The Senate

Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Initial scrutiny

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

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

Purpose	This bill seeks to amend the *Aged Care Act 1997* (Aged Care Act), the *Aged Care Quality and Safety Commission Act 2018* (Quality and Safety Commission Act), the *Aged Care (Transitional Provisions) Act 1997* (Transitional Act), the *National Health Reform Act 2011* (National Health Reform Act), the *Veterans' Entitlements Act 1986*, the *Military Rehabilitation and Compensation Act 2004*, and the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* to implement eight measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety (Royal Commission).
Portfolio	Health
Introduced	House of Representatives on 1 September 2021

Broad delegation of administrative powers[1]

1.2 Item 51 of Schedule 1 to the bill seeks to repeal and substitute subsection 96-2(14) of the *Aged Care Act 1997* to provide that the Secretary may delegate all of the Secretary's powers and functions under Part 2.3 of the Aged Care Act to a person making an assessment for the purposes of section 22-4.

1.3 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

1 Schedule 1, item 51. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

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.

1.4 The explanatory memorandum in this instance contains no justification as to why it is appropriate that the Secretary may delegate their powers to any person. The committee notes that current subsection 96-2(14) of the Aged Care Act provides a similarly broad delegation power. However, the committee does not consider that consistency with existing legislation is a sufficient justification for the inclusion of broad delegations of administrative powers.

1.5 The committee requests the minister's advice as to

- **why it is considered necessary and appropriate to allow for the delegation of any or all of the Secretary's functions or powers under Part 2.3; 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.**

Legislative instrument not subject to disallowance[2]

1.6 Item 4 of Schedule 2 to the bill seeks to insert proposed section 7A into the *Aged Care Quality and Safety Commission Act 2018* (Aged Care Quality and Safety Act) to provide that the minister may make a determination, by legislative instrument, that a law of a State or Territory is an 'aged care screening law'. A note under the proposed subsection confirms that these determinations will not be subject to disallowance due to the operation of subsection 44(1) of the *Legislation Act 2003*.

1.7 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum states:

> A note under this subsection provides that a legislative instrument made under new section 7A is not subject to section 42 (disallowance) of the Legislation Act (see subsection 44(1) of the Legislation Act). This recognises that it is undesirable for Parliament to disallow instruments that have been made for the purposes of a multijurisdictional body or scheme, as disallowance would affect jurisdictions other than the Commonwealth. If a determination under new section 7A is disallowed, the Aged Care Quality

2 Schedule 2, item 4, proposed section 7A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

and Safety Commission (Commission) would be limited in its ability to properly perform its functions or unable to perform them at all.[3]

1.8 At a general level, the committee does not consider the fact that section 44 of the *Legislation Act 2003* applies to an instrument is, of itself, a sufficient justification for excluding parliamentary disallowance.[4] The committee agrees with the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation that 'any exclusion from parliamentary oversight… requires that the grounds for exclusion be justified in individual cases, not merely stated'.[5] It is unclear to the committee how allowing for disallowance would limit or prevent the Aged Care Quality and Safety Commission from performing its functions.

1.9 The issue of exemption from disallowance has been highlighted recently in the committee's review of the *Biosecurity Act 2015,*[6] the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[7] and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.[8]

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

- **why it is considered necessary and appropriate to provide that determinations made under proposed section 7A are not subject to disallowance; and**

3 Explanatory memorandum, p. 56.

4 The committee further notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has recommended that the *Legislation Act 2003* be amended to repeal the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme from disallowance and sunsetting. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, p. 107.

5 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, pp. 75–76.

6 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-34.

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

8 Senate Resolution 53B. See *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

- **whether the bill could be amended to provide that these determinations are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.**

Significant matters in delegated legislation[9]

1.11 Schedule 3 to the bill seeks to amend the Aged Care Quality and Safety Act to introduce a Code of Conduct that will apply to approved providers and their aged care workers and governing persons. Item 9 of Schedule 3 to the bill seeks to insert proposed section 18A to provide the code functions of the Aged Care Quality and Safety Commissioner (Commissioner). Proposed subsection 18A(1) provides that the code functions of the Commissioner are to, in accordance with the rules, deal with information given to the Commissioner relating to a failure by an approved provider, aged care worker or governing person to comply with the Code of Conduct. Item 10 of Schedule 3 to bill amends the existing rule making provisions in section 21 of the Aged Care Quality and Safety Act to reflect the matters included in proposed section 18A.

1.12 Item 11 of Schedule 3 seeks to insert proposed section 74AE to provide that the rules may make provision for, or in relation to, a code of conduct for approved providers, aged care workers and governing persons. There is no additional detail on the face of the bill as to the kinds of matters that may be included in the Code of Conduct.

1.13 The committee's consistent view is that significant matters, such as the details of a Code of Conduct and how information in relation to a failure to comply with the Code of Conduct will be dealt with, should be included in primary legislation unless a sound justification for the use of delegated legislation has been provided. In this instance, the explanatory memorandum contains no justification for leaving these matters to delegated legislation beyond noting that 'this will allow flexibility to appropriately tailor the Code of Conduct'.[10]

1.14 The committee's concerns in this instance are heighted noting the proposed penalties for contravention of the Code of Conduct are 250 penalty units. 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.

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

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9 Schedule 3, item 9, proposed section 18A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

10 Explanatory memorandum, p. 67.

- **why it is considered necessary and appropriate to leave the making of a Code of Conduct for approved providers and aged care workers, and how information in relation to a failure to comply with the Code of Conduct will be dealt with, to delegated legislation; and**
- **whether the bill could be amended to include at least high-level guidance regarding these matters, including in relation to the content of the Code of Conduct, on the face of the primary legislation.**

Broad discretionary power

Significant penalties[11]

1.16 Schedule 3 to the bill seeks to amend the Aged Care Quality and Safety Act to provide new powers for the Commissioner to impose banning orders on aged care workers and governing persons of approved providers. Proposed subsection 74GC(2) provides that the banning order may apply generally or be of limited application, be permanent or for a specified period and be made subject to specified conditions.

1.17 The committee considers that this provision provides the Commissioner with a broad discretionary power to impose conditions on banning orders in circumstances where there is no guidance on the face of the bill as to how or when the power should be exercised. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory materials. In this instance, the explanatory memorandum states:

> Without limiting the kinds of conditions that may be imposed, it is anticipated that the types of conditions the Commissioner may impose on a banning order may include, for example, that an individual that is the subject of a banning order must provide a copy of that banning order to prospective employers where the banning order restricts them from engaging in some but not all activities related to aged care service provision. This will assist prospective employers to ensure the worker is not involved in those activities. Another type of condition that may also be imposed is one that requires the subject of the banning order to undertake and successfully complete specified training or skills development and provide evidence of this to the Commissioner.[12]

1.18 While noting this explanation, it is unclear why at least high-level guidance cannot be provided on the face of the primary legislation as to the types of conditions

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11 Schedule 3, item 25, proposed section 74GC and proposed subsection 74GD(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

12 Explanatory memorandum, p. 72.

that can be imposed. The committee notes that when considering whether to implement a banning order, the Commissioner must have regard to a number of suitability matters that are set out on the face of the primary legislation.[13]

Civil penalties

1.19 Proposed subsection 74GD(1) provides that if an individual engages in conduct that breaches a banning order, or a condition of a banning order, that is in force against an individual, a civil penalty of 1,000 penalty units may be imposed.

1.20 The explanatory memorandum states:

> The high civil penalty for contravening these subsections reflects the importance of complying with a banning order by both individuals and approved providers to ensure the safety, health and wellbeing of care recipients. This is appropriate given the nature of a banning order and its application in only the most egregious forms of misconduct.[14]

1.21 Noting the broad discretionary nature of the Commissioner's power to impose conditions on a banning order and the lack of guidance on the face of the bill as to the types of conditions that can be imposed, the committee has scrutiny concerns regarding the imposition of a significant civil penalty for persons who breach conditions of banning orders. For example, in cases where a person is required to comply with banning order conditions but has since left the aged care sector, it is unclear to the committee whether these conditions—which may include compulsory training—would remain enforceable, with failure to comply resulting in a civil penalty of up to $222,000. In this context, the committee does not consider the explanatory memorandum has adequately explained why it is appropriate to provide a civil penalty of up to 1,000 penalty units for the breach of a condition of a banning order.

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

- **why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to impose specified conditions on a banning order;**
- **whether the bill can be amended to provide at least high-level guidance as to the conditions that may be placed on a banning order; and**
- **why it is considered necessary and appropriate to apply a significant civil penalty to breaches of specified conditions on banning orders.**

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13 See item 26 of Schedule 5 to the bill, proposed section 8C.

14 Explanatory memorandum, p.73.

Significant matters in delegated legislation

Privacy[15]

1.23 Item 25 of Schedule 3 to the bill seeks to insert proposed section 74GI into the Aged Care Quality and Safety Act to provide that the Commissioner must establish and maintain a register of each individual against whom a banning order has been made, that includes the person's name, ABN, the details of the banning order and any other information specified by the rules. Proposed subsection 74GI(4) also provides that the rules may make provision for the correction of information, making the register, or specified information, publicly available and any other matters relating to the administration or operation of the register.

1.24 The committee's view is that significant matters, such as the matters that can be included on a register that may be public, 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:

> It is not anticipated that the matters which may be included in the register prescribed by the rules will extend to any highly sensitive or highly personal information about the person subject to the banning order. However, in some instances, such as where an individual or business has a common name, it may be necessary to include further information, to publish an amount of information that is sufficient to ensure the person can be identified. This would not extend, for example, to the nature of the incident/s that prompted the making of the banning order.[16]

1.25 While noting the explanation in the explanatory memorandum, the committee notes that there is nothing on the face of the bill which would prevent the inclusion of highly sensitive or highly personal information about persons on the Register. As a result, the committee notes that the potential disclosure of information regarding persons subject to banning orders will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to leave significant matters, such as what personal information can be included on the register of banning orders, to delegated legislation, noting the potential impact on a person's privacy; and**

15 Schedule 3, item 25, proposed section 74GI. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

16 Explanatory memorandum, p.75.

- **whether the bill can be amended to set out further details as to the information that can be included, or not included, on the register on the face of the primary legislation.**

Reversal of the evidential burden of proof[17]

1.27 Item 78 of Schedule 8 to the bill seeks to amend the *National Health Reform Act 2011* to insert proposed section 215A, which provides that an official of the Pricing Authority may disclose certain information to the Aged Care Advisory Committee or a committee established under section 205 of the Act. Proposed subsection 215A(2) provides that a person commits an offence if the person is a member of these committees and discloses or uses protected Pricing Authority information. Proposed subsection 215A(3) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the disclosure or use was for the purposes of the Act; was for the purposes of the performance of the functions of the committee; or was in the course of the person's service as a member of the committee.

1.28 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[18] 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.

1.29 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. In this instance, the explanatory memorandum states:

1.30 The committee notes that the *Guide to Framing Commonwealth Offences*[19] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and

17 Schedule 8, item 78, proposed section 215A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

18 Subsection 13.3(3) of the *Criminal Code* 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.

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

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[20]

1.31 In this case, it is not apparent these matters are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. While acknowledging that the explanatory memorandum states that this is the case, no additional detail or justification is provided. These matters may therefore be matters more appropriate to be included as an element of the offence.

1.32 The committee requests the minister's detailed justification as to the appropriateness of including the specified matters as an offence-specific defence. The committee suggests that it may be appropriate if proposed subsection 215A(3) were amended to provide that the relevant matters are elements of the offence. The committee requests the minister's advice in relation to this matter.

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

COAG Legislation Amendment Bill 2021

Purpose	This bill seeks to: • update outdated references to COAG Reform Fund where it occurs in legislation with Federation Reform Fund (Schedule 1); • update outdated references to COAG with First Ministers Council where it occurs in legislation (Schedule 2); • retain the term 'Ministerial Council', but change its definition where it occurs in legislation to mean a body (however described) that consists of the Minister of the Commonwealth, and the Minister of each State and Territory, who is responsible, or principally responsible, for matters relating to a particular portfolio issue (Schedule 2); and • make clear that where Commonwealth legislation makes provisions to protect from disclosure the deliberations and decisions of the Cabinet and its committees, these provisions apply to the deliberations and decisions of the committee of cabinet known as the National Cabinet (Schedule 3).
Portfolio	Prime Minister
Introduced	House of Representatives on 2 September 2021

Trespass on personal rights and liberties – freedom of information

Parliamentary scrutiny[21]

1.33 Schedule 3 to the bill seeks to make amendments to a number of Commonwealth Acts to provide that a reference to 'Cabinet' includes a committee of the Cabinet (including the committee known as National Cabinet) and a committee (however described) of the National Cabinet. This includes amendments to the:

- *Auditor-General Act 1997* (Auditor-General Act) to allow the Attorney-General to issue a certificate preventing the Auditor-General from including particular information in a public report tabled in the Parliament if it would involve the disclosure of deliberations or decisions of the National Cabinet (existing

21 Schedule 3, items 7, 14–18 and 26. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (v).

subsection 37(3) of the Auditor-General Act further prohibits any alternative disclosure by the Auditor-General of such information to the Parliament);[22]

- *Freedom of Information Act 1982* (FOI Act) to extend the current blanket exemption of Cabinet documents from the application of the FOI Act to National Cabinet documents;[23]
- *Independent National Security Legislation Monitor Act 2010* (INSLM Act) to provide that annual reports of the Monitor tabled in the Parliament may not contain any information obtained from a document prepared for the purposes of a meeting of the National Cabinet or any information that would disclose the deliberations or decisions of the National Cabinet;[24] and
- *Parliamentary Joint Committee on Law Enforcement Act 2010* (Joint Committee on Law Enforcement Act) to extend the definition of 'sensitive information' to include information that would disclose deliberations or decisions of the National Cabinet thereby limiting the power of the committee to obtain such information from the Australian Crime Commission or Australian Federal Police.[25]

1.34 From a scrutiny perspective, the committee is concerned that the above provisions will undermine the ability of the Parliament and the public to effectively scrutinise the operation of, and decisions taken by, the National Cabinet. In relation to the extension of the current blanket exemption of Cabinet documents from the application of the FOI Act to National Cabinet documents, the committee notes that the FOI Act is an important part of the accountability framework for administrative decision-making by the executive government. The committee therefore expects the explanatory materials to set out a clear justification for why such a blanket approach to prevent the disclosure of National Cabinet documents across the Commonwealth statute book is appropriate.

1.35 In outlining why existing Cabinet-related exemptions should be extended to the National Cabinet the explanatory memorandum states:

> The confidentiality of information and decision-making is critical to the effective operations of the National Cabinet, enabling issues to be dealt with quickly, based on advice from experts. The sharing of sensitive data, projections and judgements – which relies on these principles of

22 Schedule 3, item 7.

23 Schedule 3, items 14–16.

24 Schedule 3, items 17–18.

25 Schedule 3, item 26.

> confidentiality – has been the foundation of effective decision making in the interests of the Australian people.[26]

1.36 While noting this explanation, the committee is concerned that although there may, in some circumstances, be legitimate reasons that documents genuinely related to the deliberations of National Cabinet should be confidential, this bill seeks to extend Cabinet-related exemptions in some instances to *all* documents submitted, or proposed to be submitted to, National Cabinet. The committee's scrutiny concerns are heightened noting that the members of National Cabinet are not wholly or collectively responsible to the Commonwealth Parliament or to the Parliament of any state or territory. Instead, the National Cabinet is an intergovernmental body that exists outside of the accountability lines set up by responsible government in the Commonwealth and state and territory parliaments.

1.37 The committee therefore requests the minister's more detailed advice as to why it is considered necessary and appropriate to broadly exempt National Cabinet documents from disclosure under the Auditor-General Act, FOI Act, INSLM Act and Joint Committee on Law Enforcement Act.

Retrospective application[27]

1.38 Item 33 of Schedule 3 to the bill seeks to provide that the amendments to the FOI Act outlined above apply in relation to requests for access to a document where the request is made on or after commencement or where a request was made, but not finally determined, before that commencement. A request will not be finally determined unless all rights of review and appeal in relation to the request have expired or been exhausted.

1.39 The committee notes that by providing that the amendments to the FOI Act apply to requests that have not been 'finally determined' means that some requests for access will be retrospectively affected. 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.

1.40 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

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26 Explanatory memorandum, p. 17.

27 Schedule 3, item 33. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum contains no justification as to why the amendments to the FOI Act will apply retrospectively. The committee's concerns in this instance are heightened, noting the broad definition of 'finally determined' means that any appeals of existing decisions will be determined based on the amended provisions, rather than the provisions that applied at the time the original request was made.

1.41 As the explanatory materials have not addressed this matter, the committee requests the minister's advice regarding why it is necessary and appropriate for the amendments to the FOI Act to apply retrospectively. The committee's consideration of this matter would be assisted if the advice addresses whether the amendments will impact any undetermined cases, and if so, the number of cases that may be affected.

Commonwealth Electoral Amendment (Integrity of Elections) Bill 2021

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to provide for the routine auditing of the electronic component of Australian federal elections and the provision of voter identification.
Sponsor	Senator Malcolm Roberts
Introduced	Senate on 1 September 2021

Significant matters in delegated legislation[28]

1.42 Schedule 2 to the bill seeks to amend the *Commonwealth Electoral Act 1918* (Electoral Act) to provide that a person must provide a proof of identity document when voting in a Commonwealth election. Item 1 of Schedule 2 to the bill provides the definition of proof of identity document, which includes a community identity document. Item 12 of Schedule 2 seeks to insert proposed section 394A into the Electoral Act to provide that the rules can determine a number of matters in relation to community identity documents. This includes the circumstances in which a document is a community identity document and the meaning of certain terms, such as 'disadvantaged' and 'remote area'.

1.43 The committee's view is that significant matters, such as key elements of how community identity documents would be issued for voter identification purposes, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.44 The committee's concerns in this instance are heightened, noting the potential impact of these matters on an elector's right to vote in Commonwealth elections. 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.

1.45 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key elements of how community identity documents would be issued for voter identification purposes to delegated legislation.

28 Schedule 2, item 12, proposed section 394A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

Offshore Electricity Infrastructure Bill 2021

Purpose	This bill seeks to establish a regulatory framework to enable the construction, installation, commissioning, operation, maintenance, and decommissioning of offshore electricity infrastructure in the Commonwealth offshore area.
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 2 September 2021

Reversal of the evidential burden of proof[29]

1.46 The bill seeks to establish several defences which reverse the evidential burden of proof. Clause 15 makes it an offence to carry out certain activities in relation to infrastructure that is within a Commonwealth offshore area, including constructing or operating infrastructure. Subclause 15(2) provides that it is a defence if the conduct is authorised by a licence or the Act.

1.47 Clauses 95 and 96 provide offences in relation to the change in control of a licence holder. Clause 95 provides that it is an offence if there has been a change in control and the Registrar has not approved the change. Clause 96 provides that it is an offence if the Registrar has not been notified of a change. Subclauses 95(4) and 96(4) provide that it is a defence if the person did not know, and could not have reasonably been expected to know, that a change in control had occurred.

1.48 Clause 116 provides that it is an offence of strict liability if a licence holder does not maintain structures, equipment and property contained within their licence area in good condition. Subclause 116(3) provides that it is a defence if the structure, equipment or property was not brought into the licence area by authority of the licence holder.

1.49 Clause 148 provides that it is an offence to engage in prohibited activities within a protected zone. However, clause 149 provides a defence if the conduct was necessary to save a life or vessel, prevent pollution, or if all reasonable steps had been taken to avoid engaging in the conduct.

1.50 Clause 203 provides that it is an offence if a person obstructs or hinders an Offshore Electricity Infrastructure (OEI) inspector who is exercising powers under Part 2 or 3 of the *Regulatory Powers (Standard Provisions) Act 2014*. It is a defence

29 Subclauses 15(2), 95(4), 96(4), and 116(3), clause 149, and subclauses 203(4) and 211(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

under subclause 203(4) if the person has a reasonable excuse for the offending conduct.

1.51 Clause 211 provides that is an offence of strict liability if a person tampers with a notice that is displayed in accordance with subclauses 206(2), 208(3) or 209(8). It is a defence under subclause 211(4) if the person has a reasonable excuse for the offending conduct.

1.52 The defendant bears an evidential burden of proof in relation to all of the defences listed above. At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[30] 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, interfere with this common law right.

1.53 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. There is no explanation within the explanatory memorandum for reversing the evidential burden of proof in relation to the defences set out in subclauses 95(4), 96(4), 116(3), clause 149, subclause 203(4) or subclause 211(4). In relation to subclause 15(2) the explanatory memorandum states:

> The reason for placing this burden of proof on the defendant is because it is peculiarly within the knowledge of the defendant, ie. the defendant is in a position to confirm whether or not a licence or other authorisation has been obtained prior to the relevant regulated activity.[31]

1.54 The committee notes that the *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[32]

1.55 In the case of the defence set out at subclause 15(2), it is not apparent that the relevant matters would be *peculiarly* within the defendant's knowledge. For example, whether specific conduct is authorised by a licence would appear to be

30 Subsection 13.3(3) of the Criminal Code 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.

31 Explanatory memorandum, p. 27.

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

knowledge available to the Regulator. In addition, the explanatory memorandum has not explained whether, or why, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matters set out in the defence.

1.56 Additionally, the committee notes that the Guide to Framing Commonwealth Offences states that:

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[33]

1.57 The committee notes that no explanation has been provided in the explanatory memorandum regarding why an offence-specific defence of 'reasonable excuse' has been used in subclauses 203(4) and 211(4).

