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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.

Aged Care Amendment (Aged Care Recipient Classification) Bill 2020

Purpose	This bill seeks to amend the *Aged Care Act 1997* to introduce an additional, discretionary procedure for classification of recipients of residential aged care and some kinds of flexible care
Portfolio	Health
Introduced	House of Representatives on 21 October 2020

Significant matters in delegated legislation

Broad discretionary power[1]

1.2 The *Aged Care Act 1997* currently sets out a process by which care recipients for residential care, or some kinds of flexible care, are classified according to the level of care they need.[2] The classification level assigned affects the amount of subsidies payable to approved providers for providing care. The bill seeks to introduce an additional, discretionary procedure for the classification of recipients of residential aged care and some kinds of flexible care.

1.3 Proposed Part 2.4A sets out how care recipients will be classified on the secretary's initiative. Proposed section 29C-3 provides that the secretary may assess the level of care needed by care recipients, relative to the needs of other care recipients, for the purposes of classifying or reclassifying the care recipient for the relevant kind of care. However, this section sets out no criteria by which the secretary must make this assessment. Proposed subsection 29C-3(2) states that the Classification Principles,[3] which would be a legislative instrument, 'may' specify procedures that the secretary must follow in making the assessment. Once such an assessment is made, the secretary may classify a care recipient according to the level

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

2 *Aged Care Act 1997*, Part 2.4.

3 *Aged Care Act 1997*, section 96-1.

of care the care recipient needs, relative to the needs of other care recipients. Proposed subsection 29C-2(3) provides that the Classification Principles 'may' specify methods or procedures that the secretary must follow in determining an appropriate classification level, and subsection 29C-2(4) provides in making the classification the secretary must take into account the assessment of the care needs undertaken under section 29C-3 and any other matters specified in the Classification Principles.

1.4 As such, the bill provides no detail as to the procedures that the secretary must follow in assessing and classifying a care recipient. Any guidance in relation to this 'may' be set out in the Classification Principles, but there is no requirement that such matters be included in these Principles. If the Classification Principles do not set out any procedures, this would leave an unfettered discretion for the secretary (or their delegate) to determine the procedures to follow. It is not clear why the legislation does not set out at least high level guidance as to the procedures to be followed or, at a minimum, require that the Classification Principles 'must' (rather than 'may') out such guidance.

1.5 In addition, the matters that the secretary must take into account in making the classification are not contained in the bill: rather the secretary must consider the secretary's assessment of the care recipient plus anything else specified in the Classification Principles.[4] The bill also leaves to the Classification Principles what are the different classification levels;[5] which care recipients may be excluded from classification under this new Part;[6] the circumstances in which the care needs of a recipient are taken to have changed significantly;[7] and the matters the secretary must have regard to before changing a classification.[8]

1.6 The committee's view is that significant matters, such as the basis on which care recipients are classified or reclassified for care, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory materials accompanying the bill provide no information as to why it is proposed to leave these details to delegated legislation. It also provides no justification as to why the bill would provide a potentially unfettered discretionary power for the secretary to determine the processes in which an assessment or classification is made.

4 Schedule 1, item 3, proposed subsection 29C-2(4).

5 Schedule 1, item 3, proposed section 29-5.

6 Schedule 1, item 3, proposed section 29C-6.

7 Schedule 1, item 3, proposed subsection 29D-1(3).

8 Schedule 1, item 3, proposed paragraph 29E-1(3)(b).

1.7 The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave to delegated legislation most of the elements by which a care recipients' care needs are assessed or classified;**
- **why (at least high-level) rules or guidance about the exercise of the secretary's power cannot be included in the primary legislation; and**
- **why the bill only provides that the Classification Principles 'may' specify the procedures that the secretary must follow in making an assessment as to the level of care and the appropriate classification level for a care recipient, rather than requiring that the Classification Principles 'must' make provision to guide the exercise of these powers.**

Broad delegation of administrative power

Significant matters in delegated legislation[9]

1.8 Item 11 of Schedule 1 to the bill provides that the secretary may delegate the secretary's powers and functions under proposed section 29C-3, being the power to assess care recipients, to a person who satisfies the criteria specified in the Classification Principles. The explanatory memorandum states that such criteria may, for example, include professional qualifications, demonstrated experience, role-specific training and other formal credentials required of a delegate.[10] No further information is given as to what those requirements might be, or why it is appropriate to leave this detail to delegated legislation.

1.9 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.10 The committee requests the minister's advice as to:

- **why it is considered necessary to allow for the delegation of the secretary's function of assessing care recipients;**

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9 Schedule 1, item 11. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

10 Explanatory memorandum, p. 11.

- **why the criteria to whom these powers will be delegated is left to be set out in delegated legislation; and**
- **whether the bill can be amended to provide some legislative guidance as to the categories of people to whom those powers might be delegated.**

Computerised decision-making[11]

1.11 Proposed section 29C-8 provides that the secretary may arrange for the use, under the secretary's control, of computer programs for making decisions on the classification of care recipients under proposed section 29C-2, and that such a decision is taken to be a decision made by the secretary. Proposed subsection 29C-8(3) provides that the secretary may substitute a decision if satisfied that the decision made by the operation of the computer program is incorrect.

1.12 The committee notes that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.13 The explanatory memorandum explains that proposed section 29C-8 is consistent with the principles and guidance set out in the Administrative Review Council's 2004 report *Automated Assistance in Administrative Decision Making* for the following reasons:

- proposed section 29C-2 and the Classification Principles will detail factors that the decision-maker must take into account in classifying care recipients;
- these factors include using as inputs diverse and unbiased datasets, as collected by the secretary or delegate under new section 29C-3, that do not treat persons differently based on age or any other protected attributes such as disability;
- given the nature of the factors, a computer program can be programmed to apply the requirements of the Act in a logical manner, as opposed to a

11 Schedule 1, item 3, proposed section 29C-8. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

decision that requires an inherently human weighing of factors – for example, a public interest test; and

- proposed subsection 29C-8(3) and Part 6.1 of the Act provide mechanisms to substitute and review a decision made with a computer program in a particular matter, if the computer program malfunctions or makes an erroneous decision. [12]

1.14 While the committee acknowledges this explanation, without further information, it remains unclear to the committee that it is appropriate for decisions on the classification of care recipients under proposed section 29C-2 to be made by computers.

1.15 The committee therefore requests the minister's more detailed advice in relation to what factors are likely to be taken into account in classifying care recipients and how computer programs will be able to appropriately evaluate and weigh such factors.

Privacy[13]

1.16 The bill seeks to amend section 86-4 of the *Aged Care Act 1997* to provide that a delegate of the secretary who has made an assessment of care needs under proposed section 29C-3, may make a record of, disclose or otherwise use protected information (including personal information), relating to a person and acquired in the course of exercising those powers or performing those functions, or making those assessments, for any one or more of the following purposes:

- provision of aged care, or other community, health or social services, to the person;
- assessing the needs of the person for aged care, or other community, health or social services, or if already a care recipient, assessing the level of care the person needs;
- reporting on, and conducting research into, the level of need for, and access to, aged care, or other community, health or social services; and
- monitoring, reporting on, or conducting research into the quality or safety of aged care.[14]

1.17 The explanatory memorandum states that this will assist to further the objects of the Act, including to promote a high quality of care for care recipients and

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12 Explanatory memorandum, p. 7.

13 Schedule 1, items 7–9. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

14 Schedule 1, items 7–9.

to protect the health and wellbeing of care recipients.[15] It notes that section 86-5 of the *Aged Care Act 1997* provides that it is an offence to make a record of, disclose or otherwise use information disclosed under this provision other than for the purpose for which the information was disclosed. The explanatory memorandum states that this protects the information from being used in a manner inconsistent with the section.[16] However, if the information is disclosed in accordance with the above criteria then section 86-5 will have no application as a safeguard.

1.18 The committee notes that the type of personal information obtained in relation to a person when assessing their care needs is likely to include highly personal information. While using or disclosing such information for the purposes of providing care to that person or assessing their needs appears to be reasonable and necessary, it is not clear that it is appropriate to allow for the disclosure of such personal identifiable information for the purposes of monitoring, reporting on, or conducting research into the general quality or safety of aged care, or the level of need in the community.

1.19 The committee therefore requests the minister's advice as to why it is necessary to allow a delegate of the secretary to make a record of, use or disclose identifiable personal information about an aged care recipient for the purposes of monitoring, reporting on, or conducting research into the general quality or safety of aged care, or the level of need in the community.

1.20 The committee also requests the minister's advice as to the appropriateness of amending the bill to ensure that only de-identifiable information about an aged care recipient is able to be recorded, used or disclosed for this broader purpose.

15 Explanatory memorandum, p. 10.

16 Explanatory memorandum, p. 10.

Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020

Purpose	This bill seeks to amend the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* to improve the administration arrangements of paying home care subsidy to approved providers
Portfolio	Health
Introduced	House of Representatives on 21 October 2020

Power for delegated legislation to modify primary legislation (Henry VIII clause)

Retrospective application[17]

1.21 Item 16 of Schedule 1 to the bill seeks to insert a power to makes transitional rules by legislative instrument. Subitem 16(3) states that the rules may provide that, during or in relation to the first 12 months after the commencement of the item, the *A New Tax System (Goods and Services Tax) Act 1999* or any other Act or instrument has effect with any modifications prescribed by the rules. Subitem 16(4) provides that subsection 12(2) of the *Legislation Act 2003*, relating to retrospective application of legislative instruments, does not apply to rules made under item 16.

1.22 Provisions enabling delegated legislation to prescribe modifications to primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation. The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to prescribe modifications to primary legislation.

1.23 In relation to subitem 16(3) and the power for the rules to modify primary legislation, the explanatory memorandum states:

> Sub-item 16(3) is intended to allow the making of subordinate legislation to deal expeditiously with matters which may have unintentionally unfairly affected home care recipients or approved providers. It is considered that the most practical and appropriate way to quickly address emerging

17 Schedule 1, item 16. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

> circumstances regarding the administration of home care subsidy payment arrangements is to include a provision that subordinate legislation may, during the first 12 months after the commencement of the item, modify the provisions as appropriately required.[18]

1.24 While the committee acknowledges this explanation, there is no requirement on the face of the bill that the transitional rules must be beneficial, nor is there any explanation as to why it is necessary to allow the rules to modify any Act.

