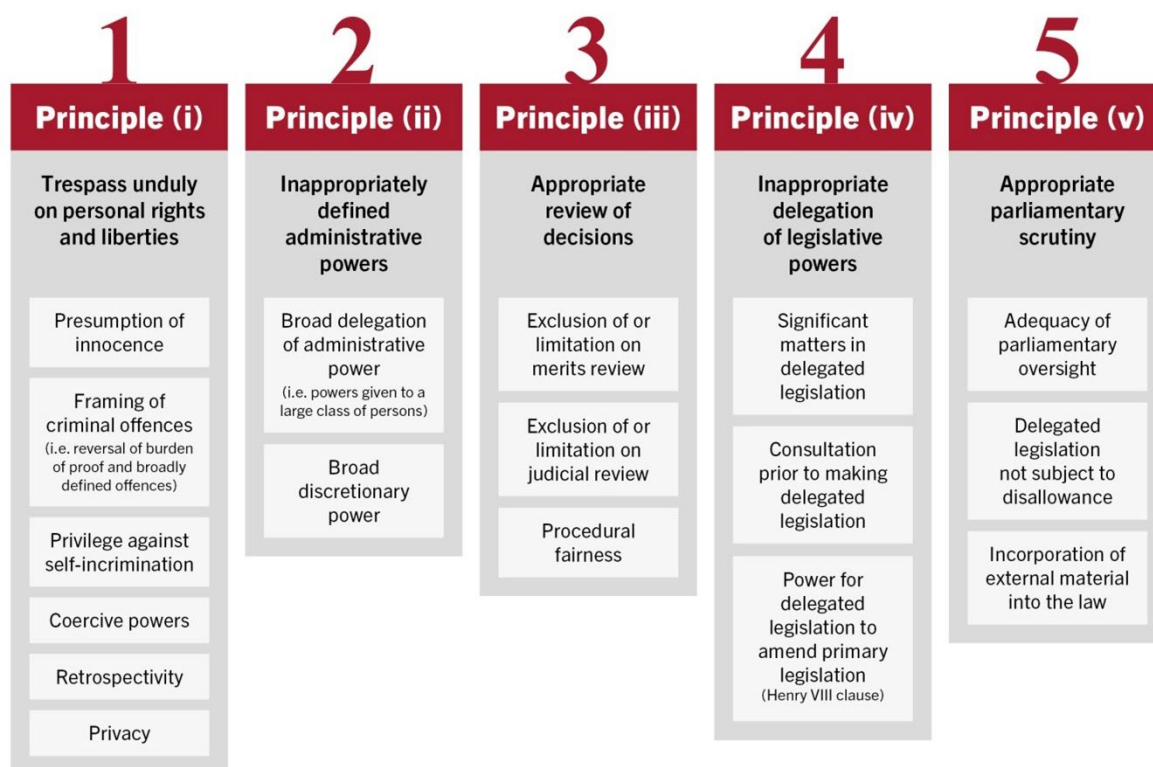
- 1.3 This Annual report provides a summary of the committee's work for the period from 1 January to 31 December 2022. The annual report is set out in four chapters:
- Chapter 1 is an introduction to the report;
 - Chapter 2 discusses the committee's mode of operation, publications and resources;
 - Chapter 3 sets out statistics relating to the committee's work in 2022; and
 - Chapter 4 provides case studies of bills scrutinised by the committee in 2022, including outcomes received by the committee.

Chapter 2

The committee's mode of operation

- 2.1 The committee examines all bills that come before the Parliament against the five principles set out in Senate standing order 24(1)(a), and usually meets each sitting week to consider them. On occasion, the committee will also meet between sittings.
- 2.2 The committee's long-standing approach is that it operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the five scrutiny principles. In addition, while the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24(1)(a), it is ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.
- 2.3 Some of the long-standing matters of concern identified by the committee are included in the diagram below.

Figure 2.1 Summary of standing order 24 and examples of issues considered under each principle



- 2.4 The committee's usual process for undertaking its work is shaped by the process for the passage of bills through the Parliament. The committee aims to report to

the Senate prior to the Senate's detailed consideration of bills so that its views can be taken into account before passage.

2.5 Figure 2.2 outlines the main steps in the committee's work.

Figure 2.2 Committee's Work Flow



2.6 More information about the committee's practices can be found on the committee's website and in the *Consolidated Guidelines, 2nd edition*.

Interaction with other legislative scrutiny committees

2.7 The Scrutiny of Bills Committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The work of the three committees is complementary in many respects. The committee therefore monitors the work of the two other legislative scrutiny committees—the Senate Scrutiny of Delegated Legislation Committee and the Parliamentary Joint Committee on Human Rights—and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

2.8 The committee regularly draws certain matters to the attention of the Scrutiny of Delegated Legislation Committee, including provisions of bills which authorise a significant delegation of legislative power or seek to modify the usual disallowance processes for legislative instruments. In 2022, the committee

drew 16 bills to the attention of the Scrutiny of Delegated Legislation Committee. When the committee draws such provisions to the attention of the Scrutiny of Delegated Legislation Committee, that committee will consider the Scrutiny of Bills Committee's comments as part of their examination of any legislative instruments made under the relevant authorising provision.

