

The Senate

Standing
Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

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

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Initial scrutiny

1.1 The committee has not considered any new bills introduced into the Parliament, or amendments to bills, since the presentation of the committee's *Scrutiny Digest 9 of 2020* out of sitting on 6 August 2020.

Chapter 2

Commentary on ministerial responses

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

Biosecurity Amendment (Traveller Declarations and Other Measures) Bill 2020

Purpose	This bill seeks to amend the <i>Biosecurity Act 2015</i> to set targeted amounts payable under an infringement notice in order to provide for a flexible and proportionate compliance response
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives on 17 June 2020
Bill status	Before the House of Representatives

Delegated legislation not subject to disallowance¹

2.2 In [Scrutiny Digest 9 of 2020](#) the committee requested the minister's advice as to:

- why it is considered necessary and appropriate for determinations listing goods or classes of goods for the purpose of infringement notice amounts under section 524 to be exempt from disallowance; and
- whether the bill can be amended to omit proposed subsection 524A(4) so that instruments made under proposed subsection 524A(1) are subject to the usual parliamentary disallowance process.²

Minister's response³

2.3 The minister advised:

1 Schedule 1, item 3, proposed subsection 524A(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2020*, pp. 1-2.

3 The minister responded to the committee's comments in a letter dated 20 August 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

The Bill proposes that a determination listing goods or classes of goods for the purpose of infringement notice amounts under section 524 be exempt from disallowance. The rationale for this is that the determination will reflect scientific evidence and assessment that the goods or classes of goods pose a significant and real threat to Australia's biosecurity.

The identification of kinds of goods or classes of goods posing a high level of biosecurity risk is a technical and scientific decision based on whether the biosecurity risk exists and can better managed with the use of higher infringement notices amounts. This assessment reflects the subject matter and technical expertise.

The determination will be based on the latest scientific and technical information and will need to be adjusted quickly to account for changing information. This will ensure the measures in place are proportionate to the risk and mitigation strategies available. Political considerations may interfere with what should be a strictly technical and scientific decision and could potentially frustrate the risk management process.

To reflect good principles of legislative administration, the determination is limited to having a duration of up to twelve months. This will ensure the determination is reviewed on a regular basis and reflects the current scientific and technical information.

The approach to exemption is consistent with well-established principles for categories of delegated legislation that may be more appropriately considered for exemptions. The *2008 Review of the Legislative Instruments Act 2003* noted the range of established grounds for exemptions to parliamentary disallowance requirements, including where the rule-making process should or needs to be separated from the political process.

A determination will be well-supported by technical and scientific advice built into the safeguards of this Bill. Suitable safeguards for the appropriate exercise of the power conferred by delegated legislation include:

- clear parameters for the exercise of this power requiring that the Director of Biosecurity must be reasonably satisfied there is a high level of biosecurity risk associated with the goods or the class of goods before listing them in the legislative instrument
- the legislative instrument can only be in force for up to 12 months, ensuring regular review of the goods and classes of goods listed to confirm the assessment of the biosecurity risk these pose
- the proposed amendment to subsection 542(3) to prevent the sub-delegation of the Director of Biosecurity's power to determine a list of goods or class of goods for the purposes of creating this differential infringement notice regime below the level of SES or acting SES employees in the department.

Potential disallowance could have a significant impact on decision-making, the risk management process and the broader management of biosecurity risks.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the identification of the kinds of goods or classes of goods posing a high level of biosecurity risk is a technical and scientific decision based on whether the biosecurity risk exists and can be better managed with the use of higher infringement notice amounts. The committee also notes the minister's advice that this approach to exemption is consistent with well-established principles for categories of delegated legislation that may be more appropriately considered for exemptions.

2.5 The committee further notes the minister's advice that a determination will be well-supported by technical and scientific advice built into the safeguards of the bill, including that the Director of Biosecurity must be reasonably satisfied there is a high level of biosecurity risk associated with the goods or the class of goods before listing them in the legislative instrument, a determination may not last longer than 12 months and the power to make a determination cannot be sub-delegated.

2.6 While noting this advice, from a scrutiny perspective, the committee remains of the view that providing for higher infringement notice amounts is a significant matter that should be subject to effective parliamentary oversight. Furthermore, it remains unclear how providing for the usual disallowance process to apply to determinations made under proposed subsection 524A(1) would 'have a significant impact on decision-making, the risk management process and the broader management of biosecurity risks'. In this regard, the committee reiterates that such determinations could come into effect the day after the instrument is registered on the Federal Register of Legislation, and that the risk that the Parliament would disallow a determination well-supported by technical and scientific advice is extremely low.

2.7 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that determinations listing goods or classes of goods for the purpose of infringement notice amounts under section 524 of the *Biosecurity Act 2015* are exempt from disallowance.

National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020

Purpose	This bill seeks to broaden the circumstances in which the NDIS Quality and Safeguards Commissioner may make a banning order against a provider or person, and clarifies the Commissioner's powers
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives on 12 June 2020
Bill status	Before the House of Representatives

Broad discretionary powers⁴

2.8 The committee initially scrutinised this bill in [Scrutiny Digest 8 of 2020](#) and requested the minister's advice.⁵ The committee considered the minister's response in [Scrutiny Digest 9 of 2020](#) and requested the minister's further advice as to whether the bill can be amended to:

- include a note in section 73ZN to alert readers of the legislation (including delegates of the Commissioner) to the fact that the requirements under paragraph 181D(4)(b) of the Act apply in relation to the exercise of the Commissioner's banning powers; and
- explicitly require that the Commissioner considers the criteria for assessing the suitability of a person to be registered as a registered NDIS provider prescribed by the National Disability Insurance Scheme rules in the exercise of the Commissioner's banning powers.