1.58 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 subclauses 15(2), 95(4), 96(4), and 116(3), clause 149, and subclauses 203(4) and 211(4).

1.59 The committee also requests the minister's advice as to why it is appropriate to use a defence of reasonable excuse in subclauses 203(4) and 211(4), including why it is not possible to rely upon more specific defences.

1.60 The committee's consideration of the appropriateness of a provision which reverses the burden of proof or includes a reasonable excuse defence is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

Reverse legal burden of proof[34]

1.61 The bill seeks to reverse the legal burden of proof in relation to two defences. The bill establishes a number of offences for breaching directions given by the Regulator or the minister under Part 2 of Chapter 4 of the bill. Clause 133 of the bill provides that it is a defence to these offences if the person proves that they took all reasonable steps to comply with the direction. A legal burden of proof is proposed to be placed on the defendant in relation to this defence. As a result, to rely on the

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

34 Subclauses 133(1) and 139(8). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

defence the defendant would need to positively prove, on the balance of probabilities, that they had taken reasonable steps to comply.

1.62 Similarly, subclauses 139(1), (3), (5) and (7) provide that it is an offence for the owner or master of a vessel to breach a determination made under subclause 136(2). Subclause 139(8) provides that it is a defence to these offences if an unforeseen emergency rendered it necessary to breach the determination, or if the vessel was not under the control of the person at the time the determination was breached. A defendant bears the legal burden of proof in relation to this defence. As a result, to rely on the defence the defendant would need to positively prove, on the balance of probabilities, one of the matters set out in subclause 139(8).

1.63 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 one or more elements of an offence, interfere with this common law right. As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of people affected being the paramount consideration.

1.64 The explanatory memorandum does not provide any justification for reversing the legal burden of proof in relation to the defence set out under clause 133 of the bill. In relation to subclause 139(8) the explanatory memorandum states:

> The reason that there is a burden placed on the defendant in this matter is because the prosecution would not be in a position to know if there is an unforeseen emergency which has caused the person to need to enter the safety zone – i.e. either to secure the safety of a vessel or to preserve human life.[35]

1.65 It is not clear to the committee from this explanation why it is necessary to reverse the legal burden of proof. The committee considers that the legal burden of proof should only be reversed in exceptional circumstances. In this case, the explanatory memorandum has not provided any explanation as to the circumstances that are said to justify a reversal of the legal burden of proof.

1.66 The committee's concerns are heightened in this instance given that the legal burden of proof is reversed in relation to a number of strict liability offences. In addition, the committee is concerned given the significant penalties, including significant imprisonment terms, that may apply under several of the offences.

1.67 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to reverse the legal

35 Explanatory memorandum, p. 145.

burden of proof in subclauses 133(1) and 139(8) and why it is not sufficient to reverse the evidential, rather than legal, burden of proof.

1.68 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.*

Evidentiary certificates[36]

1.69 Subclause 112(3) provides that the Registrar may issue a written certificate stating that an entry, matter or thing that is required or permitted to be made or done under Part 3 of Chapter 3 of the bill has, or has not, been made or done. Subclause 112(4) provides that a certificate produced under subclause 112(3) is prima facie evidence of the statements contained within it.

1.70 Certificates that constitute prima facie evidence of the matters contained within them are known as evidentiary certificates. The committee notes that where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceeding. While a person still retains the right to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The use of evidentiary certificates therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common law right to be presumed innocent until proven guilty. Consequently, the committee expects a detailed justification for any proposed powers to use evidentiary certificates to be included in the explanatory materials. In this instance, the explanatory memorandum states:

> Evidentiary certificates promote efficiency by removing delays arising from obtaining evidence with more traditional methods, freeing up the court's time to consider the more serious issues related to the offence. The use of an evidentiary certificate for a 'formal' matter may include, for example, that an application made for the approval of a change in control of a licence holder has been made, including the date on which it was lodged with the Registrar.[37]

1.71 While acknowledging this explanation, the committee notes that the *Guide to Framing Commonwealth Offences* states, in relation to criminal proceedings, that evidentiary certificates:

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36 Clause 112. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

37 Explanatory memorandum, p. 106.

> … are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.[38]

1.72 The *Guide to Framing Commonwealth Offences* further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.[39]

1.73 In this instance, it appears that the matters that may be included in a certificate given in accordance with subclause 112(4) may encompass a wide range of technical and non-technical issues relating to the change in control of a licence holder. Consequently, it is not clear to the committee whether a certificate would cover *only* formal or technical matters sufficiently removed from the relevant proceedings such as might make its use appropriate.

1.74 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing that a certificate provided in accordance with subclause 112(3) is prima facie evidence of the matters specified in the certificate.

Strict liability offences[40]

1.75 The bill seeks to establish several strict liability offences, including in relation to actions that are not authorised by licence, actions that interfere with the activities of a licence holder, tampering with notices issued by the Regulator, breaching a direction given by the Regulator or the minister, or breaching a determination in relation to a safety zone or a protection zone. Each of these strict liability offences is subject to varying penalty levels. The following strict liability offences are subject to a maximum penalty of 100 penalty units:

- subclause 77(2);
- subclause 78(2);
- subclause 116(4);
- subclause 123(3);

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38 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 54.

39 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 55.

40 Subclauses 77(2), 78(2), 116(4), 123(3), 128(3), 139(3), and 267(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

- subclause 128(3); and
- subclause 267(2).

1.76 In addition, subclause 139(7) provides that it is an offence of strict liability for the owner or master of a vessel to breach a determination made under subclause 136(2). The maximum penalty for the offence is imprisonment for 5 years.

1.77 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[41]

1.78 In this instance, the statement of compatibility states:

> The strict liability offences in this Bill are considered reasonable, necessary, and proportionate to the objective of ensuring the safety of the offshore workforce, the protection of OEI and the integrity of the licensing scheme. This will strengthen the regulatory functions under the Bill in the Commonwealth offshore area. The offences that carry strict liability are intended to compel reasonable compliance with requirements in relation to activities that are regulated under the Bill that would otherwise be intrinsically or potentially unsafe unless high standards of compliance are met. The removal of the requirement to prove fault in the relevant circumstances aims to provide a strong deterrent. They are consistent with other contemporary robust regulatory regimes such as the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and do not unreasonably or impermissibly limit the presumption of innocence. The offences are designed to ensure offshore infrastructure activities are carried out in a safe and responsible manner. The offences are also consistent with the guidance set out in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*[42]

1.79 In addition, the explanatory memorandum states in relation to subclause 139(7):

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41 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

42 Statement of compatibility, p. 14.

> This penalty is relatively high for a strict liability offence. However, this is in the context of the seriousness of the breach and also the much higher penalties that would apply where there is a fault element attached.[43]

1.80 It is not clear to the committee from this explanation why these offences are consistent with the guidance set out in the *Guide to Framing Commonwealth Offences* in circumstances where the penalty for each of the offences listed above is higher than the recommended threshold of 60 penalty units. The committee is particularly concerned in relation to the inclusion of a significant custodial penalty for the strict liability offence in subclause 139(7).

1.81 Moreover, while acknowledging that the offences are intended to encourage compliance with the offshore infrastructure scheme, it is not clear to the committee from the explanation provided why it is necessary to provide for offences of strict liability to achieve this outcome.

1.82 In light of the above, the committee requests a detailed justification from the minister as to why it is proposed to apply strict liability to the offence set out at subclause 139(7), with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.

1.83 In relation to the strict liability offences at subclauses 77(2), 78(2), 116(4), 123(3), 128(3), and 267(2), the committee draws these offences to the attention of senators and leaves to the Senate as a whole the appropriateness of including them in the bill, noting that a penalty above what is recommended in the *Guide to Framing Commonwealth Offences* applies to the proposed offences.

Exemption from disallowance[44]

1.84 Clause 182 of the bill provides that the minister may, by legislative instrument, give written directions to the Regulator about the performance of its functions under the bill. A note to clause 182 clarifies that a direction under clause 182 is not subject to disallowance due to the operation of regulations made under the *Legislation Act 2003*.

1.85 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues current arrangements does not, of itself, provide an adequate justification.

1.86 In this instance, the explanatory memorandum states that:

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43 Explanatory memorandum, p. 144.

44 Clause 182. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

> Directions of this nature are ordinarily exempt from these requirements, by the operation of the Legislation Act and the *Legislation (Exemptions and Other Matters) Regulation 2015*. They are administrative in character as they do not determine the law or alter the content of the law; rather they determine how the law does or does not apply in particular cases or circumstances. In addition, they are intended to remain in force until revoked by the Minister.[45]

1.87 At a general level, the committee does not consider the fact that an instrument will fall within one of the classes of exemption in the Legislation (Exemptions and Other Matters) Regulation 2015 is, of itself, a sufficient justification for excluding parliamentary disallowance.[46] The committee agrees with the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation that 'any exclusion from parliamentary oversight… requires that the grounds for exclusion be justified in individual cases, not merely stated'.[47]

1.88 The committee therefore expects that the explanatory memorandum to a bill that authorises the making of a legislative instrument that is exempt from disallowance should specify why the exemption is appropriate in the particular circumstances.

1.89 This issue has been highlighted recently in the committee's review of the *Biosecurity Act 2015*,[48] the inquiry of the Senate Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[49] and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.[50]

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45 Explanatory memorandum, p. 166.

46 The committee further notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has recommended that the blanket exemption of instruments that are 'a direction by a Minister to any person or body' should be abolished. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, p. 101.

47 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, pp. 75–76.

48 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-34.

49 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

50 Senate resolution 53B. See *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

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

- **why it is considered necessary and appropriate to provide that directions made under clause 182 are not subject to disallowance; and**
- **whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.**

Instruments not subject to parliamentary disallowance[51]

1.91 Clause 136 provides that the Regulator may, by notifiable instrument, determine that a specified area surrounding eligible safety zone infrastructure is a safety zone. Eligible safety zone infrastructure includes renewable energy infrastructure, electricity transmission infrastructure and seabed cables. A safety zone determination has the effect of prohibiting vessels from entering, or being present, within a zone without the written consent of the Regulator.

1.92 The committee notes that notifiable instruments will not be subject to the tabling, disallowance or sunsetting requirements that typically apply to legislative instruments. As such there is no parliamentary scrutiny of the determinations issued under clause 136. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why the determinations issued under clause 136 are not legislative in character. In this instance, the explanatory memorandum notes:

> The establishment of a safety zone is to be done by notifiable instrument. The reason for this is that the parameters for the creation of a safety zone are clearly set out in the Bill, which satisfies the requirement for it to be created as a notifiable instrument. The determination is not legislative in character, and as such, need not be made subject to Parliamentary scrutiny or sunsetting.
>
> …..
>
> In addition, it is important for the Regulator to be able to declare a safety zone and do so quickly such that the safety of people can be protected by prohibiting vessels from entering a particular area in an emergency. A notifiable instrument enables the process to be swiftly implemented without a lengthier process requiring legislative scrutiny or being subject to disallowance.[52]

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51 Clause 136. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

52 Explanatory memorandum, p. 140.

1.93 While noting this explanation, the committee has not generally accepted a desire for administrative flexibility to be a sufficient justification for providing that an instrument will not be a legislative instrument. In addition, it is not clear to the committee why a determination made under clause 136 is not of a legislative character in circumstances in which it appears that these instruments may determine or alter the content of the law. For example, the committee notes that vessels may be prohibited from entering a safety zone under subclause 137(3). In this regard, the committee notes that a protection zone determination made under clause 142 of the bill is a legislative instrument. It is unclear to the committee why determinations made under clause 142, which may impose similar obligations, are specified as legislative instruments while determinations made under clause 137 are specified as notifiable instruments.

1.94 Furthermore, the committee notes that legislative instruments can commence immediately after they registered on the Federal Register of Legislation. It is therefore unclear why providing that determinations made under clause 136 are legislative instruments would prevent the Regulation from acting quickly if necessary.

1.95 As noted above, this issue has been highlighted recently including in the committee's review of the *Biosecurity Act 2015,*[53] the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[54] and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.[55] Moreover, in this case, the committee's concerns are heightened given that elements of strict liability offences may be included within a safety zone determination, and because these offences may carry significant penalties, including imprisonment.[56]

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

- **why it is considered necessary and appropriate that determinations made under proposed clause 136 are not legislative instruments; and**

53 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-34.

54 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

55 Senate resolution 53B. See *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

56 See, for example, subclause 139(7).

- **whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

Significant matters in delegated legislation—licensing scheme[57]

1.97 Clause 29 of the bill provides that the regulations must prescribe a licensing scheme relating to, among other things, applications for licenses, changes in control of licence holders, the prescription of fees or levies, and management plans for licences. A management plan includes offshore infrastructure activities that are to be carried out under a licence and that have been approved by the Regulator.[58] Licensing schemes may cover feasibility licences, commercial licences, research and demonstration licences, and transmission and infrastructure licences.

1.98 The committee's view is that significant matters, such as the details of a licensing scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.99 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. In this case the committee's scrutiny concerns are heightened given the significance of the licensing scheme to the administration of the offshore electricity infrastructure scheme. For example, the committee notes that some elements of provisions carrying significant penalties may be set out within the licensing scheme.[59]

1.100 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave the details of the licensing scheme to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding the matters listed at subclause 29(1) on the face of the primary legislation.**

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57 Clauses 29. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

58 Clause 8, definition of 'management plan'.

59 See, for example, clause 95, clause 96 and subclause 84(3).

Fees in delegated legislation[60]

1.101 There are several provisions within the bill which would provide for fee-making powers within delegated legislation. Clause 111 of the bill provides that all instruments, or copies of instruments, that may be subject to inspection under Part 3 of Chapter 3 of the bill are open for inspection by any person on payment of a fee calculated under the licensing scheme. In addition, clause 286 of the bill provides that the regulations may make provision for fees relating to confidential information made available by the Registrar or the Minister under clauses 283 or 285.

1.102 The committee has consistent scrutiny concerns regarding provisions which allow fees to be calculated under delegated legislation where the face of the bill contains no cap on the maximum fee amount or any information or guidance as to how a fee will be calculated. In this instance the explanatory memorandum provides some guidance in relation to how the fee will be calculated. For example, in relation to clause 111 the explanatory memorandum states:

> The applicable fee (if any) will enable the Registrar, as a fully cost-recovered entity, to recover the costs that it will incur in relation to enabling public access to the relevant instrument.[61]

1.103 The committee considers that this kind of guidance should also be included on the face of the bill and that, at a minimum, the bill should include a provision stating that the fee must not be such as to amount to taxation.[62] In this regard, the committee notes the advice set out at paragraph 24 of the Office of Parliamentary Counsel Drafting Direction No. 3.1.[63] While there is no legal need to include such a provision, the committee considers that it is nonetheless important to include to avoid confusion and to make clear that the amount calculated under delegated legislation will be a fee and not a tax. In addition, as set out in the Drafting Direction, such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.

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60 Clauses 111 and 286. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

61 Explanatory memorandum, p. 105.

62 See, for example, subsection 399(3) of the *Export Control Act 2020* and subsection 32(4) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

63 Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, September 2020, para 24.

1.104 The committee also notes that clause 189 states that the relevant fee must not be such as to amount to taxation. It is unclear to the committee why the fee-making powers at clauses 111 and 286 do not include similar guidance.

1.105 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide at least high-level guidance regarding how the fees under clause 111 and clause 286 will be calculated, including, at a minimum, a provision stating that the fees must not be such as to amount to taxation.

Power for delegated legislation to modify the operation of primary legislation (akin to Henry VIII clause)—regulations for pre-existing infrastructure[64]

1.106 Clause 309 sets out transitional measures in relation to pre-existing offshore infrastructure. Subclause 309(3) provides that the regulations may provide that provisions of the bill apply, or do not apply, to pre-existing infrastructure. Paragraph 309(3)(c) provides that clause 309 ceases to apply at the end of a period or in circumstances specified in the regulations.

1.107 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). 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 modify the operation of primary legislation.

1.108 In this case, the explanatory memorandum states:

> The purpose of this clause is to make allowance for pre-existing infrastructure, which at the time of the enactment of this legislation is already in place. It is considered that there could be a disadvantage to owners or operators of pre-existing arrangements if they were made subject to new terms and conditions which had not previously been in place. It is appropriate for matters of a detailed transitional nature to be dealt with in delegated instruments to ensure the result is fair and appropriate in particular circumstances.[65]

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64 Clause 309. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

65 Explanatory memorandum, p. 263.

1.109 It is not clear to the committee from this explanation why it is not possible to set out transitional provisions relating to pre-existing infrastructure within the bill itself. The committee notes that it has not generally considered administrative flexibility to be a sufficient justification for allowing delegated legislation to modify the operation of primary legislation. Moreover, the committee notes that there is little guidance on the face of the bill as to how the power to make regulations specifying that provisions of the bill apply or do not apply to pre-existing infrastructure should be exercised. For example, the committee notes that there is no requirement that the regulations operate beneficially for individuals, nor does the bill specify a timeframe by which clause 309 ceases to have effect.

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

- **why it is considered necessary and appropriate to allow delegated legislation to modify the operation of the bill as it applies to pre-existing offshore infrastructure; and**
- **whether the bill can be amended to, at a minimum, provide that the regulations may only have a beneficial effect and to specify a timeframe as to when clause 309 ceases to apply within the primary legislation.**

Tabling of documents in Parliament[66]

1.111 Clause 181 provides that the minister may, by written notice, require the Regulator to prepare a report or a document setting out specified information relating to the performance of its functions, or the exercise of its powers. A copy of the report must be given to the minister within the period specified in the notice.

1.112 The bill contains no requirement that reports or documents produced under clause 181 be tabled in the Parliament.

1.113 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be appropriate justification within the explanatory memorandum to the bill for failing to mandate tabling requirements.

1.114 In relation to clause 181, the explanatory memorandum states:

66 Clause 181. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

> The ability for the Minister to require the Regulator to provide reports on the exercise of powers and performance of functions is intended to provide the Minister with information. It is not intended that the reports or documents will be tabled in Parliament or made publicly available. The Regulator is required to publish certain enforcement actions under the Bill, to submit Annual Reports and to be subject to periodic reviews of the performance of its functions and the exercise of its powers. Both Annual Reports and review reports must be tabled or otherwise published.[67]

1.115 It is not clear to the committee from this explanation why it would be inappropriate to table reports or documents prepared under clause 181 in the Parliament. The committee does not consider that the fact that other reports relating to the Regulator's functions will be publicly available is a sufficient justification for failing to mandate tabling requirements in relation to clause 181.

1.116 Noting that there may be impacts on parliamentary scrutiny where reports associated with the operation of regulatory schemes are not tabled in the Parliament, the committee requests the minister's advice as to why reports or documents prepared under clause 181 of the bill are not required to be tabled in the Parliament.

Limitation on merits review[68]

1.117 Clause 33 of the bill provides that the Minister may, by written notice, grant a feasibility licence for an offshore area. A feasibility licence may only be granted to an eligible person who meets the criteria set out under clause 34. The Minister may vary the licence under clause 38.

1.118 In addition, the Minister may vary a commercial licence under clause 48, a research and demonstration licence under clause 57, and a transmission and infrastructure licence under clause 66 of the bill. Variation of a licence may include imposing conditions, varying or revoking conditions, and removing one or more licence areas from the scope of the licence.

1.119 A decision by the Minister under clauses 33, 38, 48, 57 or 66 is not subject to external merits review.[69]

1.120 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

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67 Explanatory memorandum, p. 166.

68 Clauses 33 and 38. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

69 See clause 297.

review unless a sound justification is provided. In relation to a decision by the minister under clause 32, the explanatory memorandum states:

> Granting a feasibility licence is not specified as a reviewable decision because the competitive nature of the process renders it unsuitable for external merits review.[70]

1.121 The committee appreciates that certain decisions may be unsuitable for merits review. However, it is not clear to the committee why the fact that the minister must consider the outcome of a competitive process in forming a decision under clause 33 is a sufficient justification for excluding independent review of that decision.

1.122 The explanatory memorandum does not provide any explanation as to why a decision to vary a licence under clauses 38, 48, 57 or 66 is not subject to external merits review. As a result, it is not clear to the committee why it is appropriate that a decision made under these clauses will not be subject to merits review.

1.123 The committee therefore requests the minister's more detailed advice as to why merits review will not be available in relation to the grant of a feasibility licence under clause 33 or the varying of a licence under clauses 38, 48, 57 or 66 of the bill. 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?*.

70 Explanatory memorandum, p. 255.

Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021

Purpose	The Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021 provides for an offshore electricity infrastructure levy to be imposed on offshore electricity infrastructure licence holders or those engaging in offshore infrastructure activities set out in regulations. The amount of the levy or method to calculate the levy will be set out in regulations.
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 2 September 2021

Levies in delegated legislation[71]

1.124 The bill seeks to establish the framework for the imposition of an offshore electricity infrastructure levy. The bill includes a number of regulation-making powers. Subclause 8(1) of the bill seeks to provide that an offshore electricity infrastructure levy is imposed on an offshore electricity infrastructure licence holder or a person who engages in an offshore infrastructure activity of a kind prescribed by the regulations. Subclause 8(2) of the bill provides that the regulations may prescribe different kinds of offshore electricity infrastructure levy that may be imposed on licence holders. Clause 9 of the bill seeks to provide that the amount of the levy is the amount prescribed by the regulations or worked out in accordance with a method prescribed by the regulations.