- 2.9 For example, in December 2020 the committee drew to the attention of the Scrutiny of Delegated Legislation Committee its scrutiny concerns about provisions in the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 which would allow the minister to, by legislative instrument, exempt state and territory arrangements from the application of the legislative scheme established by the bill.¹ In 2021 the Scrutiny of Delegated Legislation Committee set out its own scrutiny concerns in relation to rules made under these provisions,² noting that the specification of exempt arrangements is a significant matter that goes to the scope of the scheme as a whole.³ In response to the committees' scrutiny concerns, the Minister for Foreign Affairs amended the rules on 10 August 2021 to provide that they sunset after five years.⁴
- 2.10 The committee will continue to work closely with the Scrutiny of Delegated Legislation Committee and the Parliamentary Joint Committee on Human Rights where appropriate in the future.

Committee publications and resources

[Scrutiny Digest](#)

- 2.11 Since 2017, the committee has published its scrutiny comments in a document known as the *Scrutiny Digest*.
- 2.12 Chapter 1 of the *Scrutiny Digest* comprises the committee's initial comments on bills and amendments, identified by reference to the committee's scrutiny principles. Chapter 2 comprises the committee's comments on responses received from ministers. Chapter 3 draws attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.
- 2.13 The *Scrutiny Digest* is generally published on the Wednesday of each sitting week, although on occasion the committee will also report between sittings.

¹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* 18 of 2020, pp. 41–42.

² Australia's Foreign Relations (State and Territory Arrangements) Rules 2020 [F2020L01569].

³ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Correspondence relating to the Australia's Foreign Relations \(State and Territory Arrangements\) Rules 2020](#).

⁴ Australia's Foreign Relations (State and Territory Arrangements) Amendment (Repeal) Rules 2021 [F2021L01125]

Scrutiny News

- 2.14 The committee secretariat prepares a brief *Scrutiny News* publication each sitting week which highlights comments drawn from material in the committee's *Scrutiny Digest*, with a particular focus on information that may be useful when bills are debated and to raise awareness about the committee's scrutiny principles.
- 2.15 Highlights from the Senate Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor* are also included in *Scrutiny News*.

Guidelines

- 2.16 In July 2022 the committee published a second edition of guidelines setting out the committee's expectations in relation to its technical scrutiny principles. The committee's guidelines are regularly reviewed by the committee's secretariat and will be updated as appropriate.

Index of bills

- 2.17 The *Index of Bills* is an alphabetical list of all bills that the committee has considered during a calendar year.⁵

Acknowledgements

- 2.18 The committee wishes to acknowledge the work and assistance of the secretariat, and the external legal adviser Professor Leighton McDonald.
- 2.19 The committee also wishes to acknowledge the assistance of ministers and other proposers of bills, and departments and agencies during the reporting period. Their responsiveness to the committee is critical to the legislative process as it ensures that the committee can perform its scrutiny function effectively.

⁵ For more information see Appendix 1, pp. 13–31.

Chapter 3

Work of the committee in 2022

3.1 This chapter provides information about the work of the committee for the period from 1 January to 31 December 2022, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills.

Trends

3.2 Each year the committee usually analyses around 200 to 250 bills. The table below sets out the bills scrutinised by the committee from 2019 to 2022.

3.3 The table also outlines statistics in relation to the number of bills and amendments for which the committee had comments. The number of amendments commented on in 2021 was significantly higher than in 2022.¹

Table 3.1 Bills and Amendments Between 2019 and 2022

<i>Year</i>	<i>Bills considered</i>	<i>Bills commented on</i>	<i>Amendments considered</i>	<i>Amendments commented on</i>
2019	255	102	39	3
2020	210	101	52	15
2021	223	107	81	36
2022	146	64	41	8