1.25 In addition, the committee has a long-standing scrutiny concern about provisions that apply retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals. Generally, where a bill will have a retrospective effect, or will allow delegated legislation made under the bill to have a retrospective effect, the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.26 In this instance, in relation to subitem 16(4) and the retrospective application of the rules, the explanatory memorandum states:

> Sub-item 16(4) sets out that subsection 12(2) of the *Legislation Act 2003* does not apply to rules made under this item. This is to allow the rules, which under this item must be made within 12 months after the commencement of this item, to apply from the commencement of this item in order to expeditiously address emerging issues relevant to the administration of home care subsidy payments resulting from the commencement of this Bill. The purpose of sub-item 16(4) is to ensure that all approved providers that provide home care, that may be affected by the provisions of the Bill and any subsequent rules made under sub-item 16(3), will be subject to the same legislative requirements with effect from a date specified by the rules, if necessary. In addition, it is intended that the rules made under item 16 should operate beneficially, so as to not affect the eligibility of home care recipients to home care subsidy or the amount of home care subsidy payable for eligible home care recipients.

1.27 The committee notes the justification provided for in the explanatory memorandum and that the intention is for the transitional rules to operate beneficially. However, the committee again notes that there is no requirement on the face of the bill that the retrospective application of the transitional rules must only be beneficial. In fact, it appears that the disapplication of subsection 12(2) of the Legislation Act as proposed in subitem 16(4) would only be required if there is a possibility that the retrospective application of the transitional rules may operate to disadvantage or impose liabilities on a person.

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18 Explanatory memorandum, p. 21.

1.28 The committee therefore requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate to allow the rules made under item 16 to modify *any* Act or instrument; and**
- **whether the bill can be amended to ensure that any modifications to primary or delegated legislation made by the rules, and the retrospective application of the rules, cannot operate to disadvantage any person.**

Appropriation Bill (No. 1) 2020-2021

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government
Portfolio	Finance
Introduced	House of Representatives on 6 October 2020

Parliamentary scrutiny—ordinary annual services of the government[19]

1.29 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.30 This bill seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.31 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[20]

1.32 The Senate Standing Committee on Appropriations and Staffing[21] has also actively considered the inappropriate classification of items as ordinary annual services of the government.[22] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken

19 Various provisions. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

20 See Senate standing order 24(1)(a)(v).

21 Now the Senate Standing Committee on Appropriations, Staffing and Security.

22 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[23]

1.33 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

> 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
>
> 2) That appropriations for expenditure on:
>
> a) the construction of public works and buildings;
>
> b) the acquisition of sites and buildings;
>
> c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
>
> d) grants to the states under section 96 of the Constitution;
>
> e) new policies not previously authorised by special legislation;
>
> f) items regarded as equity injections and loans; and
>
> g) existing asset replacement (which is to be regarded as depreciation),
>
> are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

1.34 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.[24]

1.35 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which

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23 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

24 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[25]

1.36 Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.[26]

1.37 Based on the Senate resolution of 22 June 2010, it appears that at least part of the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2020-2021:

- Advanced Manufacturing Facility and Vehicle to Grid Trial ($5 million in 2020-21);[27]
- Joint Transition Authority — establishment ($17.7 million over four years);[28] and
- Perth City Deal ($327.5 million over 11 years).[29]

1.38 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of occasions;[30] however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

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25 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

26 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, *Senate Hansard*, 19 March 2018, pp. 1487-1490.

27 Budget Paper No. 2, 2020-21, p. 113.

28 Budget Paper No. 2, 2020-21, p. 71.

29 Budget Paper No. 2, 2020-21, p. 142.

30 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014,* pp. 402-406; *Fourth Report of 2015*, pp. 267-271; *Alert Digest No. 6 of 2015*, pp. 6-9; *Fourth Report of 2016*, pp. 249-255; *Alert Digest No. 7 of 2016*, pp. 1-9; *Scrutiny Digest 2 of 2017*, pp. 1-5; *Scrutiny Digest 6 of 2017*, pp. 1-6; *Scrutiny Digest 12 of 2017*, pp. 89-95; *Scrutiny Digest 2 of 2018*, pp. 1-7.

1.39 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.40 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

1.41 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 1) 2020-2021 which should only contain appropriations that are not amendable by the Senate).

Parliamentary scrutiny—appropriations determined by the Finance Minister[31]

1.42 Clause 10 seeks to enable the Finance Minister to provide additional funds to entities when he or she is satisfied that there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in Schedule 1 to the bill. This additional appropriation is referred to as the Advance to the Finance Minister (AFM).

1.43 Subclause 10(2) enables the Finance Minister to make a determination that has the effect of allocating additional amounts, up to a total of $4 billion as specified by subclause 10(3), to the appropriations outlined in Schedule 1 to the bill. Subclause 10(4) provides that a determination under subclause 10(2) is a legislative instrument, which must therefore be registered and tabled in Parliament. However, these determinations are not subject to parliamentary disallowance. The explanatory memorandum suggests that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.[32]

1.44 The amount available under the AFM—$4 billion—is significantly higher than that available in previous annual appropriation bills.[33] The explanatory memorandum

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31 Clause 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

32 Explanatory memorandum, p. 9.

33 For example, subsection 10(3) of *Appropriation Act (No. 1) 2019-2020* set a cap of $295 million.

states that the amount of the AFM 'takes into consideration the evolving nature of the COVID-19 pandemic, allocations that been made to date, the uncertainty around what may be required as part of the Government's response and the likely need for the Government to act quickly'.[34] The committee notes, however, that the use of the AFM provision to allocate additional amounts is not limited on the face of the bill to COVID-19 response measures.

1.45 The committee notes that clause 10 (the AFM provision) allows the Finance Minister to allocate additional funds to entities up to a total of $4 billion via non-disallowable delegated legislation and that it therefore delegates significant legislative power to the executive. While this does not amount to a delegation of the power to create a new appropriation, one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[35] The AFM provision in this bill leaves the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.46 The committee has examined AFM provisions in previous appropriation bills and sought further information from the Finance Minister about their use.[36] The committee notes that AFM provisions have been used in previous years to allocate additional funds of varying amounts for a wide variety of purposes. Previous examples include $48.8 million for Mersey Community Hospital and Tasmanian Health Initiatives, $206.5 million for payments to local governments, and $6 million for grants to arts and culture bodies.[37]

1.47 In 2020-21 to date, the AMF provisions have been used to allocate funding:

- for the Local Roads and Community Infrastructure Program to provide funding to local government for the delivery of road resilience and community infrastructure projects ($250 million);[38]

34 Explanatory memorandum, p. 9.

35 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [91].

36 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 95–8; and *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 5-7.

37 For further examples see Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 97–8. For a comprehensive list of AFMs made between the 2006-07 and 2017-18 financial years, see Appendix 1 to Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017.

38 *Advance to the Finance Minister Determination (No. 1 of 2020-2021)* [F2020L00875].

- to Austrade to extend the International Freight Assistance Mechanism (IFAM) to 31 December 2020 (the IFAM supports exporters of premium and perishable agricultural produce by underwriting domestic and international airfreight connectivity) ($230.1 million);[39]
- to enable Australians to be able to receive COVID-19 vaccines, once they are available ($808.8 million);[40] and
- to enable Health to fund the procurement of personal protective equipment and other essential medical supplies and equipment for the National Medical Stockpile ($384.1 million).[41]

1.48 The committee further notes that this issue also arises in relation to the Appropriation Bill (No. 2) 2020-2021.[42] The total amount that can be determined under the AFM provision in the No. 2 bill is $6 billion.

1.49 In light of the unprecedented amount available under the AFM provisions in the 2020-2021 supply bills the former Minister for Finance advised the Senate that the government had agreed to provide for increased transparency and oversight of the use of the AFM. Under these measures the former minister advised that a media release would be issued each week that AFM determinations are made and the minister would write to the shadow finance minister to seek her concurrence prior to drawing any funding from an AFM for proposed expenditure greater than $1 billion.[43] It is unclear to the committee whether it is intended that these increased transparency measures will continue in relation to AFM determinations made under this bill and Appropriation Bill (No. 2) 2020-2021, which together would allow $10 billion to be allocated under the AFM.

1.50 The committee therefore requests the minister's advice as to whether the additional transparency measures applying in relation to AFM determinations made under the 2020-2021 supply bills will continue in relation to AFM determinations made under this bill and Appropriation Bill (No. 2) 2020-2021.

39 *Advance to the Finance Minister Determination (No. 2 of 2020-2021)* [F2020L01057].

40 *Advance to the Finance Minister Determination (No. 3 of 2020-2021)* [F2020L01237].

41 *Advance to the Finance Minister Determination (No. 4 of 2020-2021)* [F2020L01273].

42 For example, see clause 12 of Appropriation Bill (No. 2) 2019-2020 (the total amount that can be determined under this AFM provision is $380 million).

43 *Senate Hansard*, 23 March 2020, p. 1860.

Appropriation Bill (No. 2) 2020-2021

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure
Portfolio	Finance
Introduced	House of Representatives on 6 October 2020

Parliamentary scrutiny—section 96 grants to the states[44]

1.51 Clause 14 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'.

1.52 Clause 14 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- terms and conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;[45] and
- the amounts and timing of those payments.[46]

1.53 Subclause 14(4) provides that determinations made under subclause 14(2) are not legislative instruments. The explanatory memorandum states that this is:

> because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 14(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.[47]

1.54 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[48]

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44 Clause 14 and Schedules 1 and 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

45 Paragraph 16(2)(a).

46 Paragraph 16(2)(b).

47 Explanatory memorandum, p. 12.

48 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511-516; *Ninth Report of 2015*, pp. 611-614; *Fifth Report of 2016*, pp. 352-357; *Eighth Report of 2016*, pp. 457-460; *Scrutiny Digest 3 of 2017*, pp. 51-54; *Scrutiny Digest 6 of 2017*, pp. 7-10; *Scrutiny Digest 12 of 2017*, pp. 99-104; *Scrutiny Digest 2 of 2018*, pp. 8-11; *Scrutiny Digest 6 of 2018*, pp. 9-12.