1.125 In relation to clause 8, the explanatory memorandum states:

> Prescribing additional offshore infrastructure activities that will be subject to the imposition of an offshore electricity infrastructure levy in subordinate legislation is intended to provide scope for the licensing scheme that is required to be established by subclause 29(1) of the Main Bill to fully develop in response to the growth of the new offshore industry. The ability to prescribe additional matters that will attract a levy in delegated legislation will enable the Commonwealth (including the Registrar) and the Regulator to be adequately resourced through cost recovery as the industry develops. Parliamentary oversight of any additional offshore infrastructure activities that are prescribed will be available given any regulations would be subject to disallowance.

71 Clauses 8 and 9. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

> Offshore infrastructure activities will almost always occur under a licence, and charges will be applicable to a licence holder. However, certain remedial actions can also apply to former licence holders, to conduct activities, where it may be appropriate to charge. The ability to prescribe additional matters that will attract a levy in delegated legislation gives flexibility to ensure the regulatory costs are recovered for activities which are more likely to occur as the regime grows, matures and enters different operational stages.[72]

1.126 In relation to clause 9, the explanatory memorandum states:

> The amount of the levy will be set out in regulations to ensure it is appropriately calibrated to cover the costs for regulating and administering the offshore electricity infrastructure regime as the offshore industry develops. The amount of the levy will be subject to change over time as the industry develops and matures. As well, calculation mechanisms will require periodic review to account for changes to pricing indexes, as occurs for review of offshore petroleum and greenhouse gas storage levies.[73]

1.127 One of the most fundamental functions of the Parliament is to impose taxation.[74] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, the committee considers that guidance in relation to the amount of a levy should be included on the face of the primary legislation. In this instance, no guidance is provided on the face of the bill limiting the imposition of the levy, for example to cost-recovery level, nor are maximum amounts specified. Where levies are to be prescribed by regulation the committee considers that, at a minimum, some guidance in relation to the method of calculation of the levy and/or a cap on the amount of levy should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.128 In addition, the committee has generally not considered a desire for flexibility to be a sufficient justification for including significant matters in delegated legislation. The committee is therefore concerned that the explanatory memorandum fails to adequately justify why it is necessary and appropriate to leave virtually all of the details of the imposition of the offshore electricity infrastructure levy to delegated legislation. This includes the possible expansion of the levy to new persons who engage in offshore infrastructure activities and the prescription of different kinds of levy. The committee notes that similar schemes, such as the *Offshore Petroleum and*

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72 Explanatory memorandum, p. 7.

73 Explanatory memorandum, p. 8.

74 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

Greenhouse Gas Storage (Regulatory Levies) Act 2003, contain significantly more guidance in relation to the kinds of levy that may be imposed within the primary legislation than this bill.

1.129 From a scrutiny perspective, the committee considers that further guidance in relation to the circumstances in which the offshore electricity infrastructure levy will be imposed should be included on the face of the primary legislation. If it is necessary to change the scope of the levy in the future the committee considers that this should be done through the introduction of new primary legislation into the Parliament.

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

- **why it is considered necessary and appropriate to leave the persons on whom the offshore electricity infrastructure levy will be imposed, the kinds of levy that may be imposed and the amount of any levy to delegated legislation; and**
- **whether the bill can be amended to prescribe at least high-level guidance in relation to these matters on the face of the primary legislation, including whether the bill can be amended to include, at a minimum, guidance in relation to the method of calculation of the levy and/or a cap on the amount of levy.**

Chapter 2

Commentary on ministerial responses

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

Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021

Purpose	This bill seeks to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) to: • establish the Northern Territory Aboriginal Investment Corporation; • streamlining the exploration and mining provisions of the Land Rights Act; • improve and clarify the land administration provisions of the Land Rights Act; and • align the Aboriginal Benefits Account with the Commonwealth's financial framework.
Portfolio/Sponsor	Indigenous Australians
Introduced	House of Representatives on 25 August 2021
Bill status	Before the House of Representatives

No-invalidity clause[1]

2.2 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsections 65BH(3) and 12D(7).[2]

1 Schedule 1, item 6, proposed subsection 65BH(3) and Schedule 3, item 25, proposed subsection 12D(7). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 1-2.

Minister's response[3]

2.3 The minister advised:

Detail on the specific subsections is outlined below, however it is also important to note the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA) includes existing no-invalidity provisions to protect the rights of persons who have estates or interests granted to them under the ALRA.

Subsection 65BH(3)

A function of the NT Aboriginal Investment Corporation (NTAI Corporation) is to make investments for the purposes mentioned in paragraphs 65BA(a) and (b). The NTAI Corporation can also invest surplus money (see section 65BG). These investments may be in businesses, ventures or other activities of third parties. New subsection 65BH(3) ensures that commercial agreements that impact parties other than the NTAI Corporation are not invalidated where the NTAI Corporation fails to comply with subsections 65BH(1) and (2). The no-invalidity clause in subsection 65BH(3) is necessary and appropriate as it protects the rights of, and provides business certainty for, entities transacting with the NTAI Corporation.

Subsection 12D(7)

Proposed subsection 12D(4) of the Bill provides that a Northern Territory Land Council must not enter into the agreement in relation to land that is the subject of a deed of grant held in escrow unless it is satisfied that the required consultation has been undertaken and the terms and conditions on which the proposed grant of an estate or interest in the land is to be made are reasonable. The no-invalidity clause in proposed subsection 12D(7) confirms that a failure to comply with subsection (4) does not invalidate the agreement. Proposed section 12D will facilitate traditional Aboriginal owners (through their Land Council) entering into commercial arrangements in relation to land the subject of a deed of grant held in escrow by the Land Council. Currently, there is no express provision in the Act providing for such arrangements. The no-invalidity clause will further facilitate such arrangements by giving certainty to proponents entering into such arrangements with a Land Council.

Section 12D is modelled off existing section 11A of the ALRA, which permits the Land Councils to enter into agreements concerning land under claim. This section also has a no-invalidity clause to protect the rights and interests of persons who have entered into an agreement with the Land Council.

The no-invalidity clause is necessary and appropriate to ensure that a failure by the Land Council to comply with subsection 12D(4) does not affect the validity of the agreement. This is considered important to ensure the

3 The minister responded to the committee's comments in a letter dated 29 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

integrity and certainty of the agreement where compliance with subsection 12D(4) may be called into question at a later time.

Taken as a whole, the provisions in section 12D are reasonable and necessary to provide certainty for all stakeholders in terms of both the matters that a Land Council must be satisfied of before it enters into an agreement and the legally binding nature of the agreement.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the no-invalidity clause in proposed subsection 65BH(3) is necessary and appropriate as it protects the rights of, and provides business certainty for, entities transacting with the NTAI Corporation.

2.5 The committee also notes the minister's advice that the no-invalidity clause in proposed subsection 12D(7) will facilitate arrangements by giving certainty to proponents entering into arrangements with a Land Council. The minister also advised that this is considered important to ensure the integrity and certainty of the agreement where compliance with proposed subsection 12D(4) may be called into question at a later time.

2.6 The committee reiterates that there are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. The committee has generally not accepted a desire for certainty to be a sufficient justification for the inclusion of no-invalidity clauses.

2.7 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister 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 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of including a no-invalidity clause in proposed subsections 65BH(3) and 12D(7).

Significant matters in delegated legislation[4]

2.9 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave key details regarding the operation of the NTAI Corporation to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[5]

Minister's response[6]

2.10 The minister advised:

> In establishing the NTAI Corporation, the Bill provides for the purposes for which the NTAI Corporation may invest, its particular functions and powers to invest, and limits the types of instruments the NTAI Corporation may invest in. The Bill also places some limitations on how its investment powers may be exercised (for example, see paragraph 65BH(2)(a), subsection 65BK(1), and subsection 65BL(1)). The abovementioned subsections primarily relate to limitations on the NTAI Corporation's investment activities and use of specific financial instruments.
>
> I note the committee's comments in relation to proposed new subsections 65BH(2), 65BI(1), 65BJ(2) and 65BK(3) of the Bill, which provide for rules in relation to the investment limit, loans, borrowing and guarantees that may further limit how particular investment-related functions and powers of the NTAI Corporation may be exercised or performed.
>
> It is necessary and appropriate that these matters be prescribed by rules so that they can be adapted when necessary, for example, in addressing changes to the NTAI Corporation's risk profile, asset base, capital structure and organisational capability of the NTAI Corporation as it evolves. This flexibility will enable any risks associated with the NTAI Corporation's performance of its investment related functions to be addressed, adapted and limited when appropriate. Doing so by legislative instrument also allows changes to be quickly adopted to respond urgent circumstances. As such, rules made by legislative instrument is an appropriate mechanism to

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4 Schedule 1, item 6, proposed subsections 65BH(2), 65BI(1), 65BJ(2) and 65BK(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 2-3.

6 The minister responded to the committee's comments in a letter dated 29 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> respond to evolving commercial requirements without further amendments to the Bill.
>
> In accordance with the requirements for making legislative instruments under the *Legislation Act 2003*, the Minister for Indigenous Australians and the Finance Minister must be satisfied that appropriate consultation has been undertaken in relation to the proposed legislative instrument. In addition, the instrument is subject to Parliamentary scrutiny, disallowance and sunsetting requirements.
>
> As such, I consider it appropriate that these details will be addressed in delegated legislation, ensuring the necessary level of flexibility and ability to evolve to ensure the NTAI Corporation is able to operate most effectively.

Committee comment

2.11 The committee thanks the minister for this response. The committee notes the minister's advice that it is necessary and appropriate that the matters in proposed subsections 65BH(2), 65BI(1), 65BJ(2) and 65BK(3) be prescribed by rules so that they can be adapted when necessary, for example, in addressing changes to the NTAI Corporation's risk profile, asset base, capital structure and organisational capability. The minister also advised that this flexibility will enable any risks associated with the NTAI Corporation's performance of its investment related functions to be addressed, adapted and limited when appropriate.

2.12 The committee has consistently drawn attention to framework provisions, 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 key details regarding how the NTAI Corporation will operate, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. From a scrutiny perspective, the committee does not consider that the minister's advice has provided a sufficient justification for leaving a number of significant matters to delegated legislation. The committee has generally not accepted a desire for administrative flexibility to be sufficient in these circumstances.

2.13 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key details regarding the operation of the NTAI Corporation to delegated legislation.

2.14 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Instruments not subject to parliamentary disallowance[7]

2.15 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice regarding:

- why a strategic investment plan made under proposed section 65C is not a legislative instrument; and
- whether the bill could be amended to provide that a strategic investment plan is a legislative instrument to ensure that they are subject to appropriate parliamentary oversight.[8]

Minister's response[9]

2.16 The minister advised:

> In considering whether the strategic investment plan would be a legislative instrument, the key tests for determining whether an instrument is legislative or administrative in nature were considered. These are set out in subsection 8(4) of the *Legislation Act 2003* (the Legislation Act). Specifically, subsection 8(4) provides that an instrument is a legislative instrument if:
>
> a. the instrument is made under a power delegated by the Parliament;
> b. the instrument determines or alters the law, rather than determining particular circumstances in which the law applies; and
> c. the instrument has the effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.
>
> Instruments that do not fulfil the definition set out in subsection 8(4) of the Legislation Act are likely to be administrative in nature. The strategic investment plan is an administrative document setting out the NTAI Corporation's priorities and principle objectives in relation to performing its functions, developed in consultation with Aboriginal people and organisations in the NT. The NTAI Corporation must have regard to the strategic investment plan in performing its functions (see paragraph 65BC(b)) and an acquisition of a derivative must be consistent with the strategic investment plan (see subsection 65BL(2)). In this respect, it is not determining the law or altering its content, does not affect rights or interests and is clearly administrative in nature, acting to guide how the

7 Schedule 1, item 6, proposed section 65C. 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 15 of 2021*, pp. 3-4.

9 The minister responded to the committee's comments in a letter dated 29 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> NTAI Corporation exercises its functions and powers in particular circumstances.
>
> Part 2 of the *Legislation (Exemptions and Other Matters) Regulations 2015* sets out instruments that are not legislative instruments. I note that item 12 refers to "a report or review, including an annual or periodic report or review" and item 32 refers to "a corporate plan (however described)". The strategic investment plan is similar in character to these documents and therefore not suitable to be a legislative instrument.
>
> Further, Paragraph 12 of the Statement of Compatibility with Human Rights in the Explanatory Memorandum identifies that the Bill's consultation processes for the development of a strategic investment plan advance the right to self-determination by providing a mechanism for Aboriginal peoples and organisations in the Northern Territory (NT) to shape how payments and investments are made. Defining the strategic investment plan as a legislative instrument subject to disallowance would reduce the opportunity for Aboriginal peoples and organisations in the NT to influence payments and would hamper progress toward the right to self-determination.
>
> Consistent with advice received from the Attorney-General's Department, I am satisfied that the strategic investment plan is administrative in nature and it is not appropriate to amend the Bill to provide that the strategic investment plan is a legislative instrument.

Committee comment

2.17 The committee thanks the minister for this response. The committee notes the minister's advice that the strategic investment plan is an administrative document setting out the NTAI Corporation's priorities and principal objectives in relation to performing its functions, developed in consultation with Aboriginal people and organisations in the Northern Territory. The minister also advised that the strategic investment plan does not determine the law or alter its content, does not affect rights or interests and is clearly administrative in nature, acting to guide how the NTAI Corporation exercises its functions and powers in particular circumstances.

2.18 While noting the minister's advice, it remains unclear to the committee why the matters that may be included in the strategic investment plan are purely administrative in nature. The committee notes, for example, that proposed subsection 65C(5) provides that the rules may prescribe matters that must be included in a strategic investment plan. It appears that these additional matters may determine or alter the content of the law.

2.19 In any event, from a scrutiny perspective, the committee considers that, given the significant nature of the strategic investment plan, it would be appropriate to allow for additional parliamentary scrutiny and oversight of the plan.

2.20 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister 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 draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that a strategic investment plan made under proposed section 65C is not a legislative instrument and is therefore not subject to parliamentary scrutiny beyond tabling in the Parliament.

Tabling of documents in Parliament[10]

2.22 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to whether the bill can be amended to provide that:

- the minister must arrange for a copy of any progress report on the strategic investment plan to be tabled in both Houses of the Parliament; and
- the minister *must* publish any progress report on the strategic investment plan on the internet.[11]

Minister's response[12]

2.23 The minister advised:

> Together with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the Bill provides extensive transparency mechanisms for the new NTAI Corporation. In addition to the reporting and transparency requirements under the PGPA Act including corporate plans, annual reporting and annual performance statements, the proposed NTAI Corporation will be required to consult on its strategic investment plan with Aboriginal people and organisations in the NT (proposed new subsection 65C(6)) and will be required to publish its strategic investment plans and table them in parliament (proposed new subsections 65C(8) and (9)).
>
> The progress reports under item 19 of Part 2 to the Bill are an additional transitional measure that can be invoked at the discretion of the Minister for Indigenous Australians to provide supplementary information to Government during the first 3 years of the NTAI Corporation's operation.

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10 Schedule 1, item 19. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 4-5.

12 The minister responded to the committee's comments in a letter dated 29 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> The transitional reports are likely to be operational in nature and will be followed by published and tabled strategic investment plans.
>
> A requirement to publish and table progress reports may not be appropriate if the reports contain commercially sensitive material or other sensitive information. This creates a need for discretion to publish in order to protect sensitive commercial information, particularly where third parties may be involved.
>
> I consider the Bill's existing transparency mechanisms to provide strong accountability to Aboriginal peoples in the NT and the Parliament without need for further amendment.

Committee comment

2.24 The committee thanks the minister for this response. The committee notes the minister's advice that the progress reports under item 19 of Schedule 1 to the bill are an additional transitional measure that can be invoked at the discretion of the minister to provide supplementary information to government during the first three years of the NTAI Corporation's operation. The minister advised that the transitional reports are likely to be operational in nature and will be followed by published and tabled strategic investment plans.

2.25 The committee also notes the minister's advice that a requirement to publish and table progress reports may not be appropriate if the reports contain commercially sensitive material or other sensitive information and that this creates a need for discretion to publish in order to protect sensitive commercial information, particularly where third parties may be involved.

2.26 The committee reiterates its consistent scrutiny view that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Additionally, making documents associated with review of investment schemes available online promotes transparency and accountability. It remains unclear to the committee why progress reports on the strategic investment plan cannot be tabled in Parliament.

2.27 Additionally, the committee notes that if it was mandatory to publish any progress report, amendments could be included to allow for the removal of any genuinely sensitive material.

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

2.29 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing that a copy of any progress report on the strategic investment plan must be tabled in both Houses of the Parliament and not requiring the minister to publish a copy of any progress report online.

Significant matters in delegated legislation[13]

2.30 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave key details regarding the process for when a body will be an approved entity to hold a township lease to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[14]

Minister's response[15]

2.31 The minister advised:

> In considering this question, it is important to draw attention to the details regarding the process that are set out in the primary legislation. Proposed section 3AA prescriptively details the core elements of the nomination and approval process for Aboriginal and Torres Strait Islander corporations to become approved entities. Broadly, a Land Council may nominate an Aboriginal and Torres Strait Islander corporation to be an approved entity for an area of land situated in the Land Council's area. The nomination must be given to the Minister for Indigenous Australians and contain the matters set out in subsection (5). Subsequently, the Minister for Indigenous Australians may approve an Aboriginal and Torres Strait Islander corporation as an approved entity if they are satisfied of certain matters set out in subsection (2). I note the proposed new process includes certain conditions that the Minister for Indigenous Australians must be satisfied with and comprehensive information that a nomination by a Land Council must include.
>
> In addition to the above mentioned core elements set out in the Bill, the Minister for Indigenous Australians may determine, by legislative

13 Schedule 3, item 4, proposed paragraphs 3AA(9)(a) and (c). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 5-6.

15 The minister responded to the committee's comments in a letter dated 29 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

instrument, additional things in relation to the nomination and approval process:

- The nomination must contain information determined by the Minister for Indigenous Australians under subsection (9).
- In deciding whether to approve a body as an approved entity, the Minister for Indigenous Australians must have regard to matters determined under subsection (9) for the purposes of paragraph (6)(a) and may have regard to matters determined under subsection (9) for the purposes of subparagraph (6)(b)(i).
- The Minister for Indigenous Australians may approve an Aboriginal and Torres Strait Islander corporation as an approved entity for an area of land known by a particular name if the Minister for Indigenous Australians is satisfied of a number of matters, including conditions determined per subsection (9).

As explained in the Explanatory Memorandum, the granting of a township lease to an Aboriginal and Torres Strait Islander corporation was first done in 2017. Given the growing interest in community-controlled township leasing, also known as community entity township leasing, there is a need to standardise and clarify the processes around, and the operation of, these entities in the ALRA.

It is necessary and appropriate to provide sufficient flexibility to determine, by legislative instrument, additional conditions, information, and matters that must or may be taken into account in the nomination and approval process for Aboriginal and Torres Strait Islander corporations as approved entities. It is not possible to predict all of the conditions, information and matters that will need to be the subject of ministerial determination in the future. This flexibility is a prudent mechanism that will ensure that the processes mature over time as more community entity township leases are granted.

In accordance with the requirements for making legislative instruments under the *Legislation Act 2003*, the Minister for Indigenous Australians must be satisfied that appropriate consultation has been undertaken in relation to the proposed legislative instrument. In addition, the instrument is subject to Parliamentary scrutiny, disallowance and sunsetting requirements.

Committee comment

2.32 The committee thanks the minister for this response. The committee notes the minister's advice that given the growing interest in community-controlled township leasing, there is a need to standardise and clarify the processes around, and the operation of, community township entities in the *Aboriginal Land Rights (Northern Territory) Act 1976*.

2.33 The committee also notes the minister's advice that it is necessary and appropriate to provide sufficient flexibility to determine, by legislative instrument,

additional conditions, information, and matters that must or may be taken into account in the nomination and approval process for Aboriginal and Torres Strait Islander corporations as approved entities.

2.34 While noting the minister's advice, the committee has generally not accepted a desire for administrative flexibility as a sufficient justification for leaving significant matters to delegated legislation. It remains unclear to the committee why at least high-level guidance could not be included in relation to these matters on the face of the primary legislation. The committee reiterates 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.

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

2.36 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key details regarding the process for when a body will be an approved entity to hold a township lease to delegated legislation.

2.37 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Appropriation Bill (No. 1) 2021-2022

Appropriation Bill (No. 2) 2021-2022

Purpose	Appropriation Bill (No. 1) 2021-2022 seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government Appropriation Bill (No. 2) 2021-2022 seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure
Portfolio/Sponsor	Finance
Introduced	House of Representatives on 11 May 2021
Bill status	Act

Parliamentary scrutiny—measures marked 'not for publication'[16]

2.38 The committee initially scrutinised this bill in *Scrutiny Digest 8 of 2021* and requested the minister's advice.[17] The committee considered the minister's response in *Scrutiny Digest 13 of 2021* and requested the minister's further advice as to whether, in the future, Budget Paper No. 2 and the portfolio budget statements can contain:

- more thorough explanations for why funding for measures are marked as 'not for publication'; and
- where appropriate, at least a high-level indication of the amount of funding that is allocated to a measure (for example, 'not more than $50 million').[18]

Minister's response[19]

2.39 The minister advised:

> Under current arrangements, Budget Paper 2 and Portfolio Budget Statements disclose the rationale for measures being marked 'not for

16 Clauses 4 and 6 and Schedule 1 to Appropriation Bill (No. 1) 2021-2022; Clauses 4 and 6 and Schedule 2 to Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 11-12.