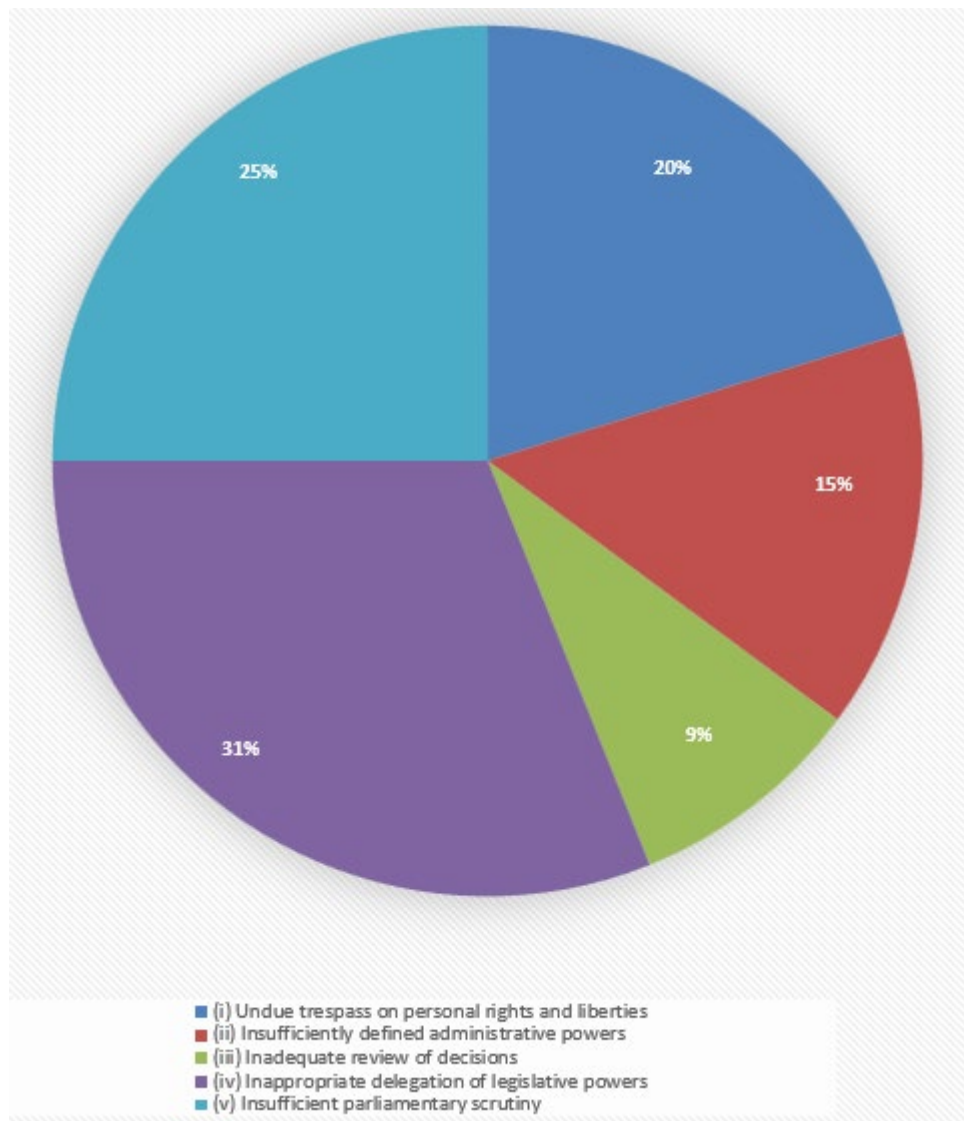
3.4 During 2022, the number of bills considered and commented on by the committee decreased significantly from the previous years. Possible factors that led to this outcome are:

- the Governor-General issued a proclamation on 10 April 2022 proroguing Parliament;
- the dissolving the House of Representatives, ahead of a federal election on 21 May; and
- a low number of sitting weeks (12 sitting weeks in 2022; 18 sitting weeks in 2021; 15 sitting weeks in 2020; 12 sitting weeks in 2019).

¹ The figures for 2019-2021 are taken from previous annual reports. Amendments are taken to include amendments to bill and addendums to explanatory memoranda.

- 3.5 The chart below provides a breakdown of the committee's comments on concerns within bills by the five principles set out in standing order 24(1)(a). The chart shows that the principle which the committee raised most frequently in 2022 was principle (iv), relating to the inappropriate delegation of legislative power (which was raised in 31 per cent of the bills the committee commented on in 2022). Principle (v) relating to insufficient parliamentary scrutiny was the next principle mostly frequently raised by the committee (in 25 per cent of bills commented on in 2022).

Figure 3.1 Scrutiny comments on bills by principle under standing order 24(1)(a) January to December 2022



Impact of the committee's work in 2022

- 3.6 The work of the committee in scrutinising bills against the five principles outlined above assists and improves parliamentary consideration of legislation in a number of important ways, including:
- more informed consideration of issues in legislation committee reports;
 - more informed debate in the Senate and committees; and
 - more comprehensive Parliamentary Library Bills Digests.
- 3.7 One of the more significant outcomes of the committee's scrutiny of bills are amendments being made to legislation and explanatory materials in order to address the committee's scrutiny concerns. As noted in Chapter 1, when the committee identifies potential scrutiny concerns with a bill, the committee's typical process is to write to the relevant minister and request a response in relation to those concerns. If ministerial responses are not provided within the requested timeframe this can significantly impact the committee's ability to report on its scrutiny concerns while a bill is still before the Parliament.
- 3.8 In the 45th and 46th Parliaments the committee noted a significant improvement in the responsiveness of ministers to its requests for information. Possible factors that led to this improved outcome are:
- amendments to standing order 24 in 2017 allowing any senator to question a minister about why the minister had not provided a timely response to the committee's request for information and to move a motion relating to the consideration of the bill; and
 - the then Deputy Chair's proactive engagement with ministers to request timely responses during the course of the 46th Parliament.
- 3.9 Table 3.2 below shows a marked decrease in the number of late responses received by the committee in the course of the last two Parliaments.

