

The Senate

Standing
Committee for the
Scrutiny of Bills

Scrutiny Digest 8 of 2022

30 November 2022

© Commonwealth of Australia 2022

ISSN 2207-2004 (print)

ISSN 2207-2012 (online)

This document was prepared by the Senate Standing Committee for the Scrutiny of Bills and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Current members

Senator Dean Smith (Chair)	LP, Western Australia
Senator Raff Ciccone (Deputy Chair)	ALP, Victoria
Senator Nick McKim	AG, Tasmania
Senator Paul Scarr	LP, Queensland
Senator Tony Sheldon	ALP, New South Wales
Senator Jess Walsh	ALP, Victoria

Secretariat

Mr Matthew Kowaluk, Secretary (A/g)

Ms Laura Sweeney, Principal Research Officer (A/g)

Ms Kaitlin Murphy, Senior Research Officer

Ms Eleonora Fionga, Legislative Research Officer

Committee legal adviser

Professor Leighton McDonald

Committee contacts

PO Box 6100

Parliament House

Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_scrutiny

Contents

Membership of the committee	iii
Introduction	vii
Chapter 1 – Initial scrutiny	
Comment bills	
Crimes Amendment (Penalty Unit) Bill 2022	1
Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022.....	3
Private Senators' and Members' bills that may raise scrutiny concerns	8
Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2022	
Bills with no committee comment	9
Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2022	
Commentary on amendments and explanatory materials	10
Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022	
Biosecurity Amendment (Strengthening Biosecurity) Bill 2022	
Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022	
Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022	
Family Assistance Legislation Amendment (Cheaper Child Care) Bill 2022	
High Speed Rail Authority Bill 2022	
Social Services and Other Legislation Amendment (Workforce Incentive) Bill 2022	
Chapter 2 – Commentary on ministerial responses	
Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.....	12
National Anti-Corruption Commission Bill 2022.....	19
Treasury Law Amendment (2022 Measures No. 3) Bill 2022	40
Chapter 3 – Scrutiny of standing appropriations	45

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* (the 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.

Crimes Amendment (Penalty Unit) Bill 2022

Purpose	This bill seeks to amend the <i>Crimes Act 1914</i> to increase the amount of the Commonwealth penalty unit from \$222 to \$275, with effect from 1 January 2023.
Portfolio	Attorney-General
Introduced	House of Representatives on 9 November 2022

Significant penalties¹

1.2 Item 1 of Schedule 1 to the bill seeks to amend the definition of 'penalty unit' in subsection 4AA(1) of the *Crimes Act 1914* (Crimes Act) to increase the amount of a single unit from \$222 to \$275. Commonwealth pecuniary criminal and civil penalty provisions are generally expressed in terms of penalty units, with the penalty amount calculated by multiplying the value of a penalty unit as prescribed by the Crimes Act by the number of penalty units applicable.² The effect of this amendment would therefore be to increase the maximum civil and criminal penalties that apply across the majority of Commonwealth legislation.

1.3 The amendment would take effect from 1 January 2023.

1.4 Commonwealth penalty unit amounts typically increase according to an indexation process, which sees amounts automatically increase every three years in line with the consumer price index. The previous automatic increase occurred on 1 July 2020 and raised the amount of a single penalty unit from \$210 to \$222, approximately 6 per cent. The increase proposed by this bill would occur alongside the usual indexation process, with the indexation process scheduled to continue from 1 July 2023.³

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

2 However, it is sometimes appropriate to express a penalty in individual dollar amounts, see Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp. 42–43.

3 Explanatory memorandum, p. 5.

1.5 The increase proposed by this bill is significant, representing an increase of almost 24 per cent. This would mean, for example, that the maximum pecuniary penalty that could be imposed under section 32 of the *Export Control Act 2020* for exporting prohibited goods would be increased from \$444,000 to \$550,000.⁴ The committee expects that any significant penalty will be justified within the explanatory materials for the bill. Scrutiny concerns are heightened in this case given that the amendment introduced by this bill would apply across the majority of Commonwealth civil and criminal penalty provisions. In this instance, the explanatory memorandum merely notes that:

... maintaining the value of the penalty unit over time is necessary to ensure that financial penalties for Commonwealth offences reflect community expectations and continue to remain effective in deterring unlawful behaviour.⁵

1.6 In his second reading speech, the Attorney-General noted that 'this measure is estimated to result in increased revenue to the Commonwealth of \$31.6 million over the next four years, which will support the government's budget repair efforts'.⁶

1.7 The committee is concerned that the Parliament is being asked to approve a wholesale increase to all civil and criminal penalties contained within Commonwealth legislation that are expressed in penalty units with very limited justification as to why this significant increase is necessary or appropriate. For example, the committee notes that the explanatory materials to the bill do not explain how the amount of the increase was determined, or why it is considered necessary to introduce an increase to the Commonwealth penalty unit of approximately 24 per cent in addition to the usual indexation process. The explanatory memorandum also contains no evidence that the proposed increase better reflects community expectations or is necessary to ensure that penalties remain an effective deterrence measure.

1.8 The committee therefore requests the Attorney-General's advice as to why it is both necessary and appropriate to increase the amount of a Commonwealth penalty unit by almost 24 percent, noting the limited explanation provided in the explanatory materials for the increase and that the increase will apply in addition to the usual indexation process.

1.9 In light of the committee's significant scrutiny concerns, the committee considers that it would have been appropriate to afford the committee more time to review the bill before passage of the bill through the Parliament.

4 The maximum penalty that may be imposed under section 32 of the *Export Control Act 2020* is 10 years' imprisonment, 2000 penalty units, or both.

5 Explanatory memorandum, p. 5.

6 The Hon Mark Dreyfus KC MP, [second reading speech](#), 9 November 2022.

Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022

Purpose	<p>This bill seeks to amend the <i>Telecommunications Act 