1.55 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution. While the Parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.56 The committee notes that important progress has been made to improve the provision of information regarding section 96 grants to the states since the 2017-18 budget, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.[49] These improvements include the addition of an Appendix E to Budget Paper No. 3,[50] which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them, and a new mandatory requirement for the inclusion of further information in portfolio budget statements where departments and agencies are seeking appropriations for payments to the states, territories and local governments.[51]

1.57 The committee considers that these measures improve the ability of the Parliament to scrutinise the executive's use of the delegated power to make grants to the states and to determine terms and conditions attaching to them under section 96 of the Constitution.

1.58 The committee thanks the former minister for responding constructively to its proposals regarding the provision of additional information about the making of grants to the states under section 96 of the Constitution, and looks forward to these measures continuing for future appropriation bills.

1.59 The committee otherwise leaves to the Senate as a whole the appropriateness of clause 14 of the bill, which allows the minister to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

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49 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp. 7-10; and *Eighth Report of 2016*, pp. 457-460.

50 Appendix E of Budget Paper No. 3, https://budget.gov.au/2020-21/content/bp3/download/bp3_19_appendix_e_online.pdf.

51 See Department of Finance, *Guide to Preparing the 2020-21 Portfolio Budget Statements,* p. 32, https://www.finance.gov.au/sites/default/files/2020-10/guide-to-preparing-the-2020-21-portfolio-budget-statement.pdf.

Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020

Purpose	Schedule 1 to this Bill seeks to amend the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* to facilitate the JobMaker Hiring Credit scheme.
Portfolio	Treasury
Introduced	House of Representatives on 7 October 2020

Significant matters in delegated legislation[52]

1.60 The bill seeks to insert proposed subsection 7(1A) into the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*. This would allow the Treasurer to make rules for the provision for and in relation to the JobMaker Hiring Credit Scheme. Proposed paragraph 7(1A)(a) provides that the rules may provide for one or more kinds of payments by the Commonwealth to an entity for the purpose of improving the prospects of individuals getting employment in Australia[53] or to increase workforce participation.[54] Such payments must be in relation to a relevant period that occurs from 7 October 2020 to 6 October 2022. Proposed paragraph 7(1A)(b) provides that the rules may also make provision for the establishment of a scheme to provide for matters relating to such payments and matters relating to the scheme.

1.61 The explanatory memorandum provides details in relation to what it is intended will be included in the rules:

> The amendments are restricted to facilitating payments under the JobMaker Hiring Credit scheme, which will support businesses to hire additional employees and expand their organisation to ensure young people can access new employment opportunities as the economy recovers from the Coronavirus
>
> Rules will be made by the Treasurer to establish the JobMaker Hiring Credit scheme, including setting out:
>
> - which employers qualify for the payment;
> - the employees to which payments relate;

52 Schedule 1, item 3, proposed subsection 7(1A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

53 Proposed subparagraph 7(1A)(a)(i).

54 Proposed subparagraph 7(1A)(a)(ii).

- the amount payable and timing of payments; and
- the obligations for recipients of the payment.[55]

1.62 The committee has consistently drawn attention to 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. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as details of the operation of significant COVID-19 response measures, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.63 In this instance, the explanatory memorandum provides no explanation as to why these matters are left to delegated legislation. It is unclear to the committee why at least high level guidance cannot be included in the primary legislation, particularly noting that details of the operation of the scheme appear to have been finalised.[56] In this regard, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.64 The committee's view is that significant matters, such as the core elements of the new JobMaker Hiring Credit Scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.65 The committee therefore requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave virtually all of the details of the operation of this new scheme to delegated legislation; and**
- **whether the bill can be amended to prescribe at least broad guidance in relation to:**
  - **which employers will qualify for payment under the scheme;**
  - **which employees will be eligible employees for the purposes of the scheme;**
  - **the amount payable and timing of payments; and**
  - **the obligations for recipients of the payment.**

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55 Explanatory memorandum, p. 7.

56 See, for example, *JobMaker Hiring Credit*, https://budget.gov.au/2020-21/content/factsheets/download/jobmaker_hiring_credit_factsheet.pdf, and Australian Taxation Office, *JobMaker Hiring Credit*, https://www.ato.gov.au/General/New-legislation/The-Australian-Government-s-economic-response-to-coronavirus/JobMaker-Hiring-Credit/.

Export Market Development Grants Legislation Amendment Bill 2020

Purpose	This bill seeks to establish a grant program which is administered by the Australian Trade and Investment Commission .The grant is provided to Australian small and medium enterprise exporters as a reimbursement for up to 50 per cent of their export-related marketing expenses
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 7 October 2020

Broad delegation of administrative power[57]

1.66 Proposed section 90 provides for delegations of the minister's and CEO's powers and functions under the *Australian Trade and Investment Commission Act 1958* (Austrade Act) and the *Export Market Development Grants Act 1997* (EMDG Act). Proposed subsection 90(1) provides that the minister may delegate in writing all or any of the minister's functions or powers under the Austrade Act (except for powers under sections 65 and 66) to the CEO. Proposed subsection 90(2) provides that the CEO may delegate in writing all or any of the CEO's functions or powers under the Austrade Act to a member of the staff of the commission referred to in section 60 of the Act.[58] Proposed paragraph 90(3)(a) provides that the CEO may delegate in writing all or any of the CEO's functions or powers under the EMDG Act or the rules made under that Act, to a member of staff of the Commission as defined by section 60 of the Austrade Act. Proposed paragraph 90(3)(b) provides that these powers may also be delegated to an APS employee in a non-corporate Commonwealth entity[59] who holds or performs the duties of an Executive Level 1 or an equivalent or higher position.

1.67 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The

57 Schedule 1, item 3, proposed section 90. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

58 Section 60 of the *Australian Trade and Investment Commission Act 1958* defines staff of the Commission to be persons engaged under the *Public Service Act 1999*.

59 Within the meaning of the *Public Governance, Performance and Accountability Act 2013*.

committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.68 In this instance the explanatory memorandum states:

> This item maintains the current delegation powers of the CEO of Austrade contained in the Austrade Act. That is, the CEO of Austrade is able to delegate any function under the Austrade Act and the EMDG Act to a staff member of the Commission.
>
> This item also adds to the CEO's power to delegate powers under the EMDG Act to include APS employees who work for a non-corporate Commonwealth entity at Executive Level 1 or above. This expansion of the delegations power empowers the CEO of Austrade to seek other entities to administer the EMDG program, should it prove cost effective to do so. [60]

1.69 The explanatory materials provide no further information about why it is considered necessary to allow the CEO to delegate all or any of their functions or powers to staff of the Commission at any level, or to Executive Level 1 or 2 employees in a non-corporate Commonwealth entity. The explanatory materials also provide no details as to whom is it anticipated these powers will be delegated within the Commission or a non-corporate Commonwealth entity, or whether delegates will have the appropriate experience and qualifications necessary to perform the functions and exercise the powers delegated to them.

1.70 The committee therefore requests the minister's advice as to:

- **why it is considered necessary to allow for the delegation of any or all of the CEO's functions or powers to officers at any level; and**
- **whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.**

Significant matters in delegated legislation[61]

1.71 Proposed section 106 provides that the minister may make rules by legislative instrument prescribing matters required or permitted by the *Export Market Development Grants Act 1997* (the Act) to be prescribed by the rules[62] or as

60 Explanatory memorandum, p. 6.

61 Schedule 1, item 4, definition of 'ready to export', Schedule 1, item 5, proposed sections 10, 11, 15–18, and 21. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

62 Proposed paragraph 106(1)(a).

necessary or convenient for carrying out or giving effect to the Act.[63] The bill provides for the rules to prescribe a range of matters including:

- the definition of 'ready to export';[64]
- the terms and conditions of a grant;[65]
- requirements in relation to the payment of a grant or instalment;[66]
- eligible kinds of persons for a grant;[67]
- eligibility and conditions for a grant;[68]
- the eligible products for a grant;[69]
- the eligible expenses of a person;[70] and
- the methods for calculating the amount of a grant.[71]

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 core elements of a scheme to grant Commonwealth funds, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides little explanation as to why these matters are left to delegated as opposed to primary legislation. In this regard, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

63 Proposed paragraph 106(1)(b).

64 Schedule 1, item 4.

65 Proposed section 10.

66 Proposed section 11.

67 Proposed section 15.

68 Proposed section 16.

69 Proposed section 17.

70 Proposed section 18.

71 Proposed section 21.

1.72 The committee therefore requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave most of the elements of the export market development grants scheme to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.**

Merits review[72]

1.73 Proposed section 102 provides that the CEO of Austrade may require grantees to provide information, documents or statements to the CEO. Proposed subsection 102(3) provides that if a grantee is given notice under proposed subsection 102(1) to give the CEO information or produce a document and does not do so by the specified date or later date agreed to by the CEO, then the CEO must not pay a grant or any instalment to the grantee. Proposed subsection 102(6) provides that if a grantee is given notice under proposed subsection 102(4) to give the CEO a statement in relation to a specified grant or instalment and does not do so when required or as otherwise agreed to by the CEO, then the CEO must not pay a grant or any instalment to the grantee.

1.74 Proposed section 97 of the bill prescribes an exhaustive list of reviewable decisions of the CEO of Austrade. The decisions made under proposed subsections 102(3) and 102(6) are not included as reviewable decisions under proposed section 97.