Table 3.2 *Statistics on late responses during the 46th Parliament*

Year	Number of responses requested by the committee	Number of late responses	% of late responses per year
2015	62	50	81%
2016	56	26	46%
2017	101	63	62%
2018	89	35	40%
2019	33	22	52%
2020	76	27	36%
2021	112	30	27%
2022	36	7	19%

- 3.10 In 2022, the work of the committee resulted in improved explanatory materials being tabled. Explanatory memoranda explain the purpose and effect of the associated bill and the operation of its individual provisions. As such, an explanatory memorandum should demonstrate that the bill's proposed approach is appropriately justified.
- 3.11 The committee regularly requests that additional information be included in explanatory memoranda to ensure that provisions of bills on which the committee has commented are adequately explained. The committee's intention in making such requests is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill.
- 3.12 For example:
- on 21 November 2022, an addendum to the explanatory memorandum to the High Speed Rail Authority Bill 2022 was tabled in the Senate to clarify matters relating to the exemption from disallowance provisions in the bill; and
 - on 23 November 2022, a supplementary explanatory memorandum to the Biosecurity Amendment (Strengthening Biosecurity) Bill 2022 was tabled in the Senate to clarify matters requested from the committee in relation to the exemption from disallowance provisions and the no-invalidity clauses in the bill.

Chapter 4

Case Studies

- 4.1 This chapter includes examples of the committee's work during 2022. The case studies provide examples of the committee's work to illustrate:
- the committee's approach to its scrutiny role;
 - the committee's role in identifying matters of concern as assessed against the scrutiny principles outlined in standing order 24(1)(a) and in obtaining relevant information which informs the legislative process; and
 - the committee's role in providing the foundation for amendments to provisions and improvements to the content of explanatory material.
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Case studies

Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022

- 4.1 The Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022 was introduced in the House of Representatives on 7 September 2022. Proposed section 34A of the bill required ministers to seek advice from the Future Fund Board on the impact of a proposed adjustment to the amount that may be debited from the Disaster Ready Fund (the maximum disbursement amount), which could only be done by legislative instrument. The bill did not make provision for a requirement that the advice be tabled in Parliament. The committee initially commented on the bill in *Scrutiny Digest 5 of 2022*.¹
- 4.2 The explanatory materials accompanying the bill did not appear to explain why the advice was not required to be tabled in Parliament, nor did it explain whether the advice would be publicly available. Noting the impact on parliamentary scrutiny of not requiring documents to be tabled in Parliament, the committee requested the minister's advice as to whether the bill could be amended to make such a requirement. However, the minister advised in relation to the committee's scrutiny concerns in *Scrutiny Digest 5 of 2022* that the reasons for an adjustment to the amount would be set out in the explanatory statement accompanying any legislative instrument made under proposed section 34A.
- 4.3 In response to the committee, the minister advised that²:

Any legislative instruments that propose an amendment to the maximum disbursement amount would be accompanied by an explanatory statement,

¹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2022*, p. 9.

² See ministerial responses tabled in relation to *Scrutiny Digest 6 of 2022* here.

which would describe the reasons for the proposed amendment. This would include an overview of the Ministers' consultation with the Borad and how the Board's advice was taken into consideration. This explanatory material would set out a broad range of relevant factors being considered, rather than being limited to the advice of the Board in respect of its investment functions and obligations.

[...]

Further, the Bill would not preclude the Finance Minister from publishing the Board's advice, including under existing section 55 of the amended Act, providing the advice did not contain any commercial or sensitive information.

4.4 The committee remained concerned that without a provision requiring the tabling of the advice, opportunities for debate and parliamentary scrutiny regarding this matter that would otherwise be available to parliamentarians are removed. However, the committee noted the minister's advice that the advice documents may contain commercial or sensitive information and instead requested that the minister undertake to include, in the explanatory statement accompanying an instrument made under proposed section 34A, high-level information including:

- an overview of the responsible Ministers' consultation with the Minister for Emergency Management; a summary of the Future Fund Board's advice with any sensitive information removed;
- how the Future Fund Board's advice was taken into account;
- if the responsible Ministers depart from the Future Fund Board's advice, the reasons for this; and
- other relevant factors considered.³

4.5 This ensures that a level of parliamentary oversight is still maintained over adjustments to the maximum amount that may be debited from the Disaster Ready Fund.

