



7 February 2022

## Introduction

This newsletter highlights key aspects of the work of the Senate Scrutiny of Bills Committee and the Senate Scrutiny of Delegated Legislation Committee. It has a particular focus on information that may be useful while bills are under consideration and legislative instruments are subject to disallowance and seeks to raise awareness about the committees' scrutiny principles set out in Senate standing orders 23 and 24.

For more detail and discussion of these matters see the committees' [Scrutiny Digests](#) and [Delegated Legislation Monitors](#).

## Guidelines

The Senate Scrutiny of Bills Committee has published [consolidated guidelines](#) setting out the committee's expectations in relation to its technical scrutiny principles.

## Key scrutiny issues: Biosecurity Act review ([Scrutiny Digest 1 of 2022](#))

The Senate Scrutiny of Bills Committee has undertaken a review of provisions within the *Biosecurity Act 2015* which exempt instruments made under that Act from disallowance by the Parliament. The committee identified 30 provisions which exempt parliamentary disallowance in the Biosecurity Act.

The committee's scrutiny view, as set out in Chapter 4 of [Scrutiny Digest 1 of 2022](#), is that the Biosecurity Act should be amended to provide that instruments made under the Act are subject to disallowance.

## Key scrutiny issues: Bills ([Scrutiny Digest 1 of 2022](#))

### Religious Discrimination Bill 2021

### Religious Discrimination (Consequential Amendments) Bill 2021

- [Significant matters in delegated legislation](#): the committee leaves to the Senate the appropriateness of provisions which leave to delegated legislation:
  - the details of publicly available policies which are relevant to determining whether a religious body's conduct is taken to be discrimination;
  - the prescription of state or territory laws which a religious educational institution is taken not to contravene where the relevant conduct gives preference to a particular religious belief or activity; and

- the prescription of Commonwealth, state or territory laws for which a general exception to the prohibition on discrimination does not apply. Where a law is not prescribed, an act done in direct compliance with that law will be taken not to be discrimination.
- Significant matters in delegated legislation: the committee is seeking advice from the Attorney-General on a provision which leaves to delegated legislation the prescription of laws, including state or territory laws, for which a statement of belief does not constitute discrimination.
- Broad discretionary power: the committee is seeking advice from the Attorney-General on provisions which provide the Commission with a broad discretionary power to grant, vary and revoke exemptions to the religious discrimination framework and which grant to the minister a broad discretionary power to vary and revoke such exemptions.
- Broad delegation of administrative power: the committee leaves to the Senate the appropriateness of provisions which allow the Australian Human Rights Commission to delegate all or any of its functions or powers to the Religious Discrimination Commissioner, a member of the staff of the Commission, or any other person or body of persons.
- Reversal of the evidential burden of proof: the committee leaves to the Senate the appropriateness of a provision which reverses the evidential burden of proof in relation to an offence for disclosing information.

## **National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021**

- Broad delegation of administrative powers: the committee is seeking advice from the minister regarding whether the bill can be amended to place limits on the ability of intelligence agency heads to delegate their power to give emergency authorisations.
- Trespass on personal rights and liberties: the committee leaves to the Senate the appropriateness of expanding the ministerial authorisation regime to enable intelligence agencies to produce intelligence on a class of Australian persons.
- Trespass on personal rights and liberties: the committee leaves to the Senate the appropriateness of allowing ASIS to undertake intelligence gathering on persons in Australia.
- Broad discretionary power: the committee leaves to the Senate the appropriateness of extending the period of time the minister may suspend, or order the temporary surrender of, a person's travel documents from 14 to 28 days.
- Tabling of documents: the committee is seeking advice from the minister regarding whether the bill can be amended to provide that intelligence agency's privacy rules are tabled in the Parliament.

## Key scrutiny issues: Legislative instruments ([Delegated Legislation Monitor 1 of 2022](#))

### Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021 [F2021L01801]

The committee is seeking advice from the Treasurer's on the following matters:

- Matters more appropriate for parliamentary enactment: why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to introduce significant new obligations on financial services licensees that provide proxy advice.
- Modification of the operation of primary legislation/parliamentary oversight: whether the Corporations Regulations 2001 can be amended to provide that the measures cease within three years after commencement and whether there is any intention to conduct a review specific to the relevant provisions.
- Significant penalties in delegated legislation: the justification for the instrument giving effect to significant offences and civil penalties, as opposed to these penalties being given effect to by primary legislation.
- Significant penalties in delegated legislation: why the significant penalties are appropriate, and in particular why custodial penalties are appropriate, with reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.
- Clarity of drafting: the meaning of the terms 'independent' and 'any other entity', including clarification of the requisite test or threshold for determining which entities will fall within the concept of 'any other entity'.