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 21-22.

19 The minister responded to the committee's comments in a letter dated 9 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> publication' ('nfp'). The Government considers that these arrangements achieve an appropriate balance between protecting the Commonwealth's commercial or national security interests, and the need for disclosure.
>
> When considering opportunities to provide further disclosure, a balance must be achieved between the risk of damaging the Commonwealth's interest and enhancing transparency. Providing a more extensive explanation of why a measure is 'nfp' and a high-level indication of allocated funding, could inadvertently imply the price the Commonwealth is prepared to pay. This may invite suppliers to tailor their bids, possibly diminishing the capacity of the Commonwealth to achieve a value for money outcome.
>
> Further, scrutiny arrangements such as the Senate Estimates process provide Senators with the opportunity to seek further information in regard to specific measures.

Committee comment

2.40 The committee thanks the minister for this response. The committee notes the minister's advice that the government considers that current disclosure arrangements in relation to budget measures marked as 'not for publication' (NFP) are appropriate. The minister advised that the current approach achieves a balance between protecting the Commonwealth's commercial or national security interests and the need for disclosure. The minister advised that providing further explanation in relation to NFP measures could inadvertently imply the price the Commonwealth is prepared to pay during negotiations, diminishing the capacity of the Commonwealth to achieve a value for money outcome. Finally, the minister advised that other arrangements, such as Senate estimates, provides senators with the opportunity to seek further information in regard to specific measures.

2.41 While acknowledging this advice, it remains unclear to the committee why it is not possible to include a more thorough explanation as to why funding measures are marked as NFP within the portfolio budget statements (PBS). In this regard, the committee notes that, in many cases, no explanation at all is currently provided within the PBS as to why a measure is marked as NFP.

2.42 The committee reiterates that clause 4 of both Appropriation Bill (No. 1) 2021-2022 and Appropriation Bill (No. 2) 2021-2022 provide that the PBS are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901* and that, as such, they may be considered in interpreting the provisions of each bill. The committee also reiterates that Parliament has a fundamental constitutional role to scrutinise and authorise the appropriation of public money. As outlined recently by the High Court, the appropriation process is intended to 'give expression to the foundational principle of representative and responsible government that no money

can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself.'[20]

2.43 Given the importance of parliamentary scrutiny over the appropriation process, the committee considers that the default position should be to publish the full amount of funding allocated to each Budget measure. However, where it is necessary and appropriate not to publish the total funding amount for a measure, the committee considers that an explanation should be included within the PBS. Noting the important role of the PBS as interpretative documents for Appropriation Bills No. 1 and No. 2, the committee therefore has significant scrutiny concerns in relation to the inclusion of measures within the PBS that are marked as NFP where there is either no, or very limited, explanation as to why it is appropriate to mark the measure as NFP.

2.44 The committee notes that all measures marked as NFP within Budget Paper No. 2 for the 2021-22 Budget contain at least a high-level explanation as to why it is necessary not to publish the funding level for that measure. It is not clear to the committee why the PBS does not at least contain similar guidance. For example, Budget Paper No. 2 contains an explanation as to why it is necessary not to publish total funding amounts for the Oil Stocks and Refining Capacity in Australia project,[21] the COVID-19 Vaccine Manufacturing Capabilities project,[22] the Davis Aerodrome Project,[23] and the Cashless Debit Card Project.[24] However, there is no equivalent explanation for any of these measures within the PBS.

2.45 Moreover, the committee has scrutiny concerns in relation to the quality of the explanations provided within the PBS and Budget Paper No. 2. It would appear that several of the measures categorised as NFP within the PBS may be inappropriately categorised. More detailed explanations as to why it is appropriate to mark a Budget measure as NFP would allow for a greater level of parliamentary scrutiny over these explanations. For example, it is unclear to the committee why it is appropriate not to publish total amounts in relation to the Rum Jungle Rehabilitation project,[25] or the Independent Review into Commonwealth Parliamentary Workplaces.[26] Both of these measures are marked as NFP due to commercial sensitivities. The committee notes that the mere existence of a commercial element in relation to a Budget measure is likely not sufficient, of itself, as a justification for not publishing any of the funding amount for that measure. In this regard, the lack of detailed explanation makes it

20 *Wilkie v Commonwealth* (2017) 263 CLR 487, 523 [61].

21 Budget Paper No. 2, 2021-22, p. 141.

22 Budget Paper No. 2, 2021-22, p. 134.

23 Budget Paper No. 2, 2021-22, p. 60.

24 Budget Paper No. 2, 2021-22, p. 179.

25 Budget Paper No. 2, 2021-22, p. 143.

26 Budget Paper No. 2, 2021-22, p. 77.

difficult for the Parliament and others to interrogate the rationale behind this classification.

2.46 It is also unclear to the committee from the minister's explanation why at least a high-level indication as to the amount of funding that is allocated to a Budget measure cannot be provided in relation to at least some NFP measures. The committee considers that, in the majority of cases, it would be possible to provide some details as to the amount allocated to a measure without compromising commercial, legal, or national security sensitivities.

2.47 The committee notes that the Department of Finance *Guide to Preparing the 2021-22 Portfolio Budget Statements* (the Guide) currently contains no guidance in relation to measures marked as NFP. The committee considers that it would be useful if future editions of the Guide addressed this issue by setting out that the default position should be to publish the full amount of funding allocated to each Budget measure but that, where it is genuinely necessary and appropriate to mark a measure as NFP, a full explanation should be given within the PBS. Consideration should be given as to whether any such explanation can include a high-level indication as to the amount of funding for a measure without compromising commercial, legal, or national security sensitivities. Any guidance should emphasise the importance of Parliament's scrutiny role and that any decision not to publish the total amount for a Budget measure must be weighed against the significance of abrogating Parliament's fundamental scrutiny role over the appropriation of money from the Consolidated Revenue Fund.

2.48 Finally, the committee notes that there has been a significant upwards trend in the number of NFP measures being included within Budget Paper No. 2. For example, Budget Paper No. 2 for the 2004-05 Budget contained seven references to the term NFP, while Budget Paper No. 2 for the 2021-22 Budget contained 229 references.

2.49 In light of the above, the committee reiterates its scrutiny concerns that the Parliament is being asked to authorise appropriations without clear information about the amounts that are to be appropriated under each individual Budget measure. The committee's concerns in relation to measures marked as 'not for publication' (NFP) are heightened in light of the upwards trend in the number of measures marked as NFP.

2.50 The committee therefore requests the minister's advice as to whether future Department of Finance guides on preparing portfolio budget statements can include guidance that:

- **as a default, the full amount of funding allocated to each Budget measure should be published within the statements;**
- **any decision not to publish the total amount for a Budget measure must be weighed against the significance of abrogating Parliament's fundamental**

scrutiny role over the appropriation of money from the Consolidated Revenue Fund; and

- **where a measure is marked as NFP, at least a high-level explanation should be included within the portfolio budget statements for why this is appropriate.**

2.51 The committee also requests the minister's further advice as to:

- **why it is not possible to provide at least a high-level indication of the amount of funding allocated to an NFP measure; and**
- **the rationale for not publishing the full amount of funding in relation to the Rum Jungle Rehabilitation project or the Independent Review into Commonwealth Parliamentary Workplaces.**

Parliamentary scrutiny—debit limits[27]

2.52 The committee initially scrutinised this bill in *Scrutiny Digest 8 of 2021* and requested the minister's advice.[28] The committee considered the minister's response in *Scrutiny Digest 13 of 2021* and requested the minister's further advice as to the circumstances, if any, in which the expected level of expenditure against debit limits will not be included in the explanatory memoranda to future Appropriation Bills.[29]

Minister's response[30]

2.53 The minister advised:

> The content of the explanatory memoranda will always remain a matter for the Government of the day. While current policy settings remain in place the Government anticipates providing details of the expected levels of expenditure in the explanatory memoranda to future Appropriation Bills.

Committee comment

2.54 The committee thanks the minister for this response. The committee notes the minister's advice that it is anticipated that details of the expected levels of

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27 Clause 13 of Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 11-12.

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 23-24.

30 The minister responded to the committee's comments in a letter dated 9 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

expenditure in relation to debit limits will be included in the explanatory memoranda to future Appropriation Bills while current policy settings remain in place.

2.55 While welcoming the minister's advice that further detail will be included in future explanatory memoranda, it remains unclear to the committee in which circumstances this information may not be included in the future. The committee considers that a circumstance in which it would not be appropriate to include details of the expected levels of expenditure in relation to debit limits would be rare.

2.56 The committee looks forward to details of the expected levels of expenditure against debit limits being included in the explanatory memoranda to future Appropriation Bills. In light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Biosecurity Amendment (Enhanced Risk Management) Bill 2021

Purpose	This bill seeks to amend the *Biosecurity Act 2015* (the Biosecurity Act) to enhance the ability to manage the risk of pests and diseases entering, emerging, establishing or spreading in Australian territory and causing harm to animal, plant and human health, the environment and the economy. It would strengthen the management of biosecurity risks posed by maritime and aviation arrivals, improve the efficiency and effectiveness of the administration of the Biosecurity Act, and increase a range of civil and criminal penalties to deter non-compliance and provide proportionate penalties.
Portfolio/Sponsor	Agriculture, Water and the Environment
Introduced	House of Representatives on 1 September 2021
Bill status	Before the House of Representatives

Coercive powers

Instruments not subject to parliamentary disallowance[31]

2.57 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to whether the bill can be amended to include at least high-level guidance in relation to proposed sections 108N (requiring body examinations) and 108P (requiring body samples for diagnosis), including guidance in relation to:

- what examinations or sampling procedures may be included within a human biosecurity group direction;
- in what circumstances it is appropriate to require an examination or body sample;
- when consent must be given and how consent is to be given; and
- what medical and professional standards will, or may, apply when undertaking a procedure under proposed sections 108N or 108P.

2.58 The committee also requested the minister's advice as to whether the bill can be amended to include requirements that:

31 Schedule 1, Part 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i), (iv) and (v).

- human biosecurity group directions made under proposed section 108B must be published online, and
- information about human biosecurity group directions, such as the total number of directions made in a year and high-level details as to the nature and contents of each direction, must be set out in the department's annual report prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013*.[32]

Minister's response[33]

2.59 The minister advised:

> The intent behind proposed sections 108N and 108P is to keep the provisions sufficiently broad to account for future listed human diseases which may have different testing and diagnosis methods. This flexibility remains of high importance to enable the Australian Government to combat listed human diseases in Australian territory. Therefore, it would not be appropriate to be specific in proposed sections 108N and 108P.
>
> Proposed subsection 108B(6) provides that a chief human biosecurity officer may only require an examination or body sample under a human biosecurity group direction if they are satisfied that biosecurity measure contributes to managing the risk of contagion of a listed human disease, or a listed human disease entering, emerging, establishing or spreading in Australian territory.
>
> Before making a decision in relation to a biosecurity measure that is included in the human biosecurity group direction, including in relation to requiring an examination or body sample, subsection 34(2) of the Biosecurity Act requires the chief human biosecurity officer or human biosecurity officer to be satisfied of a range of important considerations. These include that the measure is likely to be effective in managing such risks; that it is appropriate and adapted to manage such risks; that the circumstances are sufficiently serious to justify the measure; and that the manner in which the measure is to be imposed is no more restrictive or intrusive than is required in the circumstances.
>
> In the situation of a confirmed or suspected case of a listed human disease on a vessel or aircraft, the appropriate circumstance to request an examination or body samples, or both, would be when it has been identified

32 It is noted that an annual reporting requirement is appropriately included in relation to arrangements and grants for dealing with risks posed by diseases or pests (see Schedule 4, item 6, proposed section 614G).

33 The minister responded to the committee's comments in a letter dated 5 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

that persons have signs or symptoms of, or have been exposed to, a listed human disease.

Medically trained professionals who are assisting in the response will consider the individual circumstances of each case, when seeking to conduct an examination or obtaining body samples. Where a chief human biosecurity officer or human biosecurity officer decides that it is not appropriate for an individual to undergo a certain procedure, alternative measures may be considered.

The Bill provides guidance in relation to then consent be given for examinations and obtaining body samples for the purposes of determining the presence of listed human diseases. The decision of the chief human biosecurity officer or human biosecurity officer to impose such a biosecurity measure, and to determine how consent is to be given, will be informed by clinical knowledge and expertise. Such clinical decisions will be subject to the important safeguards in subsections 108B(6) and subsection 34(2), as outlined above. For example, the officer may decide that certain examinations would be inappropriate or too intrusive if there is no consent, in which case they can require that consent must be given before undergoing the examination, and also determine how consent can be given. Consent must also be given when the body sample is taken from the person.

Medically trained professionals who are assisting in the response will make an assessment as to whether or not a person has given consent. Section 40 of the Biosecurity Act provides an additional mechanism for an accompanying person (such as a family member and guardian) to provide consent on behalf of a child or incapable person, when the child or person cannot provide consent on their own behalf.

In the event the individual does not wish to provide consent for an examination, where required, then under proposed subsection 108N(3) that requirement would not apply to the individual. In addition, if the individual does not wish to consent to providing body samples, then that requirement would also not apply, as a result of proposed subsection 108P(2). In other situations where the chief human biosecurity officer or human biosecurity officer decides that it is not appropriate for an individual to undergo a certain examination, alternative measures may be considered.

In particular, a human biosecurity control order may be imposed on an individual to manage the risks posed to human health. The order could, for instance, provide for an alternative biosecurity measure, which could be tailored to suit the individual's circumstances, while also achieving the objective of managing human health risks. In this context, the existence of a human biosecurity group direction would not limit the imposition of a human biosecurity control order. Further, proposed subsection 108J(2) would apply so that if an individual in a class specified in the human biosecurity group direction is subject to a human biosecurity control order, the group direction would cease to be in force in relation to that individual.

Finally, proposed section 108S would ensure that there be no use of force against an individual to require the individual to comply with a biosecurity measure, including an examination under section 108N or for provision of body samples under section 108P.

Consequently, it is not considered necessary to include further specific legislative criteria in the Bill in relation to when consent must be given or how it is given.

The chief human biosecurity officer or human biosecurity officer will make the decision on what medical procedure needs to be undertaken in accordance with the human biosecurity group direction. However, it is not envisaged that the chief human biosecurity officer or human biosecurity officer will always personally undertake the medical procedure or examinations. It is likely they will instruct other medical professionals to undertake those tasks.

The training and qualification requirements for a person to be a chief human biosecurity officer for a state or territory are the following:

a) the person must have completed a training module for human biosecurity officials prepared by the Department of Health, and

b) the person must have completed any training required by the state or territory for the person to be authorised as a chief human biosecurity officer for the state or territory.

The training and qualification requirements for a person to be a human biosecurity officer are the following:

a) the person must be a medical practitioner

b) the person must have completed a training module for human biosecurity officials prepared by the Department of Health

c) if the person is an officer or employee of the state or territory body responsible for the administration of health services in the State or Territory – the person must have completed any training required by the state or territory to be authorised as a human biosecurity officer.

Proposed section 108R provides that a biosecurity measure set out in section 108N or 108P must be carried out in a manner consistent with appropriate medical standards and other relevant professional standards.

The Medical Board of Australia sets out a code of conduct for doctors in Australia. Appropriate medical and professional standards would apply relating to the degree of care and skill of health care providers who practise in the provider's specialty, taking into account the medical knowledge that is available in the field, or the level at which the average, prudent provider in a given community would practise, or how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances. In practice, this means the ‘standard’ is not static but evolves over time as further evidence emerges and practices change.

The required process must be carried out in accordance with the medical 'standard of the day.' It is important to note that some states and territories have their own legislation governing medical and professional standards. Given many different types of medical professionals may be required to conduct examinations and procedures under this framework in different states and territories, it would be inappropriate to attempt to list exactly what standards apply, for all possible specialities.

The departments are committed to high standards of accountability in the exercise of the human biosecurity group directions, given effect through the clinical decision-making process. Accountability in the application of the human biosecurity group direction is considered in proposed section 108H, which provides that the Director of Human Biosecurity is notified, as soon as reasonably practicable of the making, variation or revocation of the direction. This allows for the Director of Human Biosecurity to maintain appropriate oversight over the circumstances in which a human biosecurity group direction is made.

An additional requirement to publish a group direction online would not be feasible in the practical implementation of the group direction for multiple reasons. There are many variables involved, such as timing, form, accessibility, privacy, logistics and departmental resourcing, noting that group directions may be required to respond to urgent human health risks at any hour of the day including over weekends. COVID-19 has highlighted the need for quick, efficient and effective mechanisms to manage the spread of a listed human disease in a pandemic environment. Publishing information in this way may compromise smooth implementation of biosecurity measures by the human biosecurity officers needed to respond to emerging public health situations.

As the directions are time limited, publication of the direction is, in practice, likely to occur sometime after the direction has ceased to be in effect. It is not clear what additional benefit online publishing would provide, noting these practical challenges and that the individuals affected by the direction will already be notified of the contents of the direction and how it applies.

Group directions may also include information that could be personally identifiable or that would risk the privacy of individuals subject to that direction, or that may indicate information about a person's health status. It is not appropriate for this information to be publicly available.

The existing provisions of the Biosecurity Act in relation to human biosecurity control orders do not have an equivalent requirement to publish information in the annual report. To require such publication for the new human biosecurity group direction would be inconsistent with the existing provisions of the Biosecurity Act.

Further, as discussed above, group directions may also include information that could be personally identifiable or that would risk the privacy of individuals subject to that direction, or that may indicate information about

a person's health status, and it is not appropriate for this information to be publicly available.

Committee comment

Examinations or sampling procedures that may be included within a human biosecurity group direction and the circumstances in which it is appropriate to require an examination or body sample

2.60 The committee thanks the minister for this response. The committee notes the minister's advice that proposed sections 108N and 108P are drafted broadly to account for future listed human diseases which may have different testing and diagnosis methods. The minister advised that this flexibility is necessary to combat listed human diseases in Australian territory.

2.61 The minister also advised that the appropriate circumstance to request an examination or a body sample is when the relevant person has signs or symptoms of, or has been exposed to, a listed human disease and that person is on a vessel where there is a confirmed or suspected case of a listed human disease. The minister also advised that medically trained professionals will consider the individual circumstances of each case when seeking to conduct an examination or obtaining body samples.

2.62 While acknowledging the need to allow for some degree of discretion in requiring examinations and sampling procedures, it is not clear to the committee why it would not be possible to include at least high-level guidance in relation to the kinds of examinations or sampling procedures that may be included within a group direction, or the circumstances in which these procedures are required. For example, the bill does not make it clear whether a group direction could require an individual to undergo invasive procedures, such as a procedure that involves breaking through the skin, including blood tests or biopsies.

When consent must be given for examinations and obtaining body samples and how consent is to be given

2.63 The committee notes the minister's advice that any decision about how consent is to be given will be informed by clinical knowledge and expertise. For example, the minister advised that a human biosecurity officer may decide that certain examinations would be inappropriate or too intrusive if there is no consent. The minister also advised that the bill contains a number of safeguards in relation to consent, including proposed subsection 108N(3) which provides that, in certain circumstances, a person is not required to undertake an examination if they do not provide consent and proposed section 108S which provides that there be no use of force against an individual to require the individual to comply with a biosecurity measure.

2.64 While acknowledging this advice, and welcoming the existence of safeguards protecting a person's right to not provide consent in some circumstances, it remains unclear to the committee why it is not possible to provide at least high-level guidance

in relation to when and how consent must be given under a group direction, particularly in relation to the circumstances in which a direction to undergo an examination under section 108N does not need to be accompanied by a requirement to give consent. More broadly, it is unclear why it is not possible to include high-level requirements such as providing that consent is only valid if the person giving consent is considered to have the capacity to provide consent.

What medical and professional standards will, or may, apply

2.65 The committee notes the minister's advice that the professional or medical standards that may apply is not static but evolves over time as further evidence emerges and practices change. The minister advised that appropriate medical and professional standards would apply relating to the degree of care and skill of health care providers who practise in the provider's specialty, taking into account the medical knowledge that is available in the field, or the level at which the average, prudent provider in a given community would practise, or how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances.

2.66 The minister also advised that some states and territories have introduced legislation governing medical and professional standards and that, as a result, it would be inappropriate to attempt to list exactly what standards apply in all circumstances.

2.67 It is unclear to the committee from this explanation why it is not possible to include at least high-level guidance in relation to the medical and professional standards that will, or may, apply in these circumstances. For example, the committee considers that the bill could be amended to include appropriate safeguards, such as providing that any examinations or sampling procedures must be carried out in a way that respects an individual's dignity and privacy to the maximum extent possible, and to provide that relevant standards are specifically referenced in the primary legislation where appropriate.

Whether human biosecurity group directions can be published online

2.68 The committee notes the minister's advice that the bill already contains mechanisms that allow oversight over group directions. For example, under proposed section 108H the Director of Human Biosecurity must be notified, as soon as reasonably practicable, of the making, variation or revocation of a direction. The minister advised that additional oversight mechanisms would not be feasible due to the many variables involved in making group directions and responding to the biosecurity risks posed by listed human diseases. The minister advised that publishing group directions online may compromise the smooth implementation of biosecurity measures by the human biosecurity officers needed to respond to emerging public health situations.