4.6 In a further response to the committee, the minister undertook to implement the committee's recommendations.⁴ On 23 November 2022, the Senate agreed to one opposition amendment to the bill. The bill passed in the Senate on 23 November 2022.

4.7 The committee considered the amendments in *Scrutiny Digest 8 of 2022*, and welcomed the amendments which addressed the committee's scrutiny concerns.⁵

³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2022*, pp. 63–65.

⁴ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2022*, pp. 60–62.

⁵ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2022*, p. 10.

National Anti-Corruption Commission Bill 2022

4.8 The National Anti-Corruption Commission Bill 2022 was introduced in the House of Representatives on 28 September 2022. The bill sought to empower the Commissioner to investigate and report on corruption issues that occurred prior to the commencement of the bill. The committee initially commented on the bill in *Scrutiny Digest 6 of 2022*.⁶

4.9 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum stated that⁷:

It is appropriate that the Commissioner is able to investigate allegations of serious or systemic corrupt conduct that occurred before the NACC was established. This reflects the fact that the definition would not impose new standards of conduct in public administration, but would reflect long-standing community expectations of public officials, including the expectation to act in the public interest. It is possible that certain conduct involving public officials could have fallen short of these existing expectations before the NACC was established ... the Commissioner would only be able to make a finding of corrupt conduct if the conduct fell within one of the limbs of the definition, at the time it occurred.

4.10 The committee acknowledged that the intention of the bill was to expose corruption in public administration and recommended that the explanatory memorandum be updated to explain why it was appropriate to allow the bill to have retrospective application. The committee also recommended providing a more detailed list of examples of the kinds of conduct of a public official that is likely to constitute 'corruption of any other kind', noting the importance of this definition for the overall operation of the bill in the explanatory memorandum.

4.11 In response to the committee, the Attorney-General advised that the government would omit the provision in relation to the retrospective application of the proposed legislation.⁸ The bill passed in the Senate on 30 November 2022.

⁶ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2022*, pp. 16–19.

⁷ Explanatory memorandum, p. 76.

⁸ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2022*, pp. 20–21.

Appendix 1

The committee's scrutiny principles in detail

Provisions which trespass unduly on personal rights and liberties

Application of criterion set out in standing order 24(1)(a)(i)

- 1.1 The committee is required to report on whether the provisions of proposed legislation could 'trespass unduly on personal rights and liberties'. For example, a bill might raise issues relating to:
- having a retrospective and adverse effect on those to whom it applies, sometimes from the date of a media announcement (in these instances known as 'legislation by press release');
 - offence provisions that are broad in nature and may capture ordinary conduct as a result, particularly when the offence provision contains a custodial penalty;
 - providing for immunity from civil or criminal liability, which removes the common law right to bring an action to enforce legal rights;
 - abrogating the privilege against self-incrimination (the right people have at common law to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved);
 - reversing the common law burden of proof (requiring a person to prove their innocence when legal proceedings are taken against them);
 - imposing strict or absolute liability as an element of fault for an offence;
 - authorising search and seizure without the need to obtain a judicial warrant;
 - privacy, including the confidentiality of professional communications with a person's legal advisers; or
 - equipping officers with oppressive powers, especially for use against a vulnerable group of people.
- 1.2 These are categories that have arisen for consideration during most parliaments and are ones with which the committee is very familiar. However, standing order 24(1)(a)(i) may also apply in other circumstances and the committee is alert to identifying any new matters that may be considered inconsistent with the intent of the principle. More detail about matters that give rise to scrutiny concern and examples are discussed below.

Retrospectivity

- 1.3 Legislation has retrospective effect when it makes a law apply to an act or omission that took place before the legislation itself was enacted. Criticism of this practice is longstanding. The committee considers that retrospective

legislation is of concern where it will, or might, have a detrimental effect on people. The committee will comment adversely in these circumstances. Where proposed legislation will have retrospective effect the committee expects that the explanatory memorandum should set out in detail the reasons retrospectivity is sought. The justification should include a statement of whether any person will or might be adversely affected and, if so, the number of people involved and the extent to which their interests are likely to be affected.

For examples, see the committee's comments concerning the:

- Public Sector Superannuation Salary Legislation Amendment Bill 2022 (*Scrutiny Digest 4 of 2022*, pp. 17–19);
- National Anti-Corruption Commission Bill 2022 National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 16–19); and
- Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 202 (*Scrutiny Digest 7 of 2022*, pp. 4–7).

Broad scope of offence provisions

- 1.4 The committee considers that any offence provision should be clearly drafted and sufficiently precise to ensure that any person may understand what may constitute an offence. The committee notes that insufficiently defined terms contained within offence provisions may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. This is particularly so when the offence provision contains a custodial penalty.