1.75 In relation to proposed section 102 the explanatory memorandum states:

> Under the new section 102 grantees may also be required from time to time to provide certain information to the CEO of Austrade in relation to the grant. This requirement is necessary to manage the payment of the grant because, under subsection 21 the CEO must be satisfied each time a payment is made under a grant agreement that the person is remains eligible for the payment. While a person may be eligible for a grant at the time they enter into a grant agreement with the Commonwealth, their circumstances may change during the period of the grant agreement.
>
> The new 102 empowers the CEO of Austrade to require statements from grantees where the grantee's circumstances relevant to the grant have changed or about any other matter that might affect the payment of a grant. For example, an Australian company which is a grantee may be have decided it will withdraw its eligible product from a market. This means

72 Schedule 1, item 10, proposed subsections 102(3) and 102(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

> that company will no longer be marketing the eligible product as provided for in the grant agreement.
>
> The CEO of Austrade can decide not to pay a grant to a person if they do not provide the information within the timeframes outlined in 102. If the person fails to comply with the notice, then the CEO must not pay them but the CEO can vary the notice or extend the time.
>
> However, the CEO of Austrade is able to exercise some discretion in this decision. Such a discretion might be exercised in changed circumstances beyond the control of the person, or where the person has a reasonable excuse for not providing the information within the time frame and the information is subsequently provided. In exercising the discretion, the CEO of Austrade will be balancing a variety of factors, including the overall management of the EMDG program.

1.76 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 subsections 102(3) and 102(6). Noting that the explanatory memorandum indicates there is an element of discretion available to the CEO in making a decision not to pay a grant or grant instalment the committee considers that merits review may be appropriate for decisions made under proposed subsections 102(3) and 102(6).

1.77 The committee requests the minister's more detailed advice as to why merits review will not be available in relation to decisions made by the CEO under proposed subsections 102(3) and 102(6). The committee's consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What Decisions Should be Subject to Merit Review?.*

Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020

Purpose	This bill seeks to amend the *Judges' Pensions Act 1968* to impose on a retired Judge the same consequence for misconduct in office they would experience if they had been sitting when the misconduct was revealed
Portfolio	Senator Rex Patrick
Introduced	Senate on 6 October 2020

Retrospective application[73]

1.78 Item 2 of Schedule 1 to the bill seeks to add proposed section 17AAA to the end of Part 2 of the *Judges' Pensions Act 1968*. Subsection 17AAA(1) provides that a pension is not payable to a retired judge the day after a cessation event happens in relation to the retired judge. Subsection 17AAA(2) provides that a 'cessation event' happens in relation to a retired judge if each House of the Parliament passes, in the same session, a resolution that the retired judge cease to be paid a pension because the retired judge had engaged in serious misconduct while the retired judge was serving as a judge.

1.79 The pension cessation provision may apply retrospectively as it can be enlivened based on past conduct of a retired judge. The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.80 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and 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 states:

> This Bill is retrospective in operation for the purpose of ensuring all past Judges are held accountable for any serious misconduct done while they held their position and that only becomes apparent after their retirement or departure from the Bench. This ensures equality so that all living Judges that committed misconduct will be held accountable and face the same

73 Schedule 1, item 2, proposed subsection 17AAA(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

consequences no matter if they are on the Bench or no longer on the Bench.[74]

1.81 In light of the explanation provided, the committee leaves to the Senate as a whole the appropriateness of the proposed retrospective application of the pension cessation provision of the bill, which can be enlivened based on past conduct of a retired judge.

74 Explanatory memorandum, p. 2.

National Redress Scheme for Institutional Child Sexual Abuse Amendment (Technical Amendments) Bill 2020

Purpose	This bill seeks to amend the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* to improve the operation of the scheme. The bill seeks to clarify the operation of certain provisions and provide greater administrative efficiency, while continuing to achieve the original policy intent of the scheme
Portfolio	Social Services
Introduced	House of Representatives on 8 October 2020

Reversal of evidential burden of proof[75]

1.82 Proposed subsections 185A(1) and (2) provide that it will be an offence of strict liability to use a protected name (such as 'National Redress Scheme') or symbol without the operator's written consent. Proposed subsection 185A(3) provides an exception to the offence for the use of a name or symbol by a participating State or Territory. Proposed subsection 185A(4) provides that proposed subsection 185A(1) does not affect rights conferred by law on a person in relation to a protected name or symbol relating to a registered trade mark or a design registered under the *Designs Act 2003* that was registered immediately before the commencement of the section or relevant rule. Proposed subsection 185A(5) provides that section 185A does not affect the use, or rights conferred by law relating to the use, of a name or symbol if, immediately before the commencement of the section or relevant rule, the person was using the relevant name or symbol in good faith.

1.83 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. As a result, a defendant will bear an evidential burden of proof in relation to each of the matters in proposed subsections 185A(3)–(5).

1.84 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

75 Schedule 1, item 40, proposed subsections 185A(3)–(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.85 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matters), rather than a legal burden (requiring the defendant to positively prove the matters), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed section 185A have not been addressed in the explanatory materials.

1.86 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[76]

Significant matters in delegated legislation[77]

1.87 Proposed subsection 185A(6) provides that the rules may prescribe names which are protected names and symbols which are protected symbols for the purposes of proposed section 185A (which provides for an offence of strict liability).

1.88 The committee's view is that significant matters, such as protected names and symbols relevant to the commission of a strict liability offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no explanation as to why these matters are left to delegated legislation.

1.89 In this context, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.90 The committee therefore requests the minister's detailed advice as to why it is considered necessary and appropriate to allow other protected names and protected symbols relevant to the commission of a strict liability offence to be set out in delegated legislation.

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

77 Schedule 1 item 40 proposed subsection 185A(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

Privacy[78]

1.91 Proposed subsection 95(1A) seeks to permit protected information about a non-participating institution to be disclosed to a third party for the purpose of encouraging the institution to participate in the National Redress Scheme. Proposed amendments to existing subsection 95(2) would have the effect of providing that information disclosed under proposed subsection 95(1A) may only be dealt with by the recipient for the same purpose it was disclosed for.

1.92 In relation to proposed subsection 95(1A), the explanatory memorandum states:

> This new provision will facilitate engagement with and between States, Territories and non-government institutions such as peak bodies, and support proactive engagement to encourage institutions to participate in the Scheme. This will be of particular benefit in the lead up to the 31 December 2020 deadline for institutions to be declared participating institutions and in the event the Minister extends this timeframe by prescribing a later date. Having more institutions participate in the Scheme will maximise the number of survivors who have access to redress through the Scheme.
>
> The amendment will not affect the application of the protected information provisions to information about individuals who apply for redress or permit any additional use or disclosure of protected information that relates to an individual (including information that is personal information for the purposes of the *Privacy Act 1988*).

1.93 In relation to the proposed amendments to existing subsection 95(2), the explanatory memorandum states:

> Item 50 amends subsection 95(2) so that it applies to a person to whom information is disclosed under new subsection 95(1A). This means that information about a non-participating institution that is disclosed for the purpose of encouraging that institution to participate in the Scheme can only be dealt with (that is, obtained, recorded, disclosed or used) by a recipient for that same purpose. This limitation is a key mechanism for ensuring protected information is not used or disclosed more broadly than necessary to assist in achieving the objects of the Redress Act and that is reasonable and proportionate to achieving this policy objective. The existing protected information provisions and penalties for unauthorised use and disclosure of protected information remain unchanged.[79]

1.94 While the committee acknowledges the above explanation, the committee is concerned that the protected information which the operator may disclose under

78 Schedule 1, item 49, proposed subsections 95(1A) and 95(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

79 Explanatory memorandum p. 10.

proposed subsection 95(1A) may include information which was disclosed to the scheme by individuals prior to the commencement of the proposed subsection.[80] If this is the case, an individual could not have been aware that their protected information may be disclosed for the purpose set out in proposed section 95(1A) at the time they provided that information to the scheme. Without further information, it is unclear whether this knowledge may have impacted on an individual's decision to disclose such information to the scheme. In this respect, the committee notes that the explanatory memorandum does not provide sufficient clarity on the nature and scope of protected information that may be disclosed under proposed subsection 95(1A).

1.95 As the explanatory materials do not adequately address this matter, the committee requests the minister's detailed advice as to:

- **the type of protected information that is likely to be disclosed under proposed subsection 95(1A);**
- **who the protected information is likely to be disclosed to; and**
- **any additional safeguards in place to protect individuals' privacy.**

80 Schedule 1, item 51, proposed section 199.

Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020

Purpose	This bill seeks to remove trial parameters to establish the Cashless Debit Card as an ongoing program and to transition Income Management in the Northern Territory and Cape York Region to the card. It also seeks to make further modifications to the operation of the program
Portfolio	Social Services
Introduced	House of Representatives on 8 October 2020

Insufficiently defined administrative power[81]

1.96 Existing subsection 124PHA(1) of the *Social Security (Administration) Act 1999* (the Act) provides that the secretary must determine that a person is not a program participant if the secretary is satisfied that being a program participant would pose a serious risk to the person's mental, physical or emotional wellbeing. Item 32 of Schedule 1 to the bill seeks to insert proposed subsection 124PHA(3) into the Act to provide that an officer or employee of a State or Territory, or of an agency or body of a State or Territory, may request that the secretary reconsider a determination made under subsection 124PHA(1) if the officer or employee considers that is necessary for medical or safety reasons relating to the person or their dependents. If the secretary receives such a request and is no longer satisfied of the matter in subsection 124PHA(1) the secretary must revoke the determination.[82]

1.97 The committee has consistently drawn attention to legislation that allows administrative powers to be exercised by a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit on the categories of people who may exercise administrative powers that may affect a person's rights and liberties. The committee's preference is that those authorised to exercise significant administrative powers be confined to the holders of nominated offices or to members of the Senior Executive Service (or equivalent). The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing broad classes of persons to exercise significant administrative powers.

81 Schedule 1, item 32, proposed subsection 124PHA(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

82 Proposed subsection 124PHA(3A).

1.98 Where significant administrative powers may be exercised by a broad class of persons, the committee considers that an explanation of why this is considered necessary should be included in the explanatory memorandum. In this instance, the explanatory memorandum does not provide a justification as to why it is necessary to allow such a broad class of persons to request that the secretary reconsider a determination that a person is not a program participant.