2.69 Further, the minister advised that publication of a group direction is likely to occur after the direction has ceased to be in effect and that it is not clear what additional benefits online publishing would provide, noting that the individuals affected by the direction will already be notified of the contents of the direction and

how it applies. Finally, the minister advised that group directions may contain an individual's private information and that, as such, it would not be appropriate to make this information publicly available.

2.70 It is not clear to the committee why publishing biosecurity group directions online would compromise the work of biosecurity officers. The committee notes that publishing group directions online after the effect of the direction has ceased will afford a higher degree of parliamentary and public scrutiny over the directions as is appropriate for the use of coercive powers. The committee notes that any amendment to the bill could include safeguards intended to protect individuals' privacy.

Whether information about human biosecurity group directions can be set out in the department's annual report

2.71 The committee notes the minister's advice that an amendment to include details about group directions within the department's annual report would be inconsistent with the Biosecurity Act as existing provisions in relation to human biosecurity control orders do not have an equivalent requirement to publish information in the annual report. Moreover, the minister advised that group directions may contain an individual's private information, including information that may indicate details about a person's health status and that, as such, it would not be appropriate to make this information publicly available.

2.72 Consistency with existing legislation is not a sufficient justification for failing to provide for sufficient parliamentary scrutiny over coercive powers. Rather, from a scrutiny perspective, the committee considers that it would be appropriate to amend the bill such that information in relation to both group directions and human biosecurity control orders be included within annual reports prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013*. In addition, it is not clear to the committee why high-level details such as the total number of directions made in a year and high-level details as to the nature and contents of each direction would infringe on an individual's privacy. The committee notes that any amendment to the bill could include safeguards intended to protect individuals' privacy.

2.73 Finally, the committee notes that similar high-level information is published online in relation to other compliance and regulatory activities undertaken by departments administering the Biosecurity Act. For example, section 9-48 of the Export Control (Animals) Rules 2021 allows the Secretary of the Department of Agriculture, Water and the Environment to publish records and reports made in relation to the independent observer program on live animal export vessels.[34]

34 Information in relation to records and reports made by accredited veterinarians or authorised officers in this context is currently published on the department's website at: https://www.agriculture.gov.au/export/controlled-goods/live-animals/livestock/regulatory-framework/compliance-investigations/independent-observations-livestock-export-sea.

2.74 In light of the above, the committee requests the minister's further advice as to whether the bill can be amended to include at least high-level guidance in relation to proposed sections 108N (requiring body examinations) and 108P (requiring body samples for diagnosis), including guidance in relation to:

- **what examinations or sampling procedures may be included within a human biosecurity group direction;**
- **in what circumstances it is appropriate to require an examination or body sample;**
- **when consent must be given and how consent is to be given; and**
- **what medical and professional standards will, or may, apply when undertaking a procedure under proposed sections 108N or 108P.**

2.75 In particular, the committee considers that it would be appropriate if safeguards protecting an individual's right to bodily autonomy and an individual's right to provide and withdraw consent be considered. The committee considers that it would be possible to include high-level guidance in relation to these matters without compromising the level of discretion needed to effectively address the risk of listed human diseases.

2.76 **The committee's consideration of the appropriateness of proposed sections 108N and 108P would be assisted if the minister's response includes consideration of the specific examples and suggestions for amendment raised by the committee. Specifically, whether the bill can be amended such that guidance is included as to:**

- **whether an individual can be required to undergo invasive procedures, such as a procedure that involves breaking through the skin, including blood tests or biopsies;**
- **when and how consent must be given under a group direction, particularly in relation to the circumstances in which a direction to undergo an examination under section 108N does not need to be accompanied by a requirement to give consent;**
- **when consent is validly given, including that consent is not validly given if the person giving consent does not have capacity; and**
- **how examinations or sampling procedures must be carried out including, at a minimum, that they be carried out in a way that respects an individual's dignity and privacy.**

2.77 In addition, from a scrutiny perspective, the committee considers that it would be appropriate to include similar guidance in relation to human biosecurity control orders set out under Part 3 of Chapter 2 of the *Biosecurity Act 2015*. The committee requests the minister's advice in relation to including this further guidance within the bill.

2.78 Noting, that it is unclear how publication of human biosecurity group directions could infringe on individuals' privacy and that, in any event, safeguards to protect privacy could be included within the bill, the committee also requests the minister's further advice as to whether the bill can be amended to include requirements that:

- **human biosecurity group directions made under proposed section 108B must be published online, and**
- **information about human biosecurity group directions and human biosecurity control orders imposed under Part 3 of Chapter 2 of the *Biosecurity Act 2015*, such as the total number of directions made and the total number of orders imposed in a year and high-level details as to the nature and contents of each direction and order, must be set out in the department's annual report prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013*.**

Significant matters in delegated legislation—notification requirements[35]

2.79 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave notification requirements in relation to a human biosecurity group direction to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.

Minister's response[36]

2.80 The minister advised:

> The human health measures in this Bill will play an important part in supporting progress towards the safe reopening of Australia's borders by reducing the potential for the entry, emergence, establishment and spread of listed human diseases. It is urgently required to support safe resumption of international travel in line with government priorities, in short timeframes.

35 Schedule 1, item 16, proposed subsections 108E(3), 108F(8) and 108G(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

36 The minister responded to the committee's comments in a letter dated 5 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> It is necessary and appropriate that the notification requirements for a human biosecurity group direction are set out in the regulations, and it is not proposed to amend the Bill to provide guidance regarding this matter in the primary legislation.
>
> As set out in paragraph 68 of the Explanatory Memorandum to the Bill, the regulations provide flexibility, allowing for a range of different methods by which notification of the direction can be given, depending on what is most appropriate for the circumstances of each case and having regard to technological or operational requirements of the relevant conveyance. This avoids the creation of overly prescriptive legislation that is not fit for purpose to respond to changing circumstances, particularly in the context of managing the risk of contagion of a listed human disease.
>
> The regulations would also allow for consistent application of the notification requirements to the class of individuals, as well as appropriate guidance and clarity about the notification processes.
>
> Further, given that the notification requirements will be prescribed in regulation, these requirements will be subject to parliamentary scrutiny and disallowance processes.

Committee comment

2.81 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate to include notification requirements within delegated legislation because the regulations will allow for the necessary flexibility to deal with the changing circumstances that occur in the context of managing the biosecurity risk of a listed human disease. The minister also advised that the regulations will allow for consistent application of notification requirements, as well as appropriate guidance and clarity about the notification processes.

2.82 While acknowledging this advice, the committee reiterates that it does not generally consider administrative flexibility to be a sufficient justification for the inclusion of significant matters in delegated legislation. In this instance, the committee's concerns are heightened given the impact that a human biosecurity group direction may have on individual rights and liberties.

2.83 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving notification requirements in relation to a human biosecurity group direction to delegated legislation.

Significant matters in delegated legislation—body samples for diagnosis[37]

2.84 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave requirements relating to the taking, storing and use of body samples to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding the storage and use of body samples on the face of the primary legislation.

Minister's response[38]

2.85 The minister advised:

> Under proposed section 108P, an individual who has undertaken an examination may be required to provide specified body samples for the purposes of determining the presence of certain listed human diseases. However, an individual is only required to provide a body sample if the individual consents to do so in the manner specified in the direction.
>
> Proposed subsection 108P(4) provides that the regulations must prescribe requirements for taking, storing, transporting, labelling and using body samples provided.
>
> It is considered necessary and appropriate for requirements relating to the taking, storing and use of body samples to be set out in the regulations. The current framework in subsection 108P(4) of the Bill to allow the requirements relating to body samples to be prescribed in the regulations offers suitable flexibility for the administrative and procedural nature of such matters, while still retaining suitable clarity and transparency. The prescription of such matters in the regulations is also consistent with the equivalent provisions in the Biosecurity Act for the requirements for body samples in relation to human biosecurity control orders (see subsection 91(3)).
>
> Further, the provision of body samples is already subject to the safeguard in proposed section 108R that the biosecurity measures must be carried out in a manner consistent with appropriate medical standards and other relevant professional standards. Some States and Territories have their own legislation governing medical and professional standards, which extends to standards in relation to the storage and use of body samples. In light of the existing framework in the Bill and the relevant standards, it is not

37 Schedule 1, item 16, proposed subsection 108P(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

38 The minister responded to the committee's comments in a letter dated 5 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

considered necessary to set out the circumstances in which body samples must be stored or used in the primary legislation, and in fact to do so would create the potential for duplicative or conflicting standards.

In addition, given that the requirements for the storage and use of body samples will be prescribed in regulation, these requirements will be subject to parliamentary scrutiny and disallowance processes.

Committee comment

2.86 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate to include requirements relating to the taking, storing and use of body samples within delegated legislation because doing so allows for the flexibility needed to address administrative and procedural matters, while still retaining clarity and transparency. The minister also advised that including these matters within delegated legislation is consistent with the current approach taken within the Biosecurity Act. The minister further advised that the provision of body samples must be carried out in a manner consistent with appropriate medical standards and other relevant professional standards and that several states and territories have introduced legislation governing the medical and professional standards applying to body samples. The minister considers that, for this reason, introducing requirements in relation to body samples within the Biosecurity Act would create the potential for duplicative or conflicting standards.

2.87 The committee reiterates that neither a desire for administrative flexibility, nor consistency with existing provisions of an Act are a sufficient justification for including significant matters in delegated legislation.

2.88 In addition, while welcoming the inclusion of the safeguard at proposed section 108R, the committee does not consider that the existence of this safeguard negates the principle that significant matters should be included within primary legislation. 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. Finally, it is not clear to the committee why the existence of standards in some states and territories means that it is not necessary to include requirements relating to body samples within primary, rather than delegated, legislation.

2.89 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving requirements relating to the taking, storing and use of body samples to delegated legislation.

Broad discretionary power

Parliamentary scrutiny—section 96 grants to the states[39]

2.90 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to confer on the Agriculture Minister and the Health Minister a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised;
- whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and
- whether the bill can be amended to include a requirement that written agreements with the states and territories about grants of financial assistance made under proposed section 614C are:
  - tabled in the Parliament within 15 sitting days after being made; and
  - published on the internet within 30 days after being made.

Minister's response[40]

2.91 The minister advised:

> *Why it is considered necessary and appropriate to confer on the Agriculture Minister and the Health Minister a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised*
>
> Proposed subsection 614B(1) would provide that the Agriculture Minister or the Health Minister (the Ministers) may, on behalf of the Commonwealth, make, vary or administer an arrangement for the making of payments by the Commonwealth, or make, vary or administer a grant of financial assistance, in relation to one or more specified activities.
>
> The ability of the Ministers to make arrangements or grants of financial assistance would be limited to the particular activities listed in proposed subsection 614B(1). This is an exhaustive list, and the specified activities are those that are directly referrable to identifying, preventing, preparing for and managing biosecurity risks. The power would be further limited by proposed subsection 614B(2) which outlines the types of risks posed by disease and pests that are intended to be covered by the activities set out

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39 Schedule 4, item 6, proposed sections 614B and 614C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

40 The minister responded to the committee's comments in a letter dated 5 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

in proposed subsection 614B(1). This limitation would ensure that arrangements or grants must have a direct link to addressing the likelihood of pests or diseases emerging, establishing or spreading and the potential for harm to human, animal and plant health, the environment, and the economy.

Allowing for the Ministers to make arrangements or grants of financial assistance is crucial in allowing the Australian Government to react and respond quickly to fast-changing circumstances where there is a pest or disease threatening human health, the environment or the agricultural sector. Pests and diseases often have the ability to spread quickly and cause widespread harm exponentially proportional to the time taken to respond.

One example of the cost effectiveness of early intervention is of the current response to Red Imported Fire Ants (RIFA) in Queensland. RIFA are considered one of the most serious invasive ant pests in the world due to their harmful effects on people, agriculture, flora and fauna, infrastructure and recreational activities. The National Red Imported Fire Ant Eradication Program (the program) was costed to continue for 10 years. In the absence of the program, the annual cost of managing RIFA would be estimated to exceed 380 per cent of the total cost of the 10 year program.

For these reasons, it is both necessary and appropriate to confer on the Ministers an ability to make arrangements and grants in the circumstances outlined in proposed subsection 614B(1). The Bill already contains sufficient guidance on the scope of how the power in proposed subsection 614B(1) is to be exercised.

Whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which financial assistance may be granted

I note the committee's concern that the Bill does not contain high-level guidance as to the terms and conditions on which financial assistance may be granted to the states and territories.

I will consider moving an amendment to the Bill to provide a framework for setting out high-level guidance in relation to the terms and conditions on which financial assistance may be granted to a state or territory. Consistent with the approach taken in other Commonwealth legislation, including other of my portfolio legislation, this may involve the regulations prescribing the terms and conditions, or the kinds of terms and conditions, that may be included in such an agreement.

I note that such an approach would have the benefit of providing clarity and transparency on the kinds of terms and conditions to be included in the agreement, while also retaining flexibility to ensure that the agreements are appropriate and tailored to the specific circumstances and financial need. If requirements are prescribed in the regulations, then this would be subject to the usual parliamentary scrutiny and disallowance processes.

Whether the bill can be amended to include a requirement that written agreements with the states and territories about grants of financial assistance made under proposed section 614C are:

- *tabled in the Parliament within 15 sitting days after being made; and*
- *published on the internet within 30 days after being made*

I note the committee's concern that there is no requirement in the Bill to table the written agreements between the Commonwealth and the states and territories to provide an opportunity for any agreements made under proposed section 614C to be considered.

I will consider moving an amendment to the Bill to include a requirement that written agreements with the states and territories about grants of financial assistance that are made under proposed section 614C are tabled in each House of Parliament within 15 sitting days after the agreement is made. I will also consider moving an amendment to include a further requirement that such agreements will be published on the internet within 30 days after the agreement is made.

I note that such an approach would be in addition to the usual parliamentary scrutiny processes for annual appropriations made through the Federal Budget process. If such amendments are progressed, this would also supplement the reporting requirements under proposed section 614G for information on grants of financial assistance to be included in both the Department of Agriculture, Water and the Environment and the Department of Health's Annual Reports.

Committee comment

2.92 The committee thanks the minister for this response. The committee notes the minister's advice that the power to make arrangements or grants of financial assistance would be limited to the particular activities listed in proposed subsection 614B(1). The minister also advised that the power would be further limited by proposed subsection 614B(2) which outlines the types of risks posed by disease and pests that are intended to be covered by the activities set out in proposed subsection 614B(1).

2.93 The minister further advised that allowing for the ministers to make arrangements or grants of financial assistance is crucial in allowing the government to react and respond quickly to fast-changing circumstances that might threaten human health, the environment or the agricultural sector.

2.94 While acknowledging this advice, the committee remains concerned that there is insufficient guidance on the face of the primary legislation as to how the broad discretionary power to make agreements or grants will be exercised.

2.95 The committee welcomes the minister's advice that he will consider moving an amendment setting out high-level guidance in relation to the terms and conditions on which financial assistance may be granted to a state or territory. The committee

also welcomes the minister's advice that he consider moving amendments to the bill to include tabling and publishing requirements for agreements made under proposed section 614C.

2.96 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring on the Agriculture Minister and the Health Minister a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bills as to how that power is to be exercised.

2.97 In relation to parliamentary scrutiny of grants to the states and territories, the committee thanks the minster for his engagement with the committee and welcomes his intention to progress amendments to the bill to:

- **include at least high-level guidance as to the terms and conditions on which financial assistance may be granted to a state or territory; and**
- **include a requirement that written agreements with the states and territories made under proposed section 614C are tabled in the Parliament within 15 sitting days after the agreement is made and published on the internet within 30 days after the agreement is made.**

Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021

Purpose	This bill seeks to: • reduce the administrative burden on CATSI corporations by making it easier to satisfy reporting and meeting obligations; • provide greater flexibility for CATSI corporations to enable the realisation of economic and community development priorities; • ensure governance requirements are fit-for-purpose by expanding the capacity of CATSI corporations to determine their own operational rules; • increase transparency of CATSI corporation operations through improved reporting for members, common law holders and other stakeholders; • enhance support for CATSI corporations that are experiencing difficulties to enable these entities return to health and, ultimately, the control of their members; • streamline the process of winding up defunct CATSI corporations; • enhance the efficacy of operations by increasing access by CATSI corporations to modern technology, including for managing their membership bases; and • provide the Registrar with expanded powers to enable a graduated, proportionate response to non-compliance.
Portfolio/Sponsor	Indigenous Australians
Introduced	House of Representatives on 25 August 2021
Bill status	Before the Senate

Reversal of the evidential burden of proof[41]

2.98 In *Scrutiny Digest 14 of 2021* the committee requested the minister's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed subsections 453-2(6), 453-3(3), 453-4(3) and 201-150(5).

2.99 The committee also requests the minister's advice as to whether the bill can be amended to provide for more specific defences in proposed subsections 453-2(6), 453-3(3) and 453-4(3).

2.100 The committee further suggests that it may be appropriate for the bill to be amended to provide that the defences set out at proposed subsection 201-150(5) are instead specified as elements of the offence. The committee requests the minister's advice in relation to this matter.[42]

Minister's response[43]

2.101 The minister advised:

> I do not propose to amend the existing defences in proposed subsections 453-2(6), 453-3(3) and 453-4(3) for the reasons set out over the page.
>
> Proposed subsections 453-2(6), 453-3(3) and 453-4(3) expand the Registrar's powers in relation to the production of books. Section 453-2 (Notice to produce books) is based on sections 30 and 63 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Section 453-3 (Registrar's power if books are not produced) is based on sections 38 and 63 of the ASIC Act. Section 453-4 (Registrar's power to require identification of property) is based on sections 39 and 63 of the ASIC Act.
>
> Proposed subsections 453-2(5) and (6) provide that:
>
> - it will be an offence if the Registrar gives a person a notice to produce specific books and the person does an act, or omits to do an act, with the result that the notice is not complied with; and
> - the offence does not apply if the person has a reasonable excuse.
>
> Proposed subsections 453-3(2) and (3) provide that:
>
> - a person commits an offence if they are given an order under proposed subsection 453-3(1) [to state where the books may be

41 Schedule 1, items 6 and 126, proposed subsections 453-2(6), 453-3(3), 453-4(3) and 201-150(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2021*, pp. 1-4.

43 The minister responded to the committee's comments in a letter dated 14 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

found and who last had possession of the books] and the person does an act, or omits to do an act, with the result that the notice is not complied with;

- the offence does not apply if the person has stated the required matter to the best of the person's knowledge or belief or the person has a reasonable excuse.

Proposed subsection 453-4(2) provides that:

- a person will commit an offence if the person is given an order under proposed subsection 453-4(1) [to identify the property of the corporation and how the corporation has kept account of that property] and the person does an act, or omits to do an act, with the result that the notice is not complied with;
- the offence does not apply if the person has, to the extent the person is capable of doing so, performed the relevant acts in proposed subsection 453-4(1) or the person has a reasonable excuse.

As noted by the committee at 1.6 and 1.11, in relation to the offence-specific defences under subsections 453-2(6), 453-3(3) and 453-4(3), a defendant will bear the evidential burden of proof (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter). Evidential burden means, "..... adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist." (subsection 13.3(6) of the Criminal Code).

The offence-specific defences for these provisions do not change the fact that:

- The prosecution bears the legal burden of proving every element of the offence (13.1(1) of the Criminal Code);
- The prosecution also bears the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant (13 .1 (2) of the Criminal Code).

The Attorney General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 (Guide to Framing Commonwealth Offences) says a matter should only be included in an offence-specific defence (as opposed to being included as an element of the offence) where:

i. the matter is peculiarly within the knowledge of the defendant; and

ii. it would be significantly more difficult and costly for the prosecution to disprove, than for the defendant to establish the matter.

Matter is peculiarly within the knowledge of the defendant - reasonable excuse

Each of the offence-specific defences under subsections 453-2(6), 453-3(3) and 453-4(3) provide that the offence does not apply if the person has a reasonable excuse.

Whilst acknowledging that the defence of reasonable excuse places an evidentiary burden on the defendant, it is appropriate in this case because a person who has failed to comply with a notice to produce books for example, is best placed to explain why. The very nature of the offences, failure to produce specified books, failure to state where books may be found, failure to identify property of the corporation make them matters peculiarly with the knowledge of the person (eg officer of the corporation).

The provisions are compatible with the presumption of innocence in that they give the person best placed to do so an opportunity to put forward a reasonable excuse for a failure to comply and to adduce or point to evidence that suggests a reasonable possibility that the matter (reasonable excuse) exists. The defence of reasonable excuse ensures a person is not penalised where they may have legitimate reasons for being unable to produce a document due to reasons beyond their control, or where there is some other good and acceptable reason.

A defence of reasonable excuse does not affect the application of the specific defences of general application set out in Part 2.3 of the Criminal Code such as duress, mistake or ignorance of fact, intervening conduct or event, lawful authority.

Matter is peculiarly within the knowledge of the defendant -person has stated the required matter to the best of the person's knowledge or belief

The offence-specific defences under subsections 453-3(3) includes a defence that the person has stated the required matter to the best of the person's knowledge or belief.

A defendant, in these circumstances, is best placed to adduce evidence as to that person's knowledge or belief in relation to where the books may be found and who last had possession of the books. The provision is compatible with the presumption of innocence in that it gives the person best placed to do so, an opportunity to explain why the person has stated the required matter to the best of the person's knowledge or belief and to adduce or point to evidence that suggests a reasonable possibility that the matter exists.