For example, see the committee's comment concerning the:

- National Anti-Corruption Commission Bill 2022 National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 28–29).

Immunity from civil liability

- 1.5 An immunity from civil liability removes 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.
- 1.6 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.

For examples, see the committee's comments concerning the:

- National Anti-Corruption Commission Bill 2022 National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 31–32);
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 29–30); and
- Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022 (*Scrutiny Digest 8 of 2022*, pp. 6–7).

Abrogation of the privilege against self-incrimination

- 1.7 At common law, a person can decline to answer a question on the ground that their reply might tend to incriminate them. Legislation that interferes with this common law entitlement trespasses on personal rights and liberties and causes the committee considerable concern. However, the committee is also conscious of a government's need to have sufficient information to enable it to properly carry out its duties for the community. The committee accepts that in some circumstances good administration might require access to information that can only be obtained, or can best be obtained, by requiring a person to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence.
- 1.8 The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a provision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.
- 1.9 One of the factors the committee considers is the subsequent use that may be made of any incriminating disclosures. The committee generally holds to the view that it is relevant to take into account whether the proposed legislation balances the harm of abrogating the privilege by including a prohibition against any direct and indirect uses of the information beyond the purpose for which it is being obtained.
- 1.10 To date the only exception to this that the committee generally finds acceptable is that a forced disclosure should only be available for use in criminal proceedings when they are proceedings for giving false or misleading information in the disclosure the person has been compelled to make. The committee's experience is that the importance of the availability of these use and derivative use immunities are generally understood and they are usually included in bills that seek to abrogate the privilege against self-incrimination.

For examples, see the committee's comments concerning the:

- 1.11 Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 43–44); and

- 1.12 National Anti-Corruption Commission Bill 2022 National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 23–28).

Reversal of the burden of proof

- 1.13 At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence; the accused is not required to prove anything. Provisions in some legislation reverse this burden and require the person charged with an offence to prove, or disprove, a matter in order to establish his or her innocence or at least identify evidence that suggests a reasonable possibility that the matter exists or does not exist.
- 1.14 The committee usually comments adversely on a bill that places the burden on an accused person to disprove one or more elements of the offence with which he or she is charged, unless the explanatory memorandum clearly and adequately justifies the rationale for the approach, particularly by reference to the principles outlined in its comments on this issue recorded in the committee's Scrutiny Digests and in the Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. In this respect, the burden of proof should only be reversed if the relevant matter is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.¹

For examples, see the committee's comments concerning the:

- Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Miscellaneous Measures) Bill 2021 (*Scrutiny Digest 1 of 2022*, pp. 16–20);
- Crimes Legislation Amendment (Ransomware Action Plan) Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 28–29);
- Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 40–41);
- Social Media (Protecting Australians from Censorship) Bill 2022 (*Scrutiny Digest 3 of 2022*, pp. 5–6);
- Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2022 (*Scrutiny Digest 4 of 2022*, pp. 12–14);
- Financial Accountability Regime Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 15–18);
- Financial Sector Reform Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 20–23, 25–27);
- Maritime Legislation Amendment Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 12–15); and

¹ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 50.

- Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 38-39).

Strict and absolute liability offences

- 1.15 The committee draws the Senate's attention to provisions that create offences of strict or absolute liability and expects that where a bill creates such an offence the reasons for its imposition will be set out in the explanatory memorandum that accompanies the bill.
- 1.16 An offence is one of **strict liability** where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. A person charged with a strict liability offence is able to invoke a defence of mistake of fact.
- 1.17 An offence of **absolute liability** also provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. However, in the case of absolute liability offences, the defence of mistake of fact is not available.

For examples, see the committee's comments concerning the:

- Maritime Legislation Amendment Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 12-15);
- Transport Security Amendment (Critical Infrastructure) Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 50-52); and
- Offshore Electricity Infrastructure Legislation Amendment Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 42-43).

Powers of search and seizure without warrant

- 1.18 The committee consistently draws the Senate's attention to provisions that allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties. A provision giving such a power will be acceptable only when the circumstances and gravity of the matter justify it (and this information should be included in the explanatory memorandum).

For examples, see the committee's comments concerning the:

- Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 4-6);
- National Anti-Corruption Commission Bill 2022 National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 38-40); and
- Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 22-24).

Insufficiently defined administrative powers

Application of criterion set out in standing order 24(1)(a)(ii)

1.19 Legislation may contain provisions which make rights and liberties unduly dependent on insufficiently defined administrative powers. For example, a provision might:

- give administrators ill-defined and/or wide powers; or
- delegate power to 'a person' without any further qualification as to who that person might be.

Broad discretionary powers

1.20 Since its establishment in 1981, the committee has drawn the Senate's attention to legislation that gives administrators seemingly ill-defined and wide powers. If a provision that is of interest to the committee is accompanied by a comprehensive explanation of the rationale for the approach in the explanatory memorandum, the committee is able to better understand the proposal and either make no further comment or leave the matter to the consideration of the Senate.