1.99 The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to allow *any* officer or employee of a State or Territory, or of an agency or body of a State or Territory, to request that the secretary reconsider a determination made under existing subsection 124PHA(1) that a person is not a program participant; and**
- **whether the bill can be amended to limit the categories of State or Territory officers or employees who may make such a request.**

Significant matters in delegated legislation[83]

1.100 Item 37 of Schedule 1 seeks to insert proposed subsections 124PHB(7A) and (7B) into section 124PHB of the Act. Proposed subsection 124PHB(7A) provides that the secretary must, in deciding whether a person can demonstrate reasonable and responsible management of the person's affairs (including financial affairs) under existing subsection 124PHB(3), comply with any decision-making principles determined in an instrument under proposed subsection 124PHB(7B). This has the effect that the decision-making principles that the secretary must comply with in deciding whether a person may exit the cashless debit card program (CDC) may be set out in delegated as opposed to primary legislation.

1.101 The committee's view is that significant matters, such as decision-making principles relating to an application to exit the CDC program, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum states:

> New subsection 124PHB(7B) provides that the Minister may, by legislative instrument, determine decision-making principles for the purposes of subsection 124PHB(7A). This instrument is subject to disallowance. Such principles would not introduce new criteria, rather they will help to guide the future exercise of discretion and provide participants with greater

83 Schedule 1, item 37, proposed subsection 124PHB(7B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

> clarity relating to the considerations that underpin the determination of exit applications.[84]

1.102 While the committee acknowledges this explanation, and considers that the inclusion of decision-making principles in a disallowable legislative instrument is preferable to these matters being left to internal policy guidance, it is unclear to the committee why at least high level guidance or principles cannot be included in the primary legislation. The committee notes that the explanatory memorandum states that the decision-making principles would not introduce new criteria but would act as a guide to determining exit applications. This appears to indicate that the department is aware of at least the type of decision-making principles or the general guidance that will be used to make up the decision-making principles. Given that it appears the department is (at least broadly) aware of the principles it will rely on in decision-making the committee considers that the explanatory memorandum does not sufficiently justify why these principles should be left to delegated legislation.

1.103 In addition, the committee notes the explanation that the purpose of the decision-making principles is to 'provide participants with greater clarity relating to the considerations that underpin the determination of exit applications'. The committee's view is that greater clarity and certainty on the decision-making principles which underpin exit applications would be achieved by enshrining these principles in primary legislation.

1.104 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to leave the decision-making principles in relation to whether a person may exit the cashless debit card to delegated legislation; and**
- **whether the bill can be amended to provide for the decision-making principles (or high-level guidance in relation to the principles) on the face of the primary legislation, or, at a minimum, to provide that the minister 'must', rather than 'may', determine decision-making principles for the purposes of proposed subsection 124PHB(7A).**

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84 Explanatory memorandum, p. 10.

Significant matters in non-disallowable instrument – program area determination[85]

1.106 Proposed subsection 124PD(1A) provides that the minister may determine an area for the purposes of the definition of 'Cape York area' by notifiable instrument (which is not subject to parliamentary disallowance). Such a determination may have the effect of making a person within the defined area a participant in the CDC program.

1.107 In addition, item 64 seeks to amend subsection 124PD(2) to permit the minister to determine, by notifiable instrument, a part of the Northern Territory that is excluded from the definition of 'program area'.

1.108 Where a bill provides that significant matters may be determined in an instrument that is not subject to parliamentary disallowance, the committee expects the explanatory memorandum to the bill to address why it is appropriate to exempt the instrument from the usual disallowance process. In this instance the explanatory memorandum states:

> Item 63 inserts a new subsection 124PD(1A) to provide that the Minister may determine an area for the purposes of the definition of Cape York area by notifiable instrument. This is required to establish the area as a program area and ensure consistency with the definition of the Cape York area used by the FRC. This new power to make a notifiable instrument is consistent with the existing power under section 124PD(2), which is to be modified to establish the NT as a program area.[86]

1.109 The committee does not consider the fact that there is an existing power under section 124PD(2) to make notifiable instruments to exclude part of an area from the program is a sufficient justification for exempting such significant matters from parliamentary scrutiny, particularly noting that bill seeks to establish the CDC as an ongoing measure. In this regard the committee considers that the explanatory memorandum does not provide a sufficient explanation as to why it is necessary and appropriate to set out the definition of 'Cape York area', and to determine areas excluded from the definition of 'program area', in a notifiable instrument.

1.110 The committee notes that notifiable instruments are not subject to the tabling, disallowance and sunsetting requirements that apply to legislative instruments under the *Legislation Act 2003*. Parliamentary scrutiny of the determinations would therefore be very limited. The committee's longstanding scrutiny view is that significant matters, such as the areas in which the cashless

85 Schedule 1, items 63 and 64, proposed subsections 124PD(1A) and (2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

86 Explanatory memorandum, p. 15.

welfare arrangements are to apply, should be included in primary legislation or at least in delegated legislation that is subject to parliamentary disallowance.

1.111 The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate for determinations made under proposed subsection 124PD(1A) and existing subsection 124PD(2) to be notifiable instruments which are exempt from parliamentary scrutiny including disallowance; and**
- **whether the bill can be amended to:**
  - **set out the definition of 'Cape York area' on the face of the primary legislation or, at a minimum, to provide that determinations made under proposed subsection 124PD(1A) are legislative instruments subject to parliamentary disallowance; and**
  - **provide that determinations made under existing subsection 124PD(2) (relating to the exclusion of part of an area from the program) are legislative instruments subject to parliamentary disallowance.**

Broad discretionary power

Significant matters in non-disallowable instruments[87]

1.112 Item 84 of the bill seeks to amend section 124PJ of the *Social Security (Administration) Act 1999* (the Act). The amendments would specify the portion of restrictable payments that are designated 'restricted' and 'unrestricted' for certain program participants.[88]

1.113 Proposed subsection 124PJ(2A) would permit the minister to determine, by notifiable instrument, the percentage of income that is designated as 'restricted' for persons who are program participants under subsection 124PGE(1) whose usual place of residence is, becomes or was within an area specified in the instrument. The 'restricted' portion may be varied to a percentage higher than 50% but no higher than 80%, and the 'unrestricted portion' may be varied to a percentage lower than 50%.

1.114 In relation to this the explanatory memorandum states:

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87 Schedule 1, item 87 proposed subsections 124PJ(2A) and (2B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

88 A 'restrictable payment', in relation to a participant, refers to a variety of tax and social security benefits (set out in section 124PD of the Act). The 'restricted portion' is the portion that may not be used to obtain alcoholic beverages, for gambling, or to obtain certain 'cash-like' products. The 'unrestricted portion' may be used at the recipient's discretion.

> This subsection will enable the Minister to increase the restricted portion to a maximum of 80 per cent, for program participants under 124PGE(1) for specific communities in the NT to reflect community requests. This subsection is included to allow communities that wish to increase the restricted portion to 80 per cent. This is consistent with arrangements for existing CDC program areas where the maximum restricted portion is 80 per cent. It is appropriate for these variations to be made by determination because the Secretary has a power under subsection 124PJ(3) to determine the restricted and unrestricted portions for an individual which…will prevail over any Ministerial determination in accordance with new subsection 124PJ(2C).
>
> A notifiable instrument made under subsection 124PJ(2A) or 124PJ(2B) is not subject to disallowance.

1.115 Proposed subsection 124PJ(2B) would similarly permit the minister to determine, by notifiable instrument, the percentage of income that is designated as 'restricted' for persons who are program participants under subsection 124PGE(2) or (3). The restricted portion may be varied to a percentage not exceeding 80% and including 0%, and the unrestricted portion may be varied to a percentage not exceeding 100%.

1.116 In relation to this the explanatory memorandum states:

> This subsection will enable the Minister to either increase or decrease the restricted and unrestricted portions for the entire cohort of program participants under subsection 124PGE(2) or (3), to reflect requests made by a recognised State/Territory authority in the NT or a child protection officer.
>
> The power for the Minister to vary the percentages in subsections 124PJ(2A) and 124PJ(2B) is consistent with the approach of the measure that was introduced by the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010*. That is, it is not appropriate to specify the requirements of this in legislation to ensure the format of these requests and the nature of any necessary engagement with the community following a request, is flexible to respond to the specific circumstances of that community. The Minister will only exercise this power following a request from the community. The measure recognises the different approaches that different communities may take to submit a request. For example, some communities may prefer to use a local Aboriginal corporation, local government organisation or other representative body to act on behalf of the community in making such a request.
>
> When considering a community request, the Minister will undertake necessary consultation before deciding whether to make an instrument varying the restricted portions.

1.117 While noting the information provided in the explanatory memorandum, the committee is concerned that proposed subsections 124PJ(2A) and (2B) would confer on the minister broad powers to determine, in relation to classes of program participants, the portion of payments that are restricted, with little or no guidance on the face of the bill as to how these powers are to be exercised. For example, it does not appear that the minister would be required to consider any particular matter before exercising the powers, or that the exercise of the powers would be required to follow a request from the community or from a relevant officer. In this regard, the committee has generally not accepted a desire for flexibility to be a sufficient justification for providing ministers with broad discretionary powers.

1.118 The explanatory memorandum notes that the secretary's power under existing subsection 124PJ(3) to determine the restricted and unrestricted portions of income in relation to an individual prevails over a determination of the minister under proposed subsections 124PJ(2A) or (2B). However, it is unclear how the secretary's power under subsection 124PJ(3) would be effective to ensure that the minister's powers are exercised appropriately, noting that the minister's powers apply to classes of participants while the secretary's powers apply to individuals.

1.119 In this case, the committee's scrutiny concerns are heightened because ministerial determinations would be made by notifiable instruments, which are not subject to the tabling, disallowance and sunsetting requirements that apply to legislative instruments under the *Legislation Act 2003*. Parliamentary scrutiny of the determinations would therefore be very limited. The committee's longstanding view is that significant matters, such as the restricted and unrestricted portions of social security payments, should be included in primary legislation or at least in delegated legislation which is subject to parliamentary disallowance.