Matter is peculiarly within the knowledge of the defendant – if the person has, to the extent the person is capable of doing so, performed the relevant acts

The offence-specific defences under subsection 453-4(3) includes a defence that the offence does not apply if the person has, to the extent the person is capable of doing so, performed the relevant acts.

A defendant, in these circumstances, is best placed to adduce evidence about the extent to which that person has performed the relevant acts - ie

that extent to which the person is able to identify the property of the corporation and how the corporation has kept account of that property. The provision is compatible with the presumption of innocence in that it gives the person best placed to do so, an opportunity to explain any limitations on the extent to which the person is able to identify the property of the corporation and to adduce or point to evidence that suggests a reasonable possibility that the matter (limitation) exists.

It would be significantly more difficult and costly for the prosecution to disprove, than for the defendant to establish the matter

The proposed provisions are to be included in Part 10-3 (Enforcement) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). Division 450 of the CATS! Act provides that the Registrar exercises powers in this part for the purpose of ensuring compliance with the Act and the Registrar's powers can be exercised in relation to an alleged or suspected contravention of the Act. For a prosecution to proceed, the evidence must be sufficient to justify the institution of proceedings and the prosecutor must have regard to any lines of defence open to the alleged offender.

In my responses above I have explained why the matters included in the offence-specific defences (which reverse the evidential burden of proof) are peculiarly within the knowledge of the defendant. It follows from my responses that such matters would not be difficult for the defendant to establish. For example, an officer of a corporation who is unable to produce, state or identify something that the corporation has, is best placed to explain any limitations on their ability to do so. Officers of a corporation have an obligation to discharge their duties in good faith in the best interests of the corporation.

It is important that the Registrar is able to investigate alleged or suspected contraventions of the CATSI Act and that notices to produce books are complied with unless there is a reasonable excuse. There are currently 3384 Aboriginal and Torres Strait Islander corporations and the reasons why, for example, an officer is unable to comply with a notice may be many and varied. It would be significantly more difficult and costly for the prosecution to disprove, than for the defendant to establish these matters.

I note that the prosecution bears the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant (13.1(2) of the Criminal Code).

As such, these provisions are reasonable, necessary and proportionate.

Consistency with the ASIC Act

As stated above, the proposed provisions are consistent with the ASIC Act - see section 63 of the ASIC Act. The ASIC Act provides the Commissioner with a suite of tools that allow a graduated and proportionate response to non-compliance. As a fellow regulator of corporations, the Registrar of Aboriginal and Torres Strait Islander Corporations should have access to a similar suite of tools.

> While the CATSI Act differentiates itself from the Corporations Act as a special measure through requiring the Registrar to take account of tradition and circumstance in carrying out his or her regulatory functions, that does not mean that he or she should not be afforded the same tools to execute those functions.
>
> I have considered the implications of placing the evidential onus on the prosecution to prove those matters currently set out under proposed subsection 201-150(5) as elements of the offence. I agree with the committee that, in this instance, it would not be costly for the prosecution to obtain the relevant information for the purposes of proving those matters at proposed paragraphs 201-150(5)(a) to (d).
>
> As per the committee's suggestion, the defences in subsection 201-150(5) will instead be specified as elements of the offence. A request has been made to the Office of the Parliamentary Counsel to draft the relevant amendments to the bill and a supplementary explanatory memorandum will be prepared.

Committee comment

2.102 The committee thanks the minister for this response.

2.103 In relation to the use of a reasonable excuse defence in proposed subsections 453-2(6), 453-3(3) and 453-4(3), the committee notes the minister's advice that the defence of reasonable excuse is appropriate in this case because a person who has, for example, failed to comply with a notice to produce books is best placed to explain why. The committee also notes the minister's advice that the defence of reasonable excuse ensures a person is not penalised where they may have legitimate reasons for being unable to produce a document due to reasons beyond their control, or where there is some other good and acceptable reason.

2.104 While noting the minister's advice, the committee reiterates the guidance from the *Guide to Framing Commonwealth Offences*, which states:

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[44]

2.105 It remains unclear to the committee why it would not be possible for the bill to be amended to include more specific defences in this instance.

2.106 In relation to the other offence-specific defence in proposed subsection 453-3(3), the committee notes the minister's advice that a defendant is best placed to adduce evidence as to that person's knowledge or belief in relation to where the books may be found and who last had possession of the books.

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

2.107 In relation to the other offence-specific defence in proposed subsection 453-4(3), the committee notes the minister's advice that a defendant is best placed to adduce evidence about the extent to which that person has performed the relevant acts. For example, the extent to which the person is able to identify the property of the corporation and how the corporation has kept account of that property.

2.108 The committee also notes the minister's advice that it would be significantly more difficult and costly for the prosecution to disprove, than for the defendant to establish these matters.

2.109 Finally, in relation to proposed subsection 201-150(5), the committee notes the minister's advice that it would not be costly for the prosecution to obtain the relevant information for the purposes of proving those matters. The committee also acknowledges the minister's advice that a request has been made to the Office of Parliamentary Counsel to draft the relevant amendments to the bill and a supplementary explanatory memorandum will be prepared.

2.110 The committee welcomes the minister's undertaking to progress government amendments to the bill to provide that the defences at proposed paragraphs 201-150(5)(a) to (d) will instead be specified as elements of the offence. In light of this, the committee makes no further comment on this matter.

2.111 In relation to proposed subsections 453-2(6), 453-3(3) and 453-4(3), the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of including an offence-specific defence of 'reasonable excuse' in circumstances where a more specific defence could be provided.

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

Strict liability[45]

2.113 In *Scrutiny Digest 14 of 2021* the committee considered that the bill should be amended to remove the penalty of imprisonment from the strict liability offence in proposed subsection 180-37(3), consistent with the principles set out in the *Guide to*

45 Schedule 1, item 81, proposed subsection 180-37(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Framing Commonwealth Offences.[46] The committee requested the minister's advice in relation to this matter.

Minister's response[47]

2.114 The minister advised:

> Noting the explanatory memorandum for the bill, which states that the strict liability offences in the bill are necessary to ensure the integrity of the regulatory regime established by the Act, I agree with the committee's suggestion to remove the penalty of imprisonment from the strict liability offence in subsection 180-37(3). A request has been made to the Office of the Parliamentary Counsel to draft the relevant amendments to the bill and a supplementary explanatory memorandum will be prepared.

Committee comment

2.115 The committee thanks the minister for this response. The committee acknowledges the minister's advice that he agrees with the committee's suggestion that the bill be amended to remove the penalty of imprisonment from the strict liability offence in proposed subsection 180-37(3). The committee also acknowledges the minister's advice that a request has been made to the Office of Parliamentary Counsel to draft the relevant amendments to the bill and a supplementary explanatory memorandum will be prepared.

2.116 The committee welcomes the minister's undertaking to progress government amendments to the bill to remove the penalty of imprisonment from the strict liability offence in proposed subsection 180-37(3).

2.117 In light of this undertaking, the committee makes no further comment on this matter.

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46 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

47 The minister responded to the committee's comments in a letter dated 14 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021

Purpose	This bill seeks to amend the *Criminal Code Act 1995* to establish an extended supervision order scheme for high-risk terrorist offenders. It will enable Supreme Courts to make such an order to prevent the risk that a high-risk terrorist offender poses to the community at the end of their custodial sentence.
Portfolio/Sponsor	Attorney-General
Introduced	House of Representatives on 3 September 2020
Bill status	Before the House of Representatives

Procedural fairness—right to a fair hearing[48]

2.118 The committee scrutinised this bill in *Scrutiny Digest 14 of 2020*[49] and *Scrutiny Digest 16 of 2020*.[50] The committee considered the Attorney-General's second response in *Scrutiny Digest 1 of 2021* and noted that it remained of the view that it would be appropriate for the bill to be amended to provide high level guidance that the court-only evidence provisions in items 189–210 of Schedule 1 may only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application.

2.119 In the absence of such an amendment to the text of the bill, the committee requested that an addendum to the explanatory memorandum containing the key information provided by the Attorney-General in relation to this matter 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*).[51]

48 Schedule 1, item 120, proposed sections 105A.14B-105A.14D and items 189-210. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 15-18.

50 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 34-38.

51 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 65-66.

Attorney-General's response[52]

2.120 The Attorney-General advised:

> I have carefully considered the Committee's comments and have formed the view that it is not necessary to amend the Bill for the same reasons provided to the Committee by my predecessor. Firstly, an amendment to the Bill would not result in any change to the effect and operation of the court-only evidence provisions. Secondly, it is ultimately a matter for the court to determine if, and how, information is to be protected in these proceedings, balancing the need to protect highly sensitive national security information with the offender's right to a fair hearing.
>
> In relation to the Committee's request to amend the Explanatory Memorandum, I am not proposing to amend the Explanatory Memorandum because doing so may affect the interpretation of other provisions in the *National Security Information (Criminal and Civil Proceedings) Act 2004* which are currently subject to consideration in court proceedings.

Committee comment

2.121 The committee thanks the Attorney-General for this further response. The committee notes the Attorney-General's advice that it is not necessary to amend the bill because an amendment would not result in any change to the effect and operation of the court-only evidence provisions at items 189–210 of Schedule 1. The Attorney-General also advised that amendments are not necessary because it is a matter for the court to determine if, and how, information is to be protected in any proceedings that may be made under the relevant provisions.

2.122 The Attorney-General also advised that amending the explanatory memorandum to the bill may affect the interpretation of other provisions in the *National Security Information (Criminal and Civil Proceedings) Act 2004* which are currently subject to consideration in court proceedings.

2.123 While acknowledging this advice, the committee reiterates its view that it would be appropriate to amend the bill to provide at least high-level guidance that the court-only evidence provisions in items 189–210 of Schedule 1 may only be used in exceptional circumstances, that is, where it is absolutely necessary to present highly sensitive information to a court to support an application.

2.124 Additionally, it remains unclear to the committee why it is not possible to amend the explanatory memorandum to the bill. The committee considers that information that assists in explaining the intent and effect of a bill should be included in its explanatory memorandum as a matter of course.

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52 The minister responded to the committee's comments in a letter dated 30 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

2.125 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the court-only evidence provisions of the bill.

Crimes Amendment (Remission of Sentences) Bill 2021

Purpose	This bill seeks to amend the *Crimes Act 1914* (Crimes Act) to repeal section 19AA, which applies remissions or reductions granted under state or territory laws to federal sentences.
Portfolio/Sponsor	Attorney-General
Introduced	Senate on 25 August 2021
Bill status	Before the Senate

Retrospective application

Personal rights and liberties[53]

2.126 In *Scrutiny Digest 15 of 2021* the committee requested the Attorney-General's advice as to:

- why it is considered necessary and appropriate to, in effect, retrospectively deprive prisoners of already accrued remission days; and
- whether the bill can be amended to provide that the repeal of section 19AA of the *Crimes Act 1914* only apply prospectively.[54]

Minister's response[55]

2.127 The Attorney-General advised:

> The current operation of section 19AA of the *Crimes Act 1914* means that emergency management days granted to federal offenders are automatically recognised in relation to a federal offender's sentence.
>
> Some prisoners in Victoria are receiving substantial discounts off their sentences, which have not been anticipated or considered by the courts in sentencing. The granting of significant numbers of emergency management days is inappropriate, as it interferes with, and undermines, careful and considered sentencing decisions made by the court. Sentencing courts undertake a complex and detailed consideration of these individual

53 Schedule 1, item 11. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

54 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 17-19.

55 The minister responded to the committee's comments in a letter dated 29 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

circumstances in determining the appropriate sentence for offenders, informed by precedent and sentencing principles.

Significant sentence discounts applied to serious offenders undermines the seriousness of the conduct to which the sentences relate. In extreme cases, where a court has crafted a sentence to ensure a federal offender is able to access offence-specific rehabilitation programs in prison, such as sex offender treatment, the application of emergency management days may mean that the offender is unable to complete that program in custody. That offender would then be released into the community without the benefit of treatment designed to reduce the risk that they pose to community safety.

These sentence discounts also pose significant operational challenges for intelligence and law enforcement authorities, particularly for managing high risk terrorist offenders. Shifting and shortening sentence expiry dates is unpredictable, and can impact the post-sentence management options for offenders who are eligible for a continuing detention order (CDO) under Division 105A of the *Criminal Code Act 1995* (the Criminal Code) or a control order under Division 104 of the Criminal Code.

The removal of the ability to confer significant sentence discounts in this manner is appropriate. It does not impose any additional punishments on federal offenders, and does not interfere with the sentence fixed by the court. The measures in the Bill simply restore the sentence that was justly set down by the court. These principles have been upheld in other criminal justice contexts.

For example, the High Court, in the matter of *Kevin Garry Crump v the State of New South Wales* [2012] HCA 20, determined that amendments made to NSW legislation to make it more difficult for the plaintiff to be released on parole did not interfere with the original sentence, or the order made in relation to the plaintiff declaring a minimum term he was required to serve before being eligible for release on parole. The majority considered that the relevant NSW law 'did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty.'[56]

The risks identified above apply to all federal offenders, including those who are currently serving their sentence and who have been granted emergency management days. Limiting the application of the amendments to remissions that may be granted in the future does not address the risks to community safety posed by the significant reductions in sentences for offenders currently in custody. For this reason, the provisions need to have limited retrospective application.

The measures are proportionate, in that they apply to all federal offenders and do not seek to remove remissions granted to offenders who have already been released from custody.

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56 *Kevin Garry Crump v the State of New South Wales* [2012] HCA 20*,* para 60.

Committee comment

2.128 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that some prisoners in Victoria are receiving substantial discounts off their sentences, which have not been anticipated or considered by the courts in sentencing and that the granting of significant numbers of emergency management days is inappropriate as it interferes with, and undermines, careful and considered sentencing decisions made by the court.

2.129 The committee also notes the Attorney-General's advice that limiting the application of the amendments to remissions that may be granted in the future does not address the risks to community safety posed by the significant reductions in sentences for offenders currently in custody and that for this reason, the provisions need to have limited retrospective application.

2.130 The committee reiterates its 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. The committee notes that in this case, federal offenders who have already been granted emergency management days will be detrimentally affected.

2.131 While the committee acknowledges the policy intention behind this amendment, from a scrutiny perspective, the committee considers that where reasonable expectations are undermined in cases like this there is a risk that those affected, and the public at large, will perceive that the law is being applied arbitrarily. As a result, the committee is not satisfied that the minister's response has adequately addressed the committee's scrutiny concerns.

2.132 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of, in effect, retrospectively depriving prisoners of already accrued remission days.

Defence Legislation Amendment (Discipline Reform) Bill 2021

Purpose	This bill seeks to amend the *Defence Force Discipline Act 1982* to: • expand the operation of the disciplinary infringement scheme to enhance its effectiveness in dealing with minor breaches of military discipline; • remove the subordinate summary authority, to reduce the number of summary authority levels and therefore simplify the manner in which minor disciplinary issues are enforced; and • introduce several new service offences relating to failure to perform duty or carry out activity; cyber-bullying; and failure to notify change in circumstances (concerning the receipt of a benefit or allowance).
Portfolio/Sponsor	Defence
Introduced	House of Representatives on 12 August 2021
Bill status	Before the Senate

Significant matters in delegated legislation[57]

2.133 In *Scrutiny Digest 13 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the significant elements of the operation of the disciplinary infringement scheme set out in proposed sections 9FA and 9J to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding the operation of these elements on the face of the primary legislation.[58]

57 Schedule 1, item 1, proposed sections 9FA and 9J. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

58 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 4-5.

Minister's response[59]

2.134 The minister advised:

> S.9FA (discipline officer procedure) and 9J (consequences of punishments) within Part IA of the Bill, are very similar in substance to existing provisions of the DFDA dealing with the same subject matter (see: ss.169G and 169FB respectively).
>
> The key purpose and object of Part IA is to provide a means of dealing with minor service discipline matters which is fair and efficient; and meets the disciplinary needs of the Australian Defence Force.[60] The need to maintain and enforce service discipline applies at all times and all locations, and for which Part IA will deal with the majority of minor discipline breaches in the Australian Defence Force.
>
> In particular, the disciplinary infringement scheme only applies where an infringed member elects to be dealt with under the scheme, and by so doing, acknowledges the discipline breach. The disciplinary infringement scheme does not deal with contested infringements – this can only occur before a service tribunal on a charge of a DFDA service offence. The discipline officer procedures are therefore limited in scope and are provided for on the face of the Bill (see: by s.9FA, and additionally by ss.9EB, 9F, 9FB and 9FC).
>
> The procedural requirements for discipline officers under Part IA of the Bill are covered within the Part, and mirror those provisions within the existing DFDA Part IXA, which Part IA will replace. The procedural requirements are comprehensively detailed within Australian Defence Force discipline policy guidelines, as approved by the Chief of the Defence Force. The administrative guidelines are widely published and available within the Australian Defence Force. On commencement of Part IA, the procedural and policy guidelines for discipline officer procedures will be widely published by the authority of the Chief of the Defence Force.
>
> Additionally, s.9E(4) prescribes that a disciplinary infringement notice must be in accordance with a form approved by the Chief of the Defence Force. The disciplinary infringement notice provides explanatory detail to the infringed member of matters including the discipline officer and senior discipline officer procedure, including the right of the member to call witnesses and present evidence in relation to the discipline officer's powers and punishment options.
>
> Office of Parliamentary Counsel (OPC) drafting policy is to use legislative instruments rather than regulations for all matters that do not need to be

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59 The minister responded to the committee's comments in a letter dated 7 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

60 *Defence Force Discipline Act 1982,* section9B.

prescribed by regulation (see: *OPC Drafting Direction 3.8 - subordinate legislation*). Consequently, procedural rules for the disciplinary infringement scheme within Part IA, are not matters that need to be done by regulation as reflected within s.9FA of the Bill.

S.9J(1) relates to the consequences of the punishments under the disciplinary infringement scheme (and service tribunals), and rules detailing the consequences that are to flow, as may be prescribed by the Chief of the Defence Force or a service chief. S.9J(1) is in the same terms as the current s.169FB(1). The Defence Force Discipline (Consequences of Punishment) Rules 2018 (see: s8-10) issued by the Chief of the Defence Force, detail the specific consequences that apply in respect of the respective punishments imposed by a discipline officer (and service tribunals). The Rules cover a wide range of command and administrative arrangements such as deferral of punishment commencement, access to bars etc.

The same consequences apply irrespective of whether the punishment is imposed by the authority of discipline officer or service tribunal. Following the passing of Part IA of the Bill, it is intended that the Consequences of Punishment Rules will be amended following authorisation by the Chief of the Defence Force, and include reference to senior discipline officer punishments – the amended rules will commence with effect the commencement of Part IA.

All instruments that may be made by the Chief of the Defence Force pursuant to the rule making power within s.9FA and 9J(1), will by the express terms of their respective provisions, be legislative instruments and subject to the *Legislation Act 2003* (including explanatory statement, tabling before Parliament, disallowance and sun-setting regimes) (see: *OPC Instruments Handbook*).

In response to the Committee's question as to whether the provision of high level guidance on the operation of ss.9FA and 9J should be included on the face of the Bill, I do not believe such guidance is necessary. Indeed, high level procedural requirements that give effect to the legislation are detailed on the face of the Bill by s.9FA, and additionally by ss.9EB, 9F, 9FB and 9FC. I consider the high level guidance as detailed within Part IA of the Bill to be appropriate and that detailed procedural issues are most appropriately addressed within any legislative instrument that may be issued by the Chief of the Defence Force. I also consider the additional procedural and policy guidance published by the Australian Defence Force, together with notes for the infringed member within the Disciplinary Infringement Notice (as approved by the Chief of the Defence Force) to be sufficient and appropriate.

Furthermore, for s.9J, I do not consider higher level guidance within the DFDA is required, additional to the detail within s9J(1), and I am satisfied that subordinate legislation within the Defence Force Discipline (Consequences of Punishment) Rules 2018 will give effect to the legislative requirements.

> The discipline officer procedures and the consequences of punishments that may flow, I believe are best addressed within subordinate legislation as expressed within the Bill.

Committee comment

2.135 The committee thanks the minister for this response. The committee notes the minister's advice that section 9FA (discipline officer procedure) and section 9J (consequences of punishments) within Part IA of the bill, are very similar in substance to existing provisions of the *Defence Force Discipline Act 1982* dealing with the same subject matter.

2.136 The committee also notes the minister's advice that the high-level guidance as detailed within Part IA of the bill to be appropriate and that detailed procedural issues are most appropriately addressed within any legislative instrument that may be issued by the Chief of the Defence Force. The minister also advised that the additional procedural and policy guidance published by the Australian Defence Force, together with notes for the infringed member within the Disciplinary Infringement Notice (as approved by the Chief of the Defence Force) to be sufficient and appropriate.

2.137 The committee's consistent scrutiny view is that significant matters, such as the operation of a disciplinary infringement framework, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee has not generally accepted consistency with existing legislation or a reliance on non-legislative policy guidance to be a sufficient justification for leaving significant matters to delegated legislation.

2.138 It remains unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the primary legislation. The committee's concerns in this instance are heightened noting the potential impact on personal rights and liberties that may flow from how prescribed defence members are to be dealt with under the disciplinary infringements scheme

2.139 The committee thanks the minister for providing a proposed supplementary explanatory memorandum addressing the scrutiny issues identified by the committee.

2.140 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant elements of the operation to the proposed disciplinary infringements scheme set out in proposed sections 9FA and 9J to delegated legislation.