For examples, see the committee's comments concerning the:

- Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 48-49);
- Aged Care Amendment (Implementing Care Reform) Bill 2022 (*Scrutiny Digest 4 of 2022*, pp. 1-3);
- Financial Accountability Regime Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 10-13);
- High Speed Rail Authority Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 28-30); and
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 31-33).

Delegation of power to 'a person' or to a wide class of persons

1.21 The committee consistently draws attention to legislation that allows significant and wide-ranging powers to be delegated to anyone who fits an all-embracing description (such as 'a person') or which allows delegations to a relatively large class of persons with little or no specificity as to appropriate qualifications or attributes. Generally, the committee prefers to see a limit set either on the sorts 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.

- 1.22 Where delegations are made the committee also expects that an explanation of why they are considered necessary should be included in the explanatory memorandum, especially if the delegation is broad.

For examples, see the committee's comments concerning the:

- National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021 (*Scrutiny Digest 1 of 2022*, pp. 8–10);
- Agriculture Biodiversity Stewardship Market Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 6–7);
- Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022 (*Scrutiny Digest 4 of 2022*, pp. 4–5);
- Defence, Veterans' and Families' Acute Support Package Bill 2022 (*Scrutiny Digest 4 of 2022*, pp. 10–11);
- Aboriginal Land Grant (Jervis Bay Territory) Amendment (Strengthening Land and Governance Provisions) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 2–3);
- Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 7–9); and
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 27–29).

Undue dependence on non-reviewable decisions

Application of criterion set out in standing order 24(1)(a)(iii)

- 1.23 Legislation may contain provisions which make 'rights, liberties or obligations unduly dependent upon non-reviewable decisions'. Relevantly, a bill may:

- exclude review on the merits by an appropriate appeal tribunal;
- exclude judicial review of the legality of a decision;
- provide that reasons need not be given for a decision; or
- fail to provide for people to be notified of their rights of appeal against administrative decisions.

Excluding merits and judicial review

- 1.24 The committee is of the view that, where a decision may have a substantial impact on a person's rights and interests, judicial review should generally be available to ensure that such decisions are lawfully made. Since its establishment, the committee has drawn attention to provisions that explicitly or otherwise exclude or fail to provide for effective judicial review. The committee is also concerned at the inclusion of no invalidity clauses which have the effect that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity

of that act or decision. These clauses can limit the practical efficacy of judicial review to provide a remedy for legal errors.

- 1.25 The committee also routinely draws attention to bills that seek to deny the opportunity for independent merits review. However, the committee also accepts that there are circumstances in which merits review is not, or may not be, necessary. The committee is assisted when the explanatory memorandum comprehensively and persuasively describes the rationale for the proposed approach.

For examples, see the committee's comments concerning the:

- Atomic Energy Amendment (Mine Rehabilitation and Closure) Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 1–2);
- Treasury Laws Amendment (2022 Measures No. 3) Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 36–37);
- Ozone Protection and Synthetic Greenhouse Gas Management Reform (Closing the Hole in the Ozone Layer) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 51–52);
- Biosecurity Amendment (Strengthening Biosecurity) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 10–11); and
- Broadcasting Services Amendment (Community Radio) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 25–26).

Inappropriate delegation of legislative power

Application of criterion set out in standing order 24(1)(a)(iv)

- 1.26 Legislation often includes the delegation of a power to make laws, giving delegates (usually a member or representative of the Executive Government) the authority to make regulations or other instruments that are not required to be considered and approved by Parliament before they take effect. The committee's task under this criterion is therefore to draw the Senate's attention to provisions that seek to delegate Parliament's power inappropriately. Examples of provisions that may inappropriately delegate legislative power include those which:

- enable delegated legislation to amend or modify the operation of an Act of Parliament (often called a 'Henry VIII' clause);
- provide for matters which are so important that they should be regulated by Parliament but are, in fact, to be dealt with by delegated legislation;
- provide that a levy or a charge be set by regulation; or
- give to the executive unfettered control over whether or when an Act passed by the Parliament should come into force.

Henry VIII clauses

1.27 A Henry VIII clause is a provision which authorises the amendment of either the empowering Act, or any other primary legislation, by means of delegated legislation. Since its establishment, the committee has consistently drawn attention to Henry VIII clauses and other provisions which permit delegated legislation to amend or take precedence over primary legislation. A clear and helpful explanation in the explanatory memorandum can allow the committee to leave the matter to the Senate.

For examples, see the committee's comments concerning the:

- Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021 (*Scrutiny Digest 1 of 2022*, pp. 4–5);

Significant matters in delegated legislation

1.28 The committee also draws attention to provisions that inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. Significant matters should be set out in primary legislation that is subject to full parliamentary consideration and not left to the delegated legislation disallowance process.