2.9 The committee also requested that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable.⁶

4 Schedule 1, item 3, proposed subsection 73ZN(2A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2020*, p. 7.

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2020*, pp. 39-42.

Minister's response⁷**2.10 The minister advised:**

As noted by the Committee, amending the Bill to provide additional guidance on the exercise of the banning order power risks unintentionally narrowing the circumstances in which the Commissioner of the NDIS Quality and Safeguards Commission (the NDIS Commissioner) may make a banning order. This could lead to further unintended gaps in the application of banning orders and risks challenges to the NDIS Commissioner's decisions.

In response to the Committee's recommendations, I propose to table an addendum to the explanatory memorandum for the Bill explaining how provisions of the National Disability Insurance Scheme Act 2013 (the Act) guide the exercise of powers by the NDIS Commissioner under section 73ZN.

The Bill would expand the categories of persons against whom a banning order could be made under the Act but the Bill does not otherwise propose to amend the Act to alter how banning order decisions are made. In these circumstances, I do not propose to amend the Bill to include additional amendments that would require the NDIS Commissioner to take account of particular matters when exercising powers under section 73ZN.

Committee comment

2.11 The committee thanks the minister for this response. The committee notes the minister's advice that the bill would expand the categories of persons against whom a banning order could be made under the Act but the bill does not otherwise propose to amend the Act to alter how banning order decisions are made and that, as a result, there is no intention to amend the bill to include additional amendments that would require the NDIS Commissioner to take account of particular matters when exercising powers under section 73ZN.

2.12 The committee welcomes the minister's advice that an addendum to the explanatory memorandum for the bill will be tabled explaining how provisions of the *National Disability Insurance Scheme Act 2013* guide the exercise of powers by the NDIS Commissioner under section 73ZN. The committee requests that the addendum be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

7 The minister responded to the committee's comments in a letter dated 24 August 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

2.13 In light of the information provided and the minister's undertaking to table an addendum to the explanatory memorandum, the committee makes no further comment on this matter.

Payment Times Reporting Bill 2020

Purpose	This bill seeks to introduce a new Payment Times Reporting Scheme which requires large businesses and government enterprises with an annual total income of over \$100 million to publicly report on their payment terms and practices for their small business suppliers
Portfolio	Employment, Skills, Small and Family Business
Introduced	House of Representatives on 13 May 2020
Bill status	Before the Senate

Reversal of the evidential burden of proof⁸

2.14 The committee initially scrutinised this bill in [Scrutiny Digest 7 of 2020](#) and requested the minister's advice.⁹ The committee considered the minister's response in [Scrutiny Digest 9 of 2020](#) and requested that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable.¹⁰

Minister's response¹¹

2.15 The minister advised:

The Committee has previously sought my advice on why an offence-specific defence which reverses the evidential burden of proof is contained in section 46 of the Bill. In paragraph 2.98 of the *Scrutiny Digest 9 of 2020*, the Committee has requested that an addendum to the Explanatory Memorandum containing the key information contained in my response be tabled in the Parliament as soon as practicable.

I thank the Committee for its request and advise that the additional information will be included as part of the Supplementary Explanatory Memorandum to Government amendments being made to the Bill.

8 Clause 46. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2020*, pp. 24-25.

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2020*, pp. 48-50.

11 The minister responded to the committee's comments in a letter dated 20 August 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

Committee comment

2.16 The committee thanks the minister for this response.

2.17 The committee welcomes the minister's advice that the additional information requested by the committee will be included as part of the supplementary explanatory memorandum to government amendments being made to the bill.

2.18 In light of the minister's undertaking, the committee makes no further comment in relation to this matter.

Significant matters in delegated legislation¹²

2.19 The committee initially scrutinised this bill in [Scrutiny Digest 7 of 2020](#) and requested the minister's advice.¹³ The committee considered the minister's response in [Scrutiny Digest 9 of 2020](#) and requested the minister's further advice as to whether the definition of 'small business' set out in section 5 of the draft Payment Times Reporting Rules 2020 can instead be included on the face of the bill, to ensure appropriate parliamentary oversight of this definition which is central to the operation of the proposed Payment Times Reporting Scheme.¹⁴

Minister's response¹⁵

2.20 The minister advised:

At paragraph 2.109 of the *Scrutiny Digest 9 of 2020*, the Committee has requested my advice as to whether the definition of 'small business' set out in section 5 of the draft Payment Times Reporting Rules 2020 (draft Rules) can instead be included on the face of the Bill to ensure appropriate parliamentary oversight of this definition.

I acknowledge the scrutiny view of the Committee that significant matters, such as definitions which are central to the operation of a new regulatory scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

I advise the Committee that the definition of 'small business' will be moved from the draft Rules to the primary legislation as part of

12 Clause 5, definition of **small business**. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2020*, pp. 24-25.

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2020*, p. 50.

15 The minister responded to the committee's comments in a letter dated 20 August 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

Government amendments to the Bill. This is intended to provide greater certainty to reporting entities and small business about the scope of businesses that are intended to be captured by the Payment Times Reporting Scheme.

Committee comment

2.21 The committee thanks the minister for this response.

2.22 The committee welcomes the minister's advice that the definition of 'small business' will be moved from the draft rules to the primary legislation as part of government amendments to the bill. The committee notes the minister's advice that this is intended to provide greater certainty to reporting entities and small business about the scope of businesses that are intended to be captured by the Payment Times Reporting Scheme. In accordance with its usual practice, the committee will consider any amendments to the bill when they come before the Parliament.

2.23 In light of the minister's undertaking, the committee makes no further comment in relation to this matter.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

3.4 The committee has not considered any new bills introduced into the Parliament, or amendments to bills, since the presentation of the committee's *Scrutiny Digest 9 of 2020* out of sitting on 6 August 2020.

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](#).