2.141 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Reversal of the evidential burden of proof[61]

2.142 In *Scrutiny Digest 13 of 2021* the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed sections 35A and 48B. 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*.[62]

2.143 The committee also requested the minister's advice as to whether the bill can be amended to provide for a more specific defence in proposed subsection 35A(3).[63]

Minister's response[64]

2.144 The minister advised:

> S.35A of the Bill creates an offence of failure to perform duty or carry out an activity.
>
> S.35A(3) provides a reasonable excuse defence. This will mean all *Criminal Code* defences will be available for the charged member, including the defence of mistake of fact under s.9.2 of the Code in relation to that physical element (s35A(2)). Additionally, an offence specific defence of reasonable excuse for the relevant conduct will be available, with the charged member bearing an evidential burden for the defence that is consistent with the *Criminal Code* s.13.3(3).
>
> The Guide provides that the defence of reasonable excuse should generally be avoided, unless it is not possible to rely on the general defences in the *Criminal Code* or to design more specific defences. The Guide further provides this is because the defence of reasonable excuse is too open-ended. This makes it difficult for the defendant to rely on, as it is unclear what needs to be established. Equally, it may be difficult for the prosecution to respond to the defence, if raised.
>
> The Guide nevertheless provides generally, that if the *Criminal Code* defences are insufficient, offence-specific defences adapted to the particular circumstances should be applied. S.35A(3) of the Bill provides an offence-specific defence, as opposed to being specified as an element of the offence, because circumstances that a charged member would likely raise

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61 Schedule 3, items 1 and 2, proposed sections 35A and 48B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

63 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 5-6.

64 The minister responded to the committee's comments in a letter dated 7 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

for failing to perform a duty or carry out an activity contrary to s.35A, would in most cases, be peculiarly within the knowledge of the charged member.

Equally, it would be more difficult for the prosecution to disprove than for the charged member to establish the matter. For example, circumstances peculiarly within the knowledge of the charged member might include the non-performance of duty or carrying out of an activity where the member claimed not being confident to perform the duty etc. as the reason for non-performance. This explanation would be peculiarly within the knowledge of the charged member and does not directly fit within any of the *Criminal Code* defences.

Additionally, a reasonable excuse defence is not central to the question of culpability for the service offence.

A reasonable excuse defence provides an additional protection for a charged member in addition to, and not as a substitute for the *Criminal Code* defences. DFDA discipline tribunals are presided over by military personnel comprising military officers who invariably are not legally trained. The application of a reasonable excuse defence where it arises, will be considered by the service tribunal having regard to the circumstances of the alleged offence and the military context of the conduct. A service tribunal is well able to have regard to an excuse raised, and to determine the reasonableness of that excuse, having regard to the military context. Recognising also the availability of a reasonable excuse statutory defence, applies to a substantial number of offences already within the DFDA and will extend to disciplinary infringements; it is a concept well understood by the lay commanders and non-commissioned officers who must apply the DFDA.[65]

The evidential burden on the charged member is clear on the face of the Bill (see: Note to s.35A(3)) and s.48B(2) (see: Note 1).

Additional factors that support the inclusion of a reasonable excuse defence include: the wide variety of duties and activities that defence members may be called upon to perform with the correlating exculpatory circumstances or explanation for non-performance which can be raised and considered with a reasonable excuse defence, supplementary to *Criminal Code* defences.

Evidential burden

The Guide also provides that an evidential, rather than legal, burden of proof should usually apply to a defence, and that placing a legal burden of proof on a defendant (charged member) should be kept to a minimum. The Bill at s.35A(3), provides an evidential burden on the charged member,

65 See: *Defence Force Discipline Act 1982,* sections 15; 15A-G; 16; 16A; 17; 23;28; 32; 40C; 43; 45; 46; 48; 50; 53; 54A; 60; and 100QA.

consistent with the *Criminal Code* (ss.13.3(3)) together with the note to the section, which is consistent with the Guide.

Where the law imposes a burden of proof on the defendant (charged member), it is an evidential burden, unless the law expresses otherwise (see *Criminal Code* ss.13.3 and 13.4).

a) An evidential burden of proof requires the defendant (charged member) to adduce or point to evidence that suggests a reasonable possibility that a matter exists or does not exist (*Criminal Code* s.13.3).

b) A legal burden of proof on the defendant must be discharged on the balance of probabilities (*Criminal Code* s.13.5).

An evidential burden is easier for a defendant (charged member) to discharge, and does not completely displace the prosecutor's burden (*Criminal Code* ss.13.1 and 13.2) and only defers that burden. Accordingly, as a general rule, the default position in s.13.3 of the *Criminal Code* (as outlined above), should apply and the defendant (charged member) should bear an evidential burden of proof for an offence-specific defence, unless there are good reasons to depart from this position. I am satisfied there are no good reasons to depart from the position.

In addition to the detail above and in respect of the s.48B offence – failure to comply with removal order – an offence specific defence is provided for within the Bill at s.48(2). The defence provides that s.48(2) does not apply if it is not reasonably practicable for the (charged member) to comply (with the removal order). The defence is offence-specific and is not addressed or covered by the *Criminal Code* defences. The defendant (charged member) will bear an evidential burden in relation to the defence, for the same reasons as detailed in the discussion dealing with the s.35A defence above. A defence of 'not reasonably practicable to comply' would for example, in a circumstance where a defence member takes reasonable steps to comply with the removal order by requesting a social media service provider to remove or delete the offending social media or relevant electronic service material, and the service provider is unable or unwilling to comply with the member's request to remove or delete the social media etc. material.

The Bill, I believe, correctly and fairly casts the evidential burden on the charged member in respect of the offence specific defences at ss.35A and 48B, and I do not believe there are good reasons to depart from this position. I am satisfied that the offence-specific defences within s.35A(3) and s.48(2) of the Bill are appropriate and are consistent with the broad range of discipline matters similarly provided for in the DFDA.

Committee comment

2.145 The committee thanks the minister for this response. The committee notes the minister's advice that proposed subsection 35A(3) provides an offence-specific defence, as opposed to being specified as an element of the offence, because circumstances that a charged member would likely raise for failing to perform a duty or carry out an activity contrary to section 35A, would in most cases, be peculiarly within the knowledge of the charged member.

2.146 The committee also notes the minister's advice that a reasonable excuse defence is not central to the question of culpability for the service offence. The minister also advised that there are additional factors that support the inclusion of a reasonable excuse defence, including the wide variety of duties and activities that defence members may be called upon to perform with the correlating exculpatory circumstances or explanation for non-performance which can be raised and considered with a reasonable excuse defence.

2.147 In relation to proposed subsection 48B(2), the committee notes the minister's advice that, the defendant will bear an evidential burden in relation to the defence, for the same reasons as detailed in the discussion dealing with the proposed section 35A.

2.148 While acknowledging the minister's advice that the defences in proposed subsections 35A(3) and proposed subsection 48B(2) would likely be peculiarly within the knowledge of the defendant, the committee reiterates that the *Guide to Framing Commonwealth Offences* states that:

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[66]

2.149 The committee does not consider that the minister's response has adequately addressed why a more specific defence (or defences) could not have been included in proposed subsection 35A(3) instead of a defence of 'reasonable excuse'. The committee does not consider the fact that the defence is not central to the question of culpability or that there are a wide variety of duties undertaken by defence members to be a sufficient explanation as to why a more specific defence (or defences) could not have been designed.

2.150 The committee thanks the minister for providing a proposed supplementary explanatory memorandum addressing the scrutiny issues identified by the committee.

2.151 The committee draws the offence-specific defence in proposed subsection 35A(3) to the attention of senators and leaves to the Senate as a whole

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

the appropriateness of providing an offence-specific defence of 'reasonable excuse' in circumstances where a more specific defence (or defences) could have been included.

2.152 In light of the information provided, the committee makes no further comment on the offence-specific defence in proposed subsection 48B(2).

Broad scope of offence provisions[67]

2.153 In *Scrutiny Digest 13 of 2021* the committee requested the minister's advice as to whether the bill can be amended to include further guidance or examples as to what conduct might constitute using a social media service or relevant electronic service 'in a way that a reasonable person would regard as offensive'.[68]

Minister's response[69]

2.154 The minister advised:

> The purpose of the proposed s.48A cyber-bullying offence is to prevent defence members from using a social media service or relevant electronic service (as defined within s.48A(2)), in a way that a reasonable person would regard as offensive or as threatening, intimidating harassing or humiliating another person. As presently drafted, there is no explanatory provision within the Bill or the DFDA regarding the meaning of 'offensive' generally, or specifically in aid of s.48A.
>
> I consider that the Full Court of the Federal Court decision in *Chief of the Defence Force v Gaynor* (2017) 344 ALR 317 suggests that the courts recognise that reasonable restrictions can be placed on a Defence member's use of social media where that use would compromise their capacity to be a member of, undermine the reputation of, the Australian Defence Force.
>
> Furthermore the decision of *Comcare v Banerji* (2019) 372 ALR 42 suggests that the High Court itself is not unsympathetic to constraints on social media communications where that is reasonably necessary to protect the integrity and good reputation of public institutions such as the Australian Defence Force.
>
> I recognise that one of the benefits of the proposed s.48A cyber-bullying offence is that there are many and varied circumstances of social media etc.

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67 Schedule 3, item 2, proposed sections 48A and 9J. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

68 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, p. 7.

69 The minister responded to the committee's comments in a letter dated 7 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

use that s.48A will deal with. On one level, s.48A as drafted, does not require further detail or explanation.

But overall, on balance and having regard to the questions raised by the Committee, I believe all Defence members should be fully aware of what is to be considered 'offensive' social media use, contrary to s.48A.

In response to the Committee's questions, I consider that the Bill would benefit by including interpretive guidance of the use of a social media service etc. in a way that a reasonable person would regard as "offensive". The 'reasonable person' should be I believe be guided in the legislation in making this assessment. This guidance, I believe, would be achieved by including within the Bill an interpretive provision along similar lines to s.8 of the Online Safety Act 2021 and s.473.4 of the *Criminal Code* (which deals with 'offensive' use of social media and telecommunication services respectively), and which could be suitability modified for inclusion within the DFDA to address the meaning of 'offensive' social media etc. use for the purpose of s.48A. This will require further drafting instructions to the OPC, a revised Explanatory Memorandum and Additional Legislative Approval process.

I have instructed Defence to proceed with instructions to OPC for an interpretive clause for inclusion within s.48A as follows:

48A (xx) Determining whether social media etc. use is offensive

(1) The matters to be taken into account in deciding for the purposes of this Part whether a reasonable person would regard a particular use of a social media service or relevant electronic service, as being, in all the circumstances, offensive, include:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and

(b) the literary, artistic or educational merit (if any) of the material; and

(c) the general character of the material (including whether it is of a medical, legal or scientific character).

Committee comment

2.155 The committee thanks the minister for this response. The committee notes the minister's advice that that the Full Court of the Federal Court decision in *Chief of the Defence Force v Gaynor* (2017) 344 ALR 317 suggests that the courts recognise that reasonable restrictions can be placed on a Defence member's use of social media where that use would compromise their capacity to be a member of, or undermine the reputation of, the Australian Defence Force. The minister also advised that the bill would benefit from the inclusion of interpretive guidance in relation to the use of a social media service etc. in a way that a reasonable person would regard as 'offensive'.

2.156 The committee also notes the minister's advice that this guidance could be achieved by amending the bill to include an interpretive provision along similar lines to section 8 of the *Online Safety Act 2021* and section 473.4 of the *Criminal Code* (which deals with 'offensive' use of social media and telecommunication services respectively), and which could be suitability modified for inclusion within the *Defence Force Discipline Act 1982* to address the meaning of 'offensive' social media etc. use for the purpose of proposed section 48A.

2.157 The committee acknowledges the minister's advice and welcomes the minister's undertaking to amend the bill to include legislative guidance as to what uses of a social media service or relevant electronic service might be considered 'offensive'. However, the committee notes that basing what would constitute 'offensive' use of a service on the view of a 'reasonable person' continues to leave the offence unclear as reasonable people may differ on the matters listed in the draft new provision and a court will not be in a position to survey public opinion, nor does a court have special knowledge or understanding of the standards of morality which may generally be accepted in the community.

2.158 As a result, the committee considers that proposed section 48A, including the provision as outlined in the minister's response, may still work to chill the exercise of speech in a way which may compromise the value the common law places on freedom of speech.

2.159 The committee thanks the minister for providing a proposed supplementary explanatory memorandum addressing the scrutiny issues identified by the committee.

2.160 The committee also welcomes the minister's undertaking to amend proposed section 48A to insert an interpretative clause and considers that such an amendment would partially address the scrutiny concerns raised by the committee. However, the committee draws its outstanding scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of basing the proposed guidance in the bill as to what conduct might constitute 'offensive' use of a social media service or relevant electronic service on what a 'reasonable person' would regard as offensive.

Investment Funds Legislation Amendment Bill 2021

Purpose	This bill seeks to amend the *Future Fund Act 2006* to enact a new employment framework for staff of the Future Fund Management Agency. The new employment framework reinforces the independence of the Future Fund Board from the Australian government and better aligns the framework with norms in the financial services industry. The bill also amends the *Freedom of Information Act 1982* to provide a partial exemption for documents handled by the Future Fund Board and the Agency in respect of the Board's investment activities. The bill also makes further amendments to the *Medical Research Future Fund Act 2015*, to streamline the administration of the Medical Research Future Fund, including making state and territory governments eligible to receive funding directly from the Medical Research Future Fund special account. The bill also amends the *Emergency Response Fund Act 2019* to transfer the administrative responsibility for expenditure from the Emergency Response Fund to the National Recovery and Resilience Agency.
Portfolio/Sponsor	Finance
Introduced	House of Representatives on 25 August 2021
Bill status	Before the House of Representatives

Instruments not subject to parliamentary disallowance[70]

2.161 In *Scrutiny Digest 14 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate that the Code of Conduct and Agency Values made under proposed sections 79B and 79C are not legislative instruments; and
- whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.[71]

70 Schedule 1, item 4, proposed sections 79B and 79C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

71 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2021*, pp. 8-10.

Minister's response[72]

2.162 The minister advised:

> The Investment Funds Legislation Amendment Bill 2021 (the Bill) would amend the *Future Fund Act 2006* to provide a new employment framework for staff of the Future Fund Management Agency (the Agency). Under the new framework, Agency staff would no longer be employed under the *Public Service Act 1999*. Instead, Agency staff would be engaged as Commonwealth employees by the Chair of the Future Fund Board of Guardians (Future Fund Chair) under the *Future Fund Act 2006*.
>
> Removal of Agency staff from employment under the *Public Service Act 1999* would mean that the APS Code of Conduct and APS Values would no longer apply to Agency staff (the APS Code of Conduct and APS Values are not legislative instruments - they are contained in primary legislation[73]).
>
> However, the Bill requires the Future Fund Chair to, as soon as practicable after commencement, determine a Code of Conduct and Values for the Agency that are consistent with the APS Code of Conduct and Values, as far as practicable. The Code of Conduct and Values would apply to all Agency staff as well as the Future Fund Chair. The Chair would also be required to promote the Agency Values.
>
> The Future Fund Chair would not be permitted to delegate any functions in relation to the Agency Code of Conduct or Values. This would ensure that the Future Fund Chair, as the accountable authority of the Agency, is personally responsible for determining the Code of Conduct and determining and promoting the Values. To ensure public visibility and promote transparency, the Future Fund Chair would be required to publish the Agency Code of Conduct and Values on the Agency's website. The Bill allows the Future Fund Chair to amend the Code of Conduct and Values when necessary, which provides flexibility to update the documents over time.
>
> The Agency Code of Conduct and Values have an administrative rather than a legislative character. With the Agency's unique operating environment in global financial and investment markets, it is appropriate for the Future Fund Chair, as the accountable authority of the Agency, to determine the Agency Code of Conduct and Values within the parameters of the primary legislation. This includes the legislated requirement that the Agency Code of Conduct and Values are consistent with the APS Code of Conduct and Values that are set out in the *Public Service Act 1999*, as far as practicable. This legislative requirement would ensure that Agency staff are subject to

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72 The minister responded to the committee's comments in a letter dated 14 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

73 See sections 10 and 13 of the *Public Service Act 1999*.

broadly similar expectations of conduct as APS employees, given their status as Commonwealth employees. It would also provide a degree of flexibility for the Future Fund Chair to tailor the Agency Code of Conduct and Values to suit the specialised and commercial operating environment in which the Agency operates compared to the broader APS. Agency staff would remain subject to the PGPA duties[74] that apply to Commonwealth officials.

The requirements outlined in the Bill, with respect to the Code of Conduct and Values, are more detailed and compare favourably with the requirements for other Commonwealth entities with employment frameworks outside of the *Public Service Act 1999*. For example:

- There is no legislated requirement in relation to a Code of Conduct or Values for the Australian Signals Directorate or the Reserve Bank of Australia. Both entities have a Code of Conduct and Values, however these documents are handled administratively within the entities, without any requirements or guidance specified in legislation.
- The Chairperson of the Australian Securities and Investment Commission (ASIC) must determine a Code of Conduct and Values for ASIC staff, however there is no legislated requirement for those documents to be consistent with the APS Code of Conduct and Values, or for the documents to be published online. ASIC moved to an employment framework outside of the *Public Service Act 1999* in 2018.[75]
- The Chair of the Australian Prudential Regulation Authority (APRA) must determine a Code of Conduct and Values for APRA staff, however there is no legislated requirement for those documents to be consistent with the APS Code of Conduct and Values or for the documents to be published online.[76]

None of the above documents are legislative instruments. For ASIC and APRA, the enabling legislation specifically provides that the Code and Conduct and Values for those entities are not legislative instruments[77], which is consistent with the approach under the Bill.[78]

The Code of Conduct and Values are administrative and operational in nature and for the reasons outlined above, I do not consider an amendment

74 See sections 15 to 19 of the *Public Governance, Performance and Accountability Act 2013*.

75 See the *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018*.

76 See sections 48AB and 48AC of the Australian *Prudential Regulation Authority Act 2018*.

77 See subsections 126AB(3) and 126AC(4) of the *Australian Securities and Investment Commission Act 2001* and subsections 48AB(4) and 48AC(3) of the *Australian Prudential Regulation Authority Act 1998*.

78 See subsections 798(5) and 79(6) of the amended *Future Fund Act 2006*.

is necessary or that it would add to the effective administration of the new employment framework for staff of the Agency.

Committee comment

2.163 The committee thanks the minister for this response. The committee notes the minister's advice that the Agency Code of Conduct and Values have an administrative rather than a legislative character. The minister further advised that, due to the Future Fund Agency's unique operating environment, it is appropriate for the Future Fund Chair to determine the Agency Code of Conduct and Values. The minister advised that this approach provides a degree of flexibility that enables the Chair to tailor the Agency Code of Conduct and Values to suit the specialised commercial operating environment of the Agency while also ensuring that requirements are as consistent as possible with the Australian Public Service Code of Conduct and Values. In addition, the minister advised that agency staff would remain subject to requirements under the *Public Governance, Performance and Accountability Act 2013*.

2.164 The minister further advised that other Commonwealth entities have not set out comparable codes of conduct or values within legislative instruments and that many similar codes of conduct or agency values are not required to be consistent with those set out in the *Public Service Act 1999,* as is required by this bill.

2.165 While acknowledging this advice, it is not clear to the committee why the Agency Code of Conduct and Values have an administrative character in circumstances where it appears that either instrument may determine or alter the content of the law. For example, the committee notes that proposed subsection 79C(3) of the bill provides that Agency employees must uphold the Agency Values.

2.166 Moreover, the committee does not generally consider a desire for flexibility or consistency with existing legislative provisions to be a valid justification for limiting parliamentary scrutiny. In this regard, the committee notes that it is not clear how providing that the Agency Code of Conduct and Values are not legislative instruments increases the flexibility available to the Future Fund Chair, noting, for example, that the default position is that legislative instruments commence the day after they are registered.

2.167 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing that the Future Fund Management Agency Code of Conduct and Agency Values made under proposed sections 79B and 79C are legislative instruments subject to parliamentary disallowance.

Parliamentary scrutiny—section 96 grants to the states[79]

2.168 In *Scrutiny Digest 14 of 2021* the committee requested the minister's advice as to whether the bill can be amended to:

- include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and
- include a requirement that written agreements with the states and territories about grants of financial assistance relating to medical research made under section 27 of the Act are:
    - tabled in the Parliament within 15 sitting days after being made; and
    - published on the internet within 30 days after being made.

Minister's response[80]

2.169 The minister advised:

> The *Medical Research Future Fund Act 2015* (MRFF Act) provides a robust, transparent, and effective framework for ensuring that funding for medical research and medical innovation from the MRFF is targeted to benefit all Australians. The MRFF Act includes high-level guidance on the terms and conditions under which financial assistance might be granted to the States and Territories, as well as other grant recipients.
>
> Financial assistance is granted through legislated decision-making processes which promotes informed decision-making. The MRFF Act establishes an independent body, the Australian Medical Research Advisory Board (AMRAB), to provide technical and expert advice to the Minister for Health on prioritising spending from the Medical Research Future Fund (MRFF). The legislation requires the AMRAB to determine and publish the Australian Medical Research and Innovation Strategy (Strategy)[81] and the Australian Medical Research and Innovation Priorities (Priorities). In determining the Strategy and Priorities the AMRAB consult the Australian public, organisations with expertise in health and medical research and innovation, consumer representatives, clinicians and health services managers, to ensure that the Strategy and Priorities provide a framework for decision-making regarding expenditure from the MRFF.