### Therapeutic Goods (Standard for Human Cell and Tissue Products—Donor Screening Requirements) (TGO 108) Order 2021 [F2021L01326]

- Clarity of drafting: the committee is seeking advice from the minister as to whether the instrument can be redrafted to provide greater clarity as to the operation, purpose and meaning of the following terms and phrases:
  - 'recipient of viable animal cells or tissues';
  - 'sexual activity that puts the person at an increased risk of acquiring infectious diseases'; and
  - 'travelled to another country or region within Australia with exposure to particular epidemiological situations' and 'ineligible for a period of time based on a risk assessment using the most up-to-date epidemiological data'

## Other bills commented on ([Scrutiny Digest 1 of 2022](#))

- **Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021**: the committee welcomes the ministers' advice that the arrangements for substituted decision making will be repealed from 1 July 2023. The committee also leaves to the Senate the appropriateness of providing immunity from civil and criminal liability to aged care providers and their staff in certain circumstances.

- **Animal Health Australia and Plant Health Australia Funding Legislation Amendment Bill 2021:** the committee is seeking advice from the minister in relation to the inclusion of matters relating to the Plant Health Australia levy and the Emergency Plant Pest Response levy within non-legislative instruments that are not subject to parliamentary scrutiny.
- **Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021:** the committee is seeking advice from the minister in relation to provisions which leave significant matters to delegated legislation, including provisions which allow delegated legislation to modify the operation of the primary legislation.
- **Customs Amendment (Controlled Trials) Bill 2021:** the committee leaves to the Senate the appropriateness of provisions which leave the qualification criteria for participation in controlled trials to delegated legislation.
- **Electoral Legislation Amendment (Assurance of Senate Counting) Bill 2021:** the committee received advice from the minister regarding the tabling of statements and reports in the Parliament.
- **Electoral Legislation Amendment (Contingency Measures) Bill 2021:** the committee drew a broad discretionary power to add legislation to the definition of 'Commonwealth emergency law' by delegated legislation to the attention of the Senate Scrutiny of Delegated Legislation Committee.
- **Migration Amendment (Protecting Migrant Workers) Bill 2021:** the committee leaves to the Senate the appropriateness of provisions which limit the usual requirements of the natural justice hearing rule.
- **National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021:** the committee leaves to the Senate the appropriateness of provisions which leave key details in relation to the implementation of the Participant Service Guarantee to delegated legislation.
- **National Health Amendment (Enhancing the Pharmaceutical Benefits Scheme) Bill 2021:** the committee received advice from the minister regarding a broad discretionary power and instruments not subject to parliamentary disallowance.
- **Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Miscellaneous Measures) Bill 2021:** the committee is seeking advice from the minister in relation to the inclusion of significant matters in delegated legislation, provisions which reverse the evidential burden of proof, the incorporation of materials as in force from time to time and no-invalidity clauses.
- **Veterans' Affairs Legislation Amendment (Exempting Disability Payments from Income Testing and Other Measures) Bill 2021:** the committee drew the inclusion of significant matters in delegated legislation to the attention of the Senate Scrutiny of Delegated Legislation Committee.

## Scrutiny of COVID-19 related legislation

The Scrutiny of Delegated Legislation Committee has continued to list all delegated legislation made in response to COVID-19 on its [website](#). As of 3 February 2022, 657 legislative instruments have been made, of which 18.6% are exempt from disallowance.

## Other legislative instruments commented on (*Delegated Legislation Monitor 1 of 2022*)

- The Scrutiny of Delegated Legislation Committee considered 135 disallowable legislative instruments and 26 instruments exempt from disallowance registered on the Federal Register of Legislation between 23 October 2021 and 26 November 2021. The committee is continuing to engage with ministers and agencies in relation to 51 instruments and has concluded its consideration of 16 instruments.

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This document contains a very brief summary of some recent comments made by the Senate Scrutiny of Bills Committee (Chair: Senator Helen Polley and Deputy Chair: Senator Dean Smith) and the Senate Scrutiny of Delegated Legislation Committee (Chair: Senator the Hon Concetta Fierravanti-Wells and Deputy Chair: Senator the Hon Kim Carr).

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