1.120 The committee therefore requests the minister's more detailed advice as to:

- **how the secretary's powers in subsection 124PJ(3) would be effective to ensure the minister's powers under proposed subsections 124PJ(2A) and (2B) (relating to the percentage of payments that are designated as 'restricted') are exercised appropriately;**
- **whether (at least high-level) rules or guidance in relation to the exercise of powers under proposed subsections 124PJ(2A) and (2B) could be included in the bill, including a requirement that the minister only exercise these powers after community consultation and a subsequent community request; and**
- **whether the bill could be amended to provide that determinations made under proposed subsections 124PJ(2A) and (2B), to vary the restricted portion of social security benefits for a class of program participants, are to be made by disallowable legislative instrument, rather than notifiable instrument**

Privacy[89]

1.121 Item 93 seeks to add proposed sections 124POB, 124POC and 124POD at the end of Division 4 of Part 3D of the Act. Each of those provisions would allow the secretary, and specified state and territory government officials, to share information relating to current or prospective program participants. The information must be relevant to the operation of Part 3D of the Administration Act (which relates to the cashless welfare arrangements).[90]

1.122 In relation to these proposed sections the explanatory memorandum states:

> Item 93 adds new sections 124POA, 124POB, 124POC and 124POD at the end of Division 4 of Part 3D, which authorises certain information disclosures to be made to the Secretary by an officer or employee of a financial institution or by a member, officer or employee of a community body (as well as certain reverse disclosures).
>
> …
>
> New sections 124POB, 124POC and 124POD replicate the current information sharing provisions in place for IM in Part 3B of the Social Security Administration Act. This will support information sharing between the Secretary on the one hand and, on the other, the FRC, child protection officers in the NT or other officers or employees of recognised State/Territory authority of the NT. These powers are essential to ensure that the cashless welfare arrangements operates effectively and that people can, or are only required to, enter and exit the cashless welfare arrangements as is appropriate to their circumstances.[91]

1.123 The statement of compatibility adds:

> Proposed sections 124POA to 124POD of the Bill expand the existing disclosure provisions for the disclosure of information under IM to the CDC program provisions. The purpose of disclosures by the Secretary under these provisions is to ensure that the CDC program is properly administered and appropriate information can be shared about a participant to provide protective support.
>
> Any limitation on a person's right to privacy is reasonable and proportionate given the extensive social harm that exists in the program

89 Schedule 1, item 93 proposed subsection 124POB, 124POC and 124POD, and Schedule 1, item 96, proposed paragraph 192(db). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

90 Proposed paragraphs 124POB(1)(b), 124POC(1)(b) and 124POD(1)(b).

91 Explanatory memorandum, p. 23.

> areas. There are also effective community safeguards over the extent of the restrictions imposed. [92]

1.124 In addition, item 96 seeks to amend paragraph 192(db) of the Act to extend the Secretary's power in section 192 of that Act to Part 3D. In effect, this would permit the secretary to require a person to give information or produce a document to the department where the secretary considers that the information or document may be relevant to the operation of Part 3D (relating to cashless welfare arrangements). In relation to this provision, the explanatory statement explains:

> This amendment is essential to allow the Secretary to determine whether a person should not participate in the cashless welfare arrangements on the basis of their mental, physical or emotion wellbeing or where they can demonstrate reasonable or responsible management of their affairs (including their financial affairs).[93]

1.125 The committee acknowledges the importance of ensuring that the CDC program is properly administered—including by ensuring that the program only extends to appropriate persons. However, the committee is concerned that allowing the sharing of information about program participants and extending the secretary's power to require information and documents may trespass unduly on individuals' privacy. In this respect, the committee notes that neither the explanatory memorandum nor the statement of compatibility provide detail as to the type of information that may be shared under proposed sections 124POB, 124POC and 124POD, nor the type of information or documents that may be required to be produced under paragraph 192(db).

1.126 In relation to proposed sections 124POB, 124POC and 124POD, the statement of compatibility states that there are 'effective community safeguards' in place. However, it does not provide any further detail (for example, expressly identifying the safeguards or explaining how they will operate in practice).

1.127 As the explanatory materials do not adequately address this matter, the committee requests the minister's detailed advice as to:

- **the type of information that would be collected under paragraph 192(db) of the *Social Security (Administration) Act 1999* as amended by the bill;**
- **the type of information that would be shared under proposed sections 124POB, 124POC and 124POD**; **and**
- **any relevant safeguards in place to protect individuals' privacy.**

92 Explanatory memorandum, p. 33.

93 Explanatory memorandum, p. 24.

Territories Legislation Amendment Bill 2020

Purpose	This bill seeks to amend various Acts to improve the legal frameworks applying to the territories of Norfolk Island, Christmas Island, the Cocos (Keeling Islands) and the Jervis Bay Territory
Portfolio	Infrastructure, Transport, Regional Development and Communications
Introduced	House of Representatives on 7 October 2020

Broad delegation of administrative powers[94]

1.128 Proposed subsection 8G(5) provides that a person or authority in whom a power is vested by a direction under paragraph 8G(3)(a) of the *Christmas Island Act 1958* may delegate in writing that power to another person or authority. The delegation must be authorised by the direction (proposed subsection 8G(5)(a)) or by the minister if the direction is a deemed direction under proposed subsection 8G(5A) or (5B).

1.129 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service (or equivalent). Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.130 In this instance the explanatory memorandum does not specify whether there are any limits as to who the person or authority may delegate power to under proposed subsection 8G(5). While the committee notes that such delegations would be subject to any conditions set by the direction or the minister,[95] these conditions have not been specified on the face of the bill or clarified in the explanatory memorandum.

94 Schedule 1,item 14, proposed subsection 8G(5) of the *Christmas Island Act 1958*; Schedule 1, item 40, proposed subsection 8G(5) of the *Cocos (Keeling) Islands Act 1955*; Schedule 1, item 66, proposed subsection 18B(5) of the *Norfolk Island Act 1979*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

95 Schedule 1, item 14, proposed subsection 8G(4).

1.131 Further, the committee notes that the explanatory memorandum does not specify whether the person or authority to whom vested power is delegated must have appropriate expertise or qualifications relevant to the exercise of such powers.

1.132 The committee notes that the same issues arise in relation to item 40, proposed subsection 8G(5) of the *Cocos (Keeling) Islands Act 1955* and item 66, proposed subsection 18B(5) of the *Norfolk Island Act 1979*.

1.133 The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to allow for such a broad delegation of a person or authority's powers under these provisions;**
- **whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated; and**
- **whether the bill can be amended to require that the minister or the relevant person or authority be satisfied that persons exercising delegated powers have the appropriate expertise and qualifications to exercise those delegated powers.**

Significant matters in delegated legislation[96]

1.134 Item 57 of Schedule 1 to the bill seeks to add proposed section 5 at the end of Part I of the *Norfolk Island Act 1979* (the NI Act). Proposed subsection 5(2) provides that regulations may provide for a state or territory other than Norfolk Island to be an 'applied law jurisdiction', and for a state or territory to cease being an 'applied law jurisdiction'. This provision has the effect that the law in force in Norfolk Island may be prescribed by regulations.

1.135 In relation to this the explanatory memorandum states:

> The effect of this section is that NSW, at the time the NI Act is amended by the Bill, will be an 'applied law jurisdiction' for the purposes of the NI Act, subject to any future regulations made for the purposes of this section. Such regulations may prescribe another state or territory as an 'applied law jurisdiction', in which case, under section 18A as amended, the laws of that state or territory, as in force in that jurisdiction from time to time, will be in force in Norfolk Island. Regulations may also provide for a state (including NSW) or a territory to stop being an applied law jurisdiction. Presently while a small number of NSW laws are in force in Norfolk Island

96 Schedule 1, item 57, proposed subsection 5(2) and Schedule 1, item 81, proposed subsections 60AA(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

under section 18A of the NI Act, the majority of NSW laws have been suspended under a section 19A ordinance.[97]

1.136 In addition, item 81 of Schedule 1 to the bill seeks to insert proposed section 60AA into the NI Act. This would provide that a state or territory, other than Norfolk Island, may be prescribed by regulations as having both original and appellate jurisdiction to hear and determine matters arising under laws in force in Norfolk Island.[98]

1.137 The committee's view is that significant matters, such as the determination of which laws will be in force on Norfolk Island and which state or territory courts will have jurisdiction for Norfolk Island, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum does not address why it is necessary or appropriate to set out either of these matters in delegated legislation.

1.138 The committee notes that this approach means that changes to the 'applied law jurisdiction' or the state or territory courts with jurisdiction for Norfolk Island will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.139 The committee considers that if it is envisaged that the law of a specific state or territory may become the applied law for Norfolk Island or the courts of a specific state or territory will be conferred with jurisdiction for Norfolk Island then this specific state or territory should be set out on the face of the bill. Alternatively, if the specific state or territory is not yet known, the committee considers that a new bill to set out the 'applied law jurisdiction' and the state or territory whose courts will be conferred with jurisdiction in relation to Norfolk Island should be introduced into the Parliament in the future.

1.140 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to allow regulations to determine:

- **which state or territory laws will be in force on Norfolk Island; and**
- **which state and territory courts will have jurisdiction to hear and determine matters in relation to Norfolk Island.**

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97 Explanatory memorandum, p. 42.

98 Proposed subsections 60AA (1) and (2).

Instruments not subject to parliamentary disallowance[99]

1.141 Items 67 and 72 of Schedule 1 to the bill seek to insert proposed subsections 18B(13) and 18D(13) into the *Norfolk Island Act 1979*. Proposed subsections 18B(13) and 18D(13) provide that an instrument made under proposed section 18B and 18D is not a legislative instrument. Proposed sections 18B and 18D deal with a range of matters relating to the vesting of powers under applied state and territory laws.

1.142 The committee notes that as instruments made under proposed section 18B and 18D are specified not to be legislative instruments they will not be subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As such there is no parliamentary scrutiny of non-legislative instruments. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why instruments that are to be made under proposed sections 18B and 18D are not legislative in character. In this instance, the explanatory memorandum notes in relation to proposed subsection 18D(13) (a similar explanation is provided for proposed subsection 18B(13):

> New subsection 18D(13) provides that an instrument under section 18D is not a legislative instrument. This is because it is not legislative in character and therefore not covered by subsection 8(4) of the Legislation Act. Subsection 18D(13) confirms this and is included to assist readers.[100]

1.143 While acknowledging this explanation it is unclear to the committee, on the basis of the explanatory materials provided, why instruments made under proposed sections 18B and 18D are not legislative in character.

