

The Senate

Standing
Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament as to whether the bills, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

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

General information

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

Chapter 1

Comment bills

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

Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020

Purpose	This bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> to strengthen transparency and accountability measures in relation to the disclosure of political donations or gifts at the Commonwealth level
Sponsor	Senator Jacqui Lambie
Introduced	Senate on 5 February 2020

Significant matters in delegated legislation

Privacy¹

1.2 Item 2 of Schedule 2 to the bill seeks to insert proposed section 302AB into the *Commonwealth Electoral Act 1918*, which will require the Electoral Commissioner to establish and maintain a system known as the AEC Disclosure Portal (the portal). Proposed subsection 302AB(2) provides that the portal has the following purposes:

- the electoral expenditure purpose;
- the disclosure and reporting purpose; and
- any other purposes prescribed for the purposes of this paragraph.

1.3 Proposed subsection 302AB(3) provides that additional purposes may be prescribed in regulations. Additionally, proposed section 302AC provides that regulations may make provision for the establishment, performance and administration of the portal. Proposed section 302AD provides that regulations may make provision for any matters that relate to the electoral expenditure purpose. Proposed section 302AE provides that regulations may make provision for any matter that relates to the disclosure and reporting purpose.

1 Schedule 2, item 2, proposed sections 302AB, 302AC, 302AD and 302AE. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

1.4 The committee has consistently raised concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight of new legislative schemes. Consequently, the committee's view is that significant matters, such as the functions and purposes of the proposed AEC Disclosure Portal, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum does not contain a justification for leaving key elements of the establishment and operation of the portal to regulations.

1.5 The committee also notes that, in relation to the disclosure and reporting purpose, the nature of the information that may be required to be disclosed, including whether this will include personal information, will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. As this matter is not addressed in the explanatory memorandum, it is difficult for the committee to accurately assess whether appropriate safeguards will be in place to ensure that any personal or sensitive information is appropriately managed.

1.6 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key aspects of the scope and operation of the proposed AEC Disclosure Portal to delegated legislation.

Broad delegation of investigatory powers²

1.7 Schedule 4 to the bill seeks to insert proposed Division 5A of Part XX into the *Commonwealth Electoral Act 1918*, which triggers the monitoring and investigation powers in Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*. Proposed subsections 314AJ(4) and 314AK(3) provide that an inspector may be assisted by 'other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

1.8 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring monitoring and investigatory powers on any 'other person' assisting an inspector. The committee

2 Schedule 4, item 2, proposed subsections 314AJ(4) and 314AK(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

notes that it may be appropriate to amend the bill to require that any person assisting an inspector must have the knowledge or experience appropriate to the power being exercised or the function being performed.

Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020

Purpose	This bill seeks to amend various Acts to facilitate the closure of eligible rollover funds by 30 June 2021 and allow the Commissioner of Taxation to reunite amounts he or she receives from eligible rollover funds with a member's active account
Portfolio	Treasury
Introduced	House of Representatives on 6 February 2020

Merits review³

1.9 Item 38 of Schedule 1 to the bill seeks to insert a new Part 3C into the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (SUMLM Act). In order to facilitate the closure of eligible rollover funds by 30 June 2021, proposed Part 3C will require eligible rollover fund trustees to transfer all accounts below \$6,000 to the ATO by 30 June 2020, and all remaining accounts to the ATO by 30 June 2021.

1.10 Existing section 20P of the SUMLM Act provides that decisions under Part 3A of the Act (relating to the payment of unclaimed superannuation of former temporary residents) are reviewable under the provisions of Part IVC of the *Taxation Administration Act 1953*. The committee notes that no such provision for review is included in the bill for decisions made under proposed Part 3C.

1.11 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. In this instance, the explanatory memorandum does not address whether merits review will be available for decisions made under proposed Part 3C.

1.12 The committee therefore requests the minister's advice as to whether decisions made under proposed Part 3C will be subject to similar review rights as currently provided for in existing Part 3A and, if not, the rationale for not providing for such review rights.

³ Schedule 1, item 38. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

Bills with no committee comment

1.13 The committee has no comment in relation to the following bills which were introduced into the Parliament between 4 – 6 February 2020:

- Paid Parental Leave Amendment (Flexibility Measures) Bill 2020
- Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020
- Treasury Laws Amendment (2019-20 Bushfire Tax Assistance) Bill 2020

Commentary on amendments and explanatory materials

1.14 The committee has no comments on amendments made or explanatory material relating to the following bills:

- Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Bill 2019;⁴
- Telecommunications Amendment (Repairing Assistance and Access) Bill 2019;⁵ and
- Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019.⁶

4 On 5 February 2020 the Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management (Mr Littleproud) presented a replacement explanatory memorandum, and the bill was read a third time.

5 On 6 February 2020, Senator Urquhart tabled a replacement explanatory memorandum. Debate on the bill was delayed in the Senate until 10 February 2020.

6 On 5 February 2020 the Senate agreed to 2 Opposition requests for amendments, and the bill was read a third time.

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 ministerial responses since the tabling of *Scrutiny Digest 1 of 2020* on 5 February 2020.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

- 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](#).