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79 Schedule 3, item 16, proposed paragraphs 24(e) and 24(f). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

80 The minister responded to the committee's comments in a letter dated 14 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

81 See sections 32D and 32E of the *Medical Research Future Fund Act 2015.*

- The Strategy sets out the vision, aims and objectives for the MRFF. It identifies a series of strategic platforms that, if funded, have potential for greatest impact. These platforms serve as a framework for the identification of the Priorities.
- The Priorities must be consistent with the Strategy and the MRFF Act requires the AMRAB to take into account the following when determining the Priorities:
  - the burden of disease on the Australian community;
  - how to deliver practical benefits from medical research and medical innovation to as many Australians as possible;
  - how to ensure that financial assistance provided under the MRFF complements and enhances other financial assistance provided for medical research and innovation; and
  - any other relevant matters.
- The Bill would require that the Strategy be updated every 6 years and the Priorities be updated every 3 years.

In accordance with the MRFF Act, the Minister for Health must take into account the Priorities in making decisions about whether to request the Finance Minister to debit the MRFF special account in order to provide financial assistance from the MRFF.

All decisions of the Government to debit funds from the MRFF in order to make grants of financial assistance for medical research or medical innovation are reflected in the Budget or Mid-Year Economic and Fiscal Outlook (MYEFO). Following a Government decision, the Minister for Health may make grants or arrangements subject to the legislated object of the MRFF and the processes for disbursements.

The MRFF Act provides a transparent, coherent, and consistent approach for making arrangements for grants in relation to medical research or medical innovation, or entering agreements in relation to such grants.

The Commonwealth Grant Guidelines and the Procurement Rules provide further assurance. Grant programs under the MRFF are developed in accordance with the Commonwealth Grant Rules and Guidelines 2017 (CGRG) and the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). Grant guidelines are developed for all new grant opportunities and approved grants are reported on the GrantConnect website no later than 21 days after the grant agreement takes effect. The terms and conditions of grants or arrangements are set out in a written agreement between the Commonwealth and the relevant funding recipient. This approach is consistent with the CGRGs, which state that grant agreements should provide for:

- a clear understanding between the parties on required outcomes, prior to commencing payment of the grant;

- appropriate accountability for spending relevant money, which is informed by risk analysis;
- agreed terms and conditions in regards to the use of the grant, including any access requirements; and
- the performance information and other data that the grantee may be required to collect as well as the criteria that will be used to evaluate the grant, the grantee's compliance and performance.

The MRFF Act also requires the Minister for Health to publish detailed and up-to-date information about grants made under the MRFF on the Department of Health's website.[82] This information, includes amounts paid and payable to recipients as well as the names of recipients and any other relevant matter.

In addition to publishing details of each grant that is provided from the MRFF, the Minister for Health must also report on the financial assistance provided from the MRFF and table the report in each House of Parliament.[83] This report is required as soon as practicable after the Priorities cease to be in force and must cover the grants of financial assistance provided while the Priorities were in force. The Minister for Health is required to include information on:

- how the financial assistance was consistent with the Priorities,
- the process for determining grants; and
- any other financial assistance provided the Government for medical research and medical innovation.

Terms and conditions that apply to grant opportunities are typically included in grant opportunity guidelines and funding agreements for each activity, rather than within the primary legislation. Grant opportunity guidelines for MRFF funding programs are published on GrantConnect to support the principles that applicants have access to the same information and that funding recipients will be selected based on merit in addressing each program's objectives.

Funding agreements are available to the public and are standard across grant opportunities administered by grant hubs. For the Business Grants Hub, a sample grant agreement is published when the grant opportunity is published. An example can be accessed here:

https://business.gov.au/grants-and-programs/mrff-2020-rapid-applied-research-translation-grant%C2%ADopportunity.

82 See section 58 of the *Medical Research Future Fund Act 2015*.

83 See section 57A of the *Medical Research Future Fund Act 2015*.

Funding agreements for grants administered through the National Health and Medical Research Council can be accessed here:

https://www.nhmrc.gov.au/sites/default/files/documents/attachments/final_mrff_funding_agreement_-_22.2.19_clean.pdf

The terms and conditions in the grant opportunity guidelines and funding agreements are transparent and applicable to all applicants.

In consideration of the full range of legislative requirements and the framework applying to MRFF grants and arrangements, including those relating to the states and territories, I do not consider that an amendment the MRFF Act to include more detail on the terms and conditions on which financial assistance may be granted is necessary or would add to the effective administration of the MRFF. I also consider that tabling the written agreements with the states and territories in relation to grants of financial assistance is unnecessary. There are sufficient reporting obligations in the MRFF Act that, when combined with the existing requirements in existing Commonwealth legislation and frameworks, ensure that detailed information on grants and arrangements is transparently available to the general public.

As outlined above, financial assistance is granted through a well-informed decision-making process. The process includes expert advice on where the Government should focus its expenditure from the MRFF from an independent Board, consideration through the Government's Budget process and a consistent approach for making grants for medical research and medical innovation. Where appropriate, terms and conditions are included in grant guidelines and funding agreements with recipients. The existing public and Parliamentary reporting provides appropriate transparency on expenditure from the MRFF.

Committee comment

2.170 The committee thanks the minister for this response. The committee notes the minister's advice that the terms and conditions for grants provided under the Medical Research Future Fund (MRFF) are set out within the grant opportunity guidelines, as published on GrantConnect. The minister advised that these funding guidelines apply to all grant applicants. The minister advised that, in light of this administrative framework as well as the legislative requirements applying generally to Commonwealth grant schemes, it is not necessary to amend the bill to include details as to the terms and conditions on which financial assistance may be granted to the states.

2.171 The minister also advised that tabling written agreements made under subsection 22(1) of the *Medical Research Future Fund Act 2015* (MRFF Act) is unnecessary. In this regard, the minister advised that there are sufficient reporting obligations in the MRFF Act that, when combined with the existing requirements

within Commonwealth legislation, ensure that detailed information on grants and arrangements is available to the general public.

2.172 While acknowledging this advice, the committee notes that the minister's response focuses on the administration of the MRFF without comprehensively addressing the appropriateness of limiting parliamentary oversight of the MRFF grant framework. In this regard, the committee notes that its scrutiny concerns relate specifically to the appropriateness of delegating to the executive Parliament's constitutional power to provide grants to the states, in circumstances in which there is little information as to the terms and conditions of those grants within the primary legislation.

2.173 In relation to the minister's advice that tabling the written agreements with the states and territories in relation to grants of financial assistance is not necessary, the committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are otherwise not available. The committee does not consider that public reporting obligations are sufficient to address the committee's scrutiny concerns relating to not providing for agreements to be tabled in the Parliament.

2.174 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not including in the bill:

- **at least high-level guidance as to the terms and conditions on which financial assistance relating to medical research may be granted; and**
- **a requirement that written agreements with the states and territories about arrangements or grants made under section 27 of the *Medical Research Future Fund Act 2015* be tabled in the Parliament.**

Social Security Legislation Amendment (Remote Engagement Program) Bill 2021

Purpose	Parts 1 and 2 of Schedule 1 to the Bill seek to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to: • establish a new payment under the remote engagement program, (i.e. the 'remote engagement program payment'), which will be set at a rate between $100 and $190 per fortnight, for a maximum continuous period of 104 weeks; • establish high-level qualifying criteria for the remote engagement program payment; • establish that participation in the remote engagement placement is voluntary and a person can volunteer to leave the placement if they choose; and • enable the minister to make legislative instruments that specify additional qualification criteria, determine circumstance in which the remote engagement program payment is not payable, and fix the rate of the remote engagement program payment. Parts 3 and 4 of Schedule 1 to the bill contain amendments to repeal or omit sections of the *Social Security Act 1991* applying to past Australian Government programs that have now closed.
Portfolio/Sponsor	Indigenous Australians
Introduced	House of Representatives on 1 September 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[84]

2.175 In *Scrutiny Digest 15 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave matters relating to when a person will be eligible or ineligible for the remote engagement program payment to delegated legislation; and

84 Schedule 1, item 7, proposed paragraph 661A(2)(c) and proposed section 661C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- whether the bill can be amended to include at least high-level guidance in relation to:
  - what additional qualification requirements may be determined under proposed paragraph 661A(2)(c); and
  - what circumstances in which a remote engagement program payment will not be payable to a person may be specified in a legislative instrument made under proposed subsection 661C(2).[85]

Minister's response[86]

2.176 The minister advised:

> I note the committee's comments in relation to proposed paragraph 661A(2)(c) and subsection 661C(2) including the committee's view that it "has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation."
>
> As part of the 2021-22 Budget the Government announced the Community Development Program would be replaced with a Remote Engagement Program in 2023, with the new program to be co-designed and piloted in a number of regions across remote Australia from late 2021. The pilots will be co-designed locally with the learnings from the pilots to inform the co-design of a national program in 2023.
>
> This Bill is one building block communities can draw on when co-designing their pilot Remote Engagement Program. The Bill provides an option for communities to pilot a new supplementary payment in the social security system for job seekers to participate in a Remote Engagement Placement in a local community service, such as a school, to build their skills and experience and provide a pathway to employment in the open labour market.
>
> The Bill has been specifically designed to facilitate co-design and the legislative instruments are an important feature of the co-design process in the pilot sites. Through the co-design process, the community in partnership with Government will set the amount of the Remote Engagement Program payment and the hours of engagement in the pilot sites. Communities will set rules about participation. For example, they might choose to set a three strikes and you are out policy for participating in a Remote Engagement Placement. That is, if the job seeker has an unexplained absence or misbehaves when participating in the Remote Engagement Placement, they

85 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 24-26.

86 The minister responded to the committee's comments in a letter dated 1 October 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> will be asked to leave the Remote Engagement Placement and the position will be offered to another eligible job seeker. The National Indigenous Australians Agency intends to publish outcomes of the co-design process for full transparency.
>
> This approach is not purely a matter of administrative flexibility. Rather, it is an approach consistent with the commitment to build and strengthen "structures that empower Aboriginal and Torres Strait Islander people to share decision-making authority with governments to accelerate policy and place-based progress against Closing the Gap" (Priority Reform One of the Closing the Gap Agreement).
>
> Accordingly, the matters that may be included in delegated legislation under proposed paragraph 661A(2)(c) and subsection 661C(2) are necessary to ensure sufficient consultation, transparency and flexibility for outcomes that may arise following the outcomes of the co-design process with community. Including such matters in primary legislation before the outcomes of the co-design process are known would signal the Government is pre-empting the outcomes of the co-design process.
>
> In order to avoid pre-empting the outcomes of the co-design process and for the above reasons, I do not consider it necessary to amend the Bill to provide further high-level guidance in relation to the matters that may be determined under proposed paragraph 661A(2)(c) or specified under proposed subsection 661C(2). The exercise of ministerial discretion should occur in accordance with the legislative intent of the Bill and the Australian Government's policies in relation to the Remote Engagement Program.
>
> Finally, I note that in accordance with the requirements for making legislative instruments under the *Legislation Act 2003*, the Minister must be satisfied that appropriate consultation has been undertaken in relation to the delegated legislation under proposed paragraph 661A(2)(c) and subsection 661C(2). In addition, any delegated legislation made under these proposed provisions would be subject to Parliamentary scrutiny, disallowance and sunsetting requirements.

Committee comment

2.177 The committee thanks the minister for this response. The committee notes the minister's advice that this bill is one building block communities can draw on when co-designing their pilot Remote Engagement Program. The minister also advised that the bill has been specifically designed to facilitate co-design and that legislative instruments made under proposed paragraph 661A(2)(c) and proposed subsection 661(2) are an important feature of the co-design process in the pilot sites.

2.178 The committee also notes the minister's advice that the matters that may be included in delegated legislation are necessary to ensure sufficient consultation, transparency and flexibility for outcomes that may arise following the co-design process with community. The minister advised that including such matters in primary

legislation before the outcomes of the co-design process are known would signal that the government is pre-empting the outcomes of the co-design process.

2.179 While noting the minister's advice and acknowledging the need for flexibility in the design of the Remote Engagement Program, it remains unclear to the committee why at least some high-level guidance regarding the making of legislative instruments under proposed paragraph 661A(2)(c) and proposed subsection 661C(2) could not be included on the face of the primary legislation. In particular, the committee notes that no guidance is provided in proposed section 661C as to the kind of circumstances in which the minister may specify that a remote engagement program payment is not payable to a person. The committee reiterates 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.

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

2.181 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving matters relating to when a person will be eligible or ineligible for the remote engagement program payment to delegated legislation.

2.182 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Treasury Laws Amendment (2021 Measures No. 6) Bill 2021

Purpose	Schedule 1 to the bill amends the *Income Tax Assessment Act 1997* to make refunds of large-scale generation shortfall charges non-assessable non-exempt income for income tax purposes. Schedule 2 to the bill amends the *Competition and Consumer Act 2010* by increasing the maximum amount of penalty units that can be included in regulations that prescribe an industry code, with specific amendments for industry codes relating to the industry of franchising. Schedule 3 to the bill amends the *Income Tax Assessment Act 1997* to remove the requirement for superannuation trustees to provide an actuarial certificate when calculating exempt current pension income using the proportionate method, where all members of the fund are fully in retirement phase for all of the income year. Schedule 4 to the bill seeks to amend the *Competition and Consumer Act 2010* to provide regulatory certainty for industry participants that are governed by industry codes prescribed by regulations made under Part IVB of the Act. Schedule 5 to the bill amends the *Taxation Administration Act 1953* and the *Family Law Act 1975* to create a new mechanism for sharing superannuation information for family law proceedings.
Portfolio/Sponsor	Treasury
Introduced	House of Representatives on 11 August 2021
Bill status	Received the Royal Assent on 13 September 2021

Significant matters in delegated legislation[87]

2.183 In *Scrutiny Digest 13 of 2021*[88] the committee requested the Assistant Treasurer's advice as to:

- why it is considered necessary and appropriate to leave the matters set out at proposed subsection 51AE(1A) to delegated legislation; and

87 Schedule 4, item 4, proposed subsection 51AE(1A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

88 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 14-16.

- whether the bill can be amended to include further guidance regarding those matters on the face of the primary legislation, particularly in relation to the conferral of functions and powers relating to monitoring compliance with industry codes,[89] conducting investigations,[90] granting exemptions,[91] and reviewing the operation of industry codes.[92]

Assistant Treasurer's response[93]

2.184 The Assistant Treasurer advised:

> The Committee has asked why it is considered necessary and appropriate to leave the matters set out at proposed subsection 51AE(1A) in item 4 of Schedule 4 to the Bill to delegated legislation. It is appropriate that an industry code may confer certain functions and powers on persons or bodies, including, among other things, the power to monitor compliance with a code, to conduct investigations in relation to a code and to provide exemptions from a code.
>
> - This is because the prescription of these powers and functions by regulations allows the Government to respond efficiently and effectively to issues as they arise within relevant industries. This helps to ensure that markets are well-functioning and serve consumers and industry participants. There are currently, nine industry codes made under the regulation making power of the CCA.
>
> The Committee has asked whether the Bill can be amended to include further guidance regarding those matters on the face of the primary legislation, particularly in relation to the conferral of functions and powers relating to monitoring and compliance with industry codes (51AE(1A)(a)), conducting investigations (51AE(1A)(d)), granting exemption (51AE(1A)(e)), and reviewing the operation of industry codes (51AE(1A)(f)). The Committee suggested including examples of when it may be appropriate to exercise investigation powers or by including high-level guidance in relation to the circumstances in which an exemption may be granted.
>
> - The *Legislation Act 2003* (the Act) requires legislative instrument to be registered with an explanatory statement ((section 15G) instruments are not enforceable unless they are registered (section 15K(1)).

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89 Schedule 4, item 4, proposed paragraph 51AE(1A)(a).

90 Schedule 4, item 4, proposed paragraph 51AE(1A)(d).

91 Schedule 4, item 4, proposed paragraph 51AE(1A)(e).

92 Schedule 4, item 4, proposed paragraph 51AE(1A)(f).

93 The minister responded to the committee's comments in a letter dated 9 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

- Given the bespoke arrangement for separate industry codes, placing the guidance and any examples in the explanatory statement for the regulations, as opposed to the primary law, allows for the examples to be tailored to the specific industry context in which they are expected to be exercised. This is likely to be more helpful to the regulated community.
- Existing industry codes that confer such functions and powers, and the accompanying explanatory statements, already provide examples of when it may be appropriate to exercise the powers and functions provided for by the amendments.
- The amendments are designed to complement the existing regulatory framework under the CCA. Relevantly, the CCA provides for the ACCC's powers, and limitations on the exercise of those powers, including those related to monitoring and compliance and investigation. Under the amendments the existing common law privilege against self-incrimination will continue to apply as the amendments do not expressly abrogate that right.
- The explanatory memorandum to the Bill explains constraints on the exercise of the exemptions power. This includes that the exemptions power is to be conferred on a more limited group of third parties (being the ACCC, Australian Energy Regulator (AER), and a Minister that is responsible for administering an industry code). It also provides that the exemption power is expected to be exercised reasonably and in accordance with criteria specified in the industry code.

Committee comment

2.185 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that it is appropriate to leave the matters set out at proposed subsection 51AE(1A) in item 4 of Schedule 4 to the bill to delegated legislation because the prescription of those powers and functions by regulations allows the government to respond efficiently and effectively to issues as they arise within relevant industries. The Assistant Treasurer advised that this helps to ensure that markets are well-functioning and serve both consumers and industry participants.

2.186 The Assistant Treasurer further advised that, given the bespoke arrangement for separate industry codes, placing guidance in the explanatory statement for the regulations, as opposed to the primary law, allows for the examples to be tailored to the specific industry context in which they are expected to be exercised. The Assistant Treasurer advised that this is likely to be more helpful to the regulated community. The Assistant Treasurer further advised that guidance is already included within explanatory statements to existing industry codes as well as within the explanatory memorandum to the bill. Moreover, the Assistant Treasurer advised that both the common law and the *Competition and Consumer Act 2010* contain a number of

limitations on the exercise of relevant powers, including relating to monitoring and investigation powers.

2.187 While acknowledging this advice and noting the existing guidance within the bill, explanatory memorandum and existing industry codes, it is not clear to the committee from this explanation why it would not be possible to include further high-level guidance in relation to the powers set out at proposed subsection 51AE(1A). For example, the bill could provide that an exemption should only apply in exceptional circumstances or in special commercial circumstances.[94]

2.188 The committee continues to have scrutiny concerns regarding the inclusion of significant matters in delegated legislation. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Retrospective validation[95]

2.189 In *Scrutiny Digest 13 of 2021* the committee requested the Assistant Treasurer's advice as to:

- why it is considered necessary and appropriate to retrospectively validate industry codes made, or purportedly made, under Part IVB of the *Competition and Consumer Act 2010*; and
- whether any persons are likely to be adversely affected by the retrospective validation of the industry codes, and the extent to which their interests are likely to be affected, noting that individuals and entities should not be required to comply with laws that were invalidly made.[96]

Assistant Treasurer's response[97]

2.190 The Assistant Treasurer advised:

> Item 10 of Schedule 4 to the bill seeks to validate earlier regulations prescribing industry codes that were made, prior to the commencement of

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94 See, for example, section 52 of the *Export Control Act 2020* which provides high-level guidance as to the circumstances in which an exemption may be granted alongside a general rule-making power.

95 Schedule 4, item 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

96 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 16-17.

97 The minister responded to the committee's comments in a letter dated 9 September 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 16 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

the Bill. The Bill also seeks to retrospectively validate acts or things done, or purportedly done, under the earlier regulations.

- It is considered necessary and appropriate to validate existing industry codes made, or purportedly made, under Part IVB of the CCA, as the amendments are not meant to change how the law was intended and been understood to govern the relationships between participants and consumers and other third parties.
- Given that these amendments to the CCA are aimed at clarifying the law as it was intended and has been understood to operate, we would not expect any individual to be adversely affected by the validation of existing determinations or exemptions purportedly made under section 51AE.
- However, a reading down provision has been included to provide that the amendments do not have effect to the extent that they give rise to an acquisition of property risk (within the meaning of paragraph 51(xxxi) of the Constitution). As the Commonwealth is not privy to the agreements between private entities it is difficult to assess the scale of this risk. The reading down provision is aimed at reducing the likelihood that the Commonwealth, or others, are exposed to liability for an unknown quantum, following these amendments.

Committee comment

2.191 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the amendments are aimed at clarifying the law as it was intended to operate and that, therefore, the Assistant Treasurer does not expect any individual to have been adversely affected by the validation of existing determinations or exemptions purportedly made under section 51AE.

2.192 While acknowledging this explanation, the committee notes that, while the intention of the bill may be to restore the position (and associated legal rights and obligations) that was intended when the original determinations were made, from a rule of law perspective, individuals and entities should not be required to comply with laws that were invalidly made. The committee considers that any departure from this position must be comprehensively justified. In light of this, the committee does not consider that the Assistant Treasurer's response adequately addresses whether any persons are likely to be adversely affected by the retrospective validation of the industry codes.

2.193 The committee continues to have scrutiny concerns regarding the retrospective validation of industry codes made, or purportedly made, under section 51AE of the *Competition and Consumer Act 2010*. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

3.4 The committee draws the following bill to the attention of Senators:

- Offshore Electricity Infrastructure Bill 2021 – clause 186

Senator Dean Smith
Acting 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*.