1.144 The committee therefore requests the minister's more detailed advice regarding:

- **why it is appropriate to specify that instruments made under proposed sections 18B and 18D are not legislative instruments; and**
- **whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

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99 Schedule 1, items 67 and 72, proposed subsections 18B(1) and 18D(13). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

100 Explanatory memorandum, p. 50.

Procedural fairness

Fair trial rights[101]

1.145 Item 112 of Schedule 1 to the bill seeks to repeal and substitute section 60C of the *Norfolk Island Act 1979* (the NI Act). Proposed subsection 60C(2) provides that the court of a prescribed state or territory may order that any criminal trial be held or continued in the prescribed state or territory, rather than on Norfolk Island. However, the court may only make such an order, if it is satisfied that the interests of justice require it.[102] If the court is sitting in the prescribed state or territory and the accused is not present, the accused must be represented and the court must be satisfied that the accused understands the effect of the order.[103] Proposed paragraph 60C(5)(a) provides that the court may order that the accused be removed to a specified place and held there for the purposes of the trial and any related proceedings, and proposed paragraph 60C(5)(b) provides that the court may order that all persons required to attend to give evidence in the trial or proceedings attend at a specified time and place.

1.146 The committee considers that these measures may, over time, have the effect of reducing the number of criminal trials held on Norfolk Island. From a scrutiny perspective, the committee is therefore concerned that proposed section 60C has the potential to limit access to justice on Norfolk Island for accused persons. In relation to the right to a fair trial and fair hearing rights, the statement of compatibility states:

> Under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), a person is 'entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The amendments in the Bill advance this right in a number of respects.
>
> Amendments to the NI Act allow the Commonwealth to enter into arrangements with state or territory governments to provide state-type services in Norfolk Island and provide for the possible future conferral of territory jurisdiction upon state or territory courts and tribunals. Where the laws of a state or territory have been applied in Norfolk Island to support state-type service delivery, these amendments ensure that matters arising under these laws can be heard by the relevant court with the appropriate legislative knowledge and experience in that jurisdiction.
>
> Amendments to the NI Act engage the right to a fair trial to the extent that if the jurisdiction of Norfolk Island courts is conferred on a prescribed state or territory court, the amendments provide for the court to sit in either in

101 Schedule 1, item 112, proposed section 60C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

102 Proposed paragraph 60C(4)(a).

103 Proposed paragraph 60C(4)(b).

> Norfolk Island or in the prescribed state or territory when exercising its civil jurisdiction and, when exercising its criminal jurisdiction, only if it would not be contrary to the interests of justice. This is modelled on amendments to the NI Act in 2018 authorising the Supreme Court of Norfolk Island to sit outside the Norfolk Island in its criminal jurisdiction when not contrary to the interests of justice.
>
> This allows for the venue of criminal and civil proceedings to be relocated from the place in which the alleged or impugned conduct was engaged. The relocation of proceedings may impose hardship on the accused person/defendant by reason of reduced access to witnesses and other evidence on which they may seek to rely in their defence of the proceedings. In this regard, Article 14(3)(e) of the ICCPR recognises that the accused person is entitled to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. Existing case law indicates that these factors will be taken into account by the relevant state or territory court in determining whether the relocation of the proceedings from Norfolk Island would be contrary to the interests of justice.
>
> By authorising proceedings to be relocated and the empanelment of a jury in the alternative venue, the Bill also promotes the right to a fair trial in cases where there are concerns about empanelling an impartial local jury.[104]

1.147 The committee notes that the statement of compatibility accepts that the relocation of criminal proceedings from Norfolk Island 'may impose hardship on the accused person/defendant by reason of reduced access to witnesses and other evidence on which they may seek to rely in their defence of the proceedings'. However, the statement of compatibility notes in this regard that existing case law indicates that the right of the accused to obtain evidence and examine witnesses will be taken into account by the state or territory court when determining whether it would be in the interests of justice to make an order that a trial be held in the prescribed state or territory.

1.148 While the committee welcomes the requirement that a court may only make an order that a trial be held in the prescribed state or territory if it is satisfied that the interests of justice require it, the committee considers that further safeguards may be required to ensure fair trial rights and procedural fairness, given the difficulty that accused persons may face if their trial is held in a prescribed state or territory, rather than on Norfolk Island. The proposed section may affect access to justice by creating barriers to accessing legal representation, evidence and trial support. For example, an accused person's existing legal representatives may be best placed to represent them due to experience and familiarity with the accused and the case and evidence. However, it is not clear whether an accused's legal representatives would

104 Explanatory memorandum, pp. 17-18.

be eligible to represent the accused in another jurisdiction, nor whether the court would take into account whether the accused's existing legal representatives would be in a position to travel and reside in the other jurisdiction during the trial.

1.149 **The committee therefore requests the minister's advice as to whether the bill can be amended to include additional protections to protect the rights of an accused person whose trial is held in a prescribed state or territory, rather than on Norfolk Island**.

Significant matters in delegated legislation

Privacy[105]

1.150 Item 60 of Schedule 3 to the bill proposes to insert subsection 6(5A) into section 6 of the *Privacy Act 1988.* Proposed subsection 6(5A) provides that the minister may, by legislative instrument, exempt a body, office or appointment for the purposes of proposed paragraphs 6(1)(ca) or 6(1)(ea) of the definition of agency. The effect of such an instrument would be exempt the relevant entity from the requirements of the *Privacy Act 1988* (the Privacy Act).

1.151 The committee's view is that significant matters, such as exemptions from the requirements of the Privacy Act, should be in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard the explanatory memorandum states:

> It is anticipated that the minister would only exempt, by legislative instrument, such a body, office or appointment if satisfied that the relevant body, office or appointment would be subject to a law that provides equivalent, or substantially similar, requirements relating to the use of personal information as are provided by the Privacy Act. This may be the case, for instance, where the relevant body, office or appointment is subject to an applied state or territory law which deals with the use of personal information by public bodies, such as the Privacy and Personal Information Protection Act 1998 (NSW) which regulates the use of personal information with respect to local government councils in NSW. In such a case, it may be more appropriate for the relevant external territory body, office or appointment to be subject to the privacy law requirements of the applied state or territory law rather than the Privacy Act.[106]

1.152 While noting the explanation provided in the explanatory memorandum, it is unclear to the committee why at least high-level guidance in relation to when the exemption power may be used cannot be included on the face of the bill. The

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105 Schedule 3 part 3 item 60 proposed subsection 6(5A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

106 Explanatory memorandum, p. 107, para 483.

committee notes that it is anticipated that the minister will use the power to exempt specific bodies, offices or appointments where state level privacy protections apply, such as in the example provided in the explanatory memorandum in relation to New South Wales. From a scrutiny perspective, the committee considers that it would be appropriate for such a requirement to be set out on the face of the bill to ensure that exemptions to Privacy Act requirements are not made in circumstances where there is no equivalent state or territory laws to protect the privacy of relevant individuals.

1.153 In addition, the explanatory materials do not clarify how the minister will assess whether equivalent or substantially similar safeguards exist in the relevant State or Territory jurisdictions, as compared to the Privacy Act protections.

1.154 The committee therefore requests the minister's advice as to:

- **why it is necessary and appropriate to leave significant matters, such as exemptions from the requirements of the Privacy Act, to delegated legislation, noting the potential impact on the privacy of individuals;**
- **whether the bill can be amended to include at least high-level guidance in relation to when the exemption power may be used; and**
- **how the minister will assess whether the relevant state or territory jurisdiction has equivalent or substantially similar privacy protections as provided for under the Privacy Act.**

Bills with no committee comment

1.155 The committee has no comment in relation to the following bills which were introduced into the Parliament between 6 – 22 October 2020:

- Aged Care Legislation Amendment (Financial Transparency) Bill 2020 [No. 2]
- Appropriation (Parliamentary Departments) Bill (No. 1) 2020-2021
- Bankruptcy (Estate Charges) Amendment (Norfolk Island) Bill 2020
- Native Title Amendment (Infrastructure and Public Facilities) Bill 2020
- Royal Commissions Amendment (Confidentiality Protections) Bill 2020
- Social Security Amendment (COVID-19 Supplement) Bill 2020
- Social Services and Other Legislation Amendment (Coronavirus and Other Measures) Bill 2020
- Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020

Commentary on amendments and explanatory materials

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

- Recycling and Waste Reduction Bill 2020.[107]

107 On 26 October 2020, the House of Representatives agreed to 16 Government amendments, the Assistant Minister for Waste Reduction and Environmental Management (Mr Evans) presented a supplementary explanatory memorandum, 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.

Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020

Purpose	This bill seeks to enhance Defence's capacity to provide assistance in relation to natural disasters and other emergencies
Portfolio	Defence
Introduced	House of Representatives on 3 September 2020
Bill status	Before the Senate

Parliamentary scrutiny[1]

2.2 In *Scrutiny Digest 13 of 2020* the committee requested the minister's advice as to:

- the scope of powers (including coercive powers and the use of force against members of the public) that may be exercised by reservists subject to a call out order under proposed subsection 28(1) and protected persons subject to a direction relating to the provision of Defence assistance under proposed subsection 123AA(2); and
- why it is considered necessary and appropriate to shield call out orders made under proposed subsection 28(1) and directions relating to the provision of Defence assistance under proposed subsection 123AA(2) from all forms of parliamentary scrutiny.[2]

1 Schedule 1, item 2, proposed subsection 28(1); Schedule 2, item 4, proposed section 123AA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 9-10.

Department's response[3]

2.3 The department advised:

Reserve call out orders

The power to call out Reserve members in section 28 of the Act does not authorise the deployment of the ADF, and does not provide called out Reserve members with any powers once they are deployed. In this context, called out Reserve members can be used in exactly the same way as Permanent ADF members when rendering emergency assistance. Except in very specific situations where Part IIIAAA of the Act is being used to respond to domestic violence or threats to Commonwealth interests, ADF members provide assistance in natural disasters and other emergencies under the executive power. This would not authorise the use of force, beyond what is available to members of the community (for example, self-defence), or the use of coercive powers (such as powers to control people's movement or detain people). This Bill also does not authorise the use of force or coercive powers.