For examples, see the committee's comments concerning the:

- Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Miscellaneous Measures) Bill 2021 (*Scrutiny Digest 1 of 2022*, pp. 16–19);
- Agriculture Biodiversity Stewardship Market Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 4–5);
- Crimes Legislation Amendment (Ransomware Action Plan) Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 29–30);
- Social Media (Anti-Trolling) Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 45–47);
- Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 7–9);
- Treasury Laws Amendment (2022 Measures No. 3) Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 33–35); and
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 31–33).

Setting the rate of a 'levy' by regulation

1.29 The committee has also consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation, particularly where such a levy may amount to taxation. It is for the Parliament, rather than the makers of delegated legislation, to set a rate of tax.

1.30 The committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by delegated legislation, the committee expects

that there will be some limits imposed on the exercise of this power. For example, the committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose levies or fees.

For example, see the committee's comments concerning the:

- Narcotic Drugs (Licence Charges) Amendment Bill 2022 (*Scrutiny Digest 4 of 2022*, pp. 15–16); and
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (*Scrutiny Digest 7 of 2021*, pp. 30–31).

Appropriate parliamentary scrutiny of legislative power

Application of criterion set out in standing order 24(1)(a)(v)

1.31 Whenever Parliament delegates power to legislate, it should properly address the question of how much oversight to maintain over the exercise of that delegated power. Provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny include those which:

- provide a power to make delegated legislation that is not disallowable by the Parliament;
- provide that legislative instruments to be made under primary legislation may incorporate rules or standards as in force from time to time;
- enable a minister or other person to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised, with no obligation that they be tabled in Parliament or subject to disallowance; or
- provide for the ongoing appropriation of an unspecified amount of money from the Consolidated Revenue Fund.

Delegated legislation not subject to disallowance

1.32 When a provision of a bill specifies that an instrument is not subject to disallowance the committee expects the explanatory memorandum to set out a full explanation justifying the exceptional circumstances that warrant the need for the exemption.

For examples, see the committee's comments concerning the:

- Agriculture Biodiversity Stewardship Market Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 3–4);
- Australian Radioactive Waste Agency Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 25–27);

- Brisbane Airport Curfew and Demand Management Bill 2022 (*Scrutiny Digest 3 of 2022*, pp. 1-2);
- High Speed Rail Authority Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 28–30);
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (*Scrutiny Digest 7 of 2022*, pp. 34–35); and
- Biosecurity Amendment (Strengthening Biosecurity) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 1–7).

Incorporating material 'as in force from time to time'

1.33 The *Legislation Act 2003* includes a general rule which allows a legislative instrument, such as a regulation, to adopt or incorporate additional material and give it the force of law. The incorporated material applies in the form in which it exists *at the time of adoption* unless a provision in the relevant Act allows material to be incorporated 'as in force from time to time'. Typical wording included in bills to achieve this outcome provides that the relevant regulations may:

...apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing as in force from time to time.

1.34 Allowing material to be incorporated 'as in force from time to time' is of concern from a scrutiny perspective because it:

- allows a change in legal obligations to be imposed without the Parliament's knowledge and without the opportunity for Parliament to scrutinise the variation;
- can create uncertainty in the law because those affected may not be aware that the law has changed; and
- those obliged to obey the law may have inadequate access to its terms, depending on the nature of the material being incorporated.

1.35 The committee expects that the explanatory memorandum for a bill that includes a provision which seeks to incorporate non-legislative material 'as in force from time to time' will clearly and comprehensively explain the necessity for this approach and indicate how the concerns outlined above will be met.

For examples, see the committee's comments concerning the:

- Agriculture Biodiversity Stewardship Market Bill 2022 (*Scrutiny Digest 2 of 2022*, pp. 1–2);
- Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Miscellaneous Measures) Bill 2021 (*Scrutiny Digest 1 of 2022*, pp. 20–21);
- Atomic Energy Amendment (Mine Rehabilitation and Closure) Bill 2022 (*Scrutiny Digest 5 of 2022*, pp. 3); and
- Ozone Protection and Synthetic Greenhouse Gas Management Reform (Closing the Hole in the Ozone Layer) Bill 2022 (*Scrutiny Digest 6 of 2022*, pp. 49–50).

Standing Appropriations

- 1.36 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.
- 1.37 The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation on the period during which it applies.
- 1.38 The committee reports on its scrutiny of standing appropriations in Chapter 3 of each Scrutiny Digest.

Appendix 2

List of the committee's regular publication during 2022

Table 2.1

SCRUTINY DIGESTS	DATE TABLED
No. 1	3 February 2022
No. 2	16 Marh 2023
No. 3	31 March 2023
No. 4	7 September 2023
No. 5	28 September 2023
No. 6	26 October 2023
No. 7	23 November 2023
No. 8	30 November 2023

Senator Dean Smith

Chair