The Bill would amend section 28 to make a Reserve call out order a notifiable instrument. This has substantially the same effect as the existing provision, which requires Reserve call out orders to be published in the Gazette. It is not necessary or appropriate to make Reserve call out orders legislative instruments, for a number of reasons:

- Reserve call out orders would not be a legislative instrument within the meaning of sub-section 8(4) of the *Legislation Act 2003*. They do not determine the law, only the particular circumstances in which one aspect of Reserve members' service obligation, as set out in Part III of the Act, applies.
- It would not be appropriate for Reserve call out orders to be disallowable, noting the significant levels of disruption this would cause for ADF operations, planning, and ADF members who had been called out.
- There are numerous mechanisms by which any decision by Government to call out the Reserves could be scrutinised by Parliament.

Directions under s 123AA(2)

The only purpose of a direction under proposed subsection 123AA(2) is to enliven the immunity provision in subsection 123AA(1). Subsection (2) was included to provide a clear decision that the circumstances described in the subsection had been met. The effect of subsection 123AA(2) is to limit

3 The department responded to the committee's comments in a letter dated 26 October 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 15 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

the circumstances in which the immunity provision applies. Not all assistance provided by Defence will meet the threshold to enliven the provision.

Even if subsection 123AA(2) were interpreted as providing legislative authority to direct the deployment of the ADF, the scope of the provision does not increase the Minister's existing power to direct the ADF to provide assistance under the executive power. It represents a subset of assistance Defence is already able to provide, including at the direction of the Minister. It does not authorise the use of force or coercive powers.

It is not necessary or appropriate to make directions under subsection 123AA(2) legislative instruments, for a number of reasons:

- Directions under subsection 123AA(2) would not be legislative instruments within the meaning of subsection 8(4) of the *Legislation Act 2003*. They do not determine or alter the law, only determine the particular circumstances in which the immunity in subsection 123AA(2) will apply.
- It would not be appropriate for directions under subsection 123AA(2) to be disallowable, noting the disruption this could cause to protected persons who are relying on the immunity.
- There are numerous mechanisms by which any decision by Government to direct assistance in relation to a natural disaster or other emergency could be scrutinised by Parliament.

Committee comment

2.4 The committee thanks the department for this response. The committee notes the department's advice that proposed subsection 28(1) relating to Reserve call out orders do not authorise the use of force or coercive powers. The department advised that it is necessary and appropriate to provide that a Reserve call out order is a notifiable instrument, as it would not be a legislative instrument for the purposes of subsection 8(4) of the *Legislation Act 2003,* it would be inappropriate to subject such an order to disallowance due to the need for operational certainty, and because there are other parliamentary scrutiny mechanisms available.

2.5 The committee also notes the department's advice that directions relating to the provision of Defence assistance under proposed subsection 123AA(2) do not authorise the use of force or coercive powers. The department further advised that it is not necessary or appropriate for these directions to be legislative instruments, as they do not determine the law and would not be considered legislative instruments for the purposes of section 8(4) of the *Legislation Act 2003*, and that disallowance may cause disruption to protected persons relying on the immunity, and because there are other parliamentary scrutiny mechanisms available.

2.6 While noting this advice, the committee reiterates its concerns that notifiable instruments and non-legislative directions are not subject to tabling, disallowance or sunsetting and as such are not subject to parliamentary scrutiny.

2.7 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the department 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*).

2.8 In light of the committee's ongoing scrutiny concerns in relation to parliamentary scrutiny, the committee requests the minister's further advice as to:

- **which parliamentary scrutiny mechanisms apply to a call out order made under proposed subsection 28(1) and to a direction relating to the provision of Defence assistance made under proposed subsection 123AA(2) as currently drafted; and**
- **whether the bill can be amended to:**
  - **provide that call out orders made under proposed subsection 28(1) must be tabled in both Houses of the Parliament, noting that the tabling of documents in Parliament provides opportunities for debate that are not available where documents are only published online;**
  - **provide that an annual report on the use of directions made under proposed subsection 123AA(2) must be included in the Defence annual report prepared by the secretary and given to the minister under section 46 of the *Public Governance, Performance and Accountability Act 2013*; and**
  - **provide at least high level guidance on the scope of powers that may be exercised by reservists subject to a call out order under proposed subsection 28(1) and protected persons subject to a direction relating to the provision of Defence assistance under proposed subsection 123AA(2), including clarifying on the face of the bill that these orders and directions do not authorise the use of force or coercive powers beyond what is available to members of the community.**

Immunity from civil and criminal liability[4]

2.9 In *Scrutiny Digest 13 of 2020* the committee requested the minister's advice as to why it is considered appropriate to provide protected persons with both civil and criminal immunity so that civil and criminal proceedings may only be brought against a protected person in circumstances where lack of good faith is shown.[5]

Department's response

2.10 The department advised:

> The immunity provision applies in relation to acts or omissions done, in good faith, in the performance or purported performance of the protected person's duties, when rendering emergency assistance. The use of the term 'good faith' in an immunity provision of this sort is very common, with multiple examples in State and Territory legislation. The existence of the immunity is limited by the requirement that the actions or omissions be done in the performance or purported performance of the person's duties. The duties directed to be done must be lawful duties. This provision does not expand the scope of lawful duties – for example, it does not authorise the use of force or coercive powers, and does not provide authority for protected persons to commit criminal offences with impunity. A person acting outside the scope of their lawful duties will not have the protection of this provision, even if they are acting in good faith.
>
> The immunity provision provides protections against liability in relation to how protected person performs their lawful duties, but does not expand the scope of lawful duties. For this reason, there will only be a narrow range of criminal offences where the immunity could be relied on.

Committee comment

2.11 The committee thanks the department for this response. The committee notes the department's advice that the use of the term 'good faith' in immunity provisions is common and that the provision does not expand the scope of lawful duties. The department also advised that it does not authorise the use of force or coercive powers and does not provide authority for protected persons to commit criminal offences with impunity. The department further advised that there will be a narrow range of criminal offences where the immunity may be relied upon.

2.12 While noting this explanation, the committee notes that the response did not directly address the committee's question as to why it is considered appropriate to provide civil and criminal immunity for protected persons. The committee expects that if a bill seeks to provide immunity from civil and criminal liability, particularly

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4 Schedule 2, item 4, proposed section 123AA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 10-11.

where such immunity could affect individual rights, this should be soundly justified. While the committee appreciates that the provision may not expand the scope of lawful duties that may be performed by protected persons, the committee does not consider that this provides a reason as to why the provision is considered necessary.

2.13 The committee's concerns in relation to this issue are heightened by the fact that the bill does not define the term 'other emergency', which is essential to the operation of proposed section 123AA as the immunity is in relation to duties performed in good faith by protected persons in the context of a natural disaster or other emergency. The committee is concerned that the bill does not define what may constitute an 'other emergency', which may widen the scope of when the immunity in proposed section 123AA may apply. In addition, the committee considers that the lack of a definition of an 'other emergency' in the bill limits the ability of the Parliament to effectively scrutinise the appropriateness of the provision.

2.14 The committee is also concerned that it is not clear on the face of the bill whether the Commonwealth as a whole may also be covered by the proposed immunity. While the committee notes that the explanatory memorandum clarifies that the immunity does not apply to the Commonwealth,[6] the committee considers that this would be best set out on the face of the bill to provide appropriate clarity given the significance of the provision.

2.15 The committee therefore requests the minister's further advice as to:

- **why it is considered necessary and appropriate to provide protected persons with both civil and criminal immunity; and**
- **whether the bill can be amended to:**
  - **include an inclusive definition of the term 'other emergency' (or, at a minimum, whether the explanatory memorandum can be amended to include examples of what may constitute an 'other emergency'); and**
  - **clarify that the immunity in proposed section 123AA does not extend to the Commonwealth as a whole.**

6 Explanatory memorandum, para 30.

Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020

Purpose	This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* to facilitate the devolution of environmental approvals to the states and territories, making technical amendments to the existing provisions of the Act relating to bilateral agreements to support the efficient, effective and enduring operation of bilateral agreements
Portfolio	Environment
Introduced	House of Representatives on 27 August 2020
Bill status	Before the Senate

Incorporation of materials as in force from time to time[7]

2.16 The committee initially scrutinised this bill in *Scrutiny Digest 11 of 2020* and requested the minister's advice.[8] The committee considered the minister's response in *Scrutiny Digest 13 of 2020* and requested the minister's further advice as to whether the bill could be amended to require, on the face of the primary legislation, that any document incorporated into a bilateral agreement must be made freely available.[9]

Minister's response[10]

2.17 The minister advised:

> I appreciate the importance of ensuring that documents relating to accredited state and territory assessment and approval processes are made freely available to the public. I have previously advised the Committee that the type of documents that may be incorporated into bilateral agreements would either be freely available or expected to be

7 Schedule 5, item 9, proposed section 48AA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2020*, pp. 11-12.

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 27-30.

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

made freely available (for example, state or territory policies and plans relevant to assessment and approvals processes).

Further to this, it is intended that approval bilateral agreements will include a requirement that states and territories publish relevant information on the Internet relating to the assessment and approval process that assist decision-makers to exercise their functions and powers under an accredited process. This information would include rules, guidelines, practices or precedents.

I am satisfied that this approach will support appropriate access and transparency, without the need for further legislative provisions.

Committee comment

2.18 The committee thanks the minister for this response. The committee notes the minister's advice that the type of documents which may be incorporated into bilateral agreements will be either freely available or expected to be so. The committee further notes the minister's advice that it is intended that bilateral agreements will require states and territories to publish relevant information online including rules, guidelines, practices and precedents. While the committee welcomes this advice, the committee reiterates that there is no requirement for such documents to be made freely available on the face of the primary legislation.

2.19 The committee takes this opportunity to reiterate that it is fundamental principle of the rule of the law that every person subject to the law should be able to freely and readily access its terms. As a result, the committee will have scrutiny concerns when external materials that are incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law.

2.20 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in both of her responses to the committee 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*).

2.21 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the bill not requiring documents incorporated into bilateral agreements to be freely available.

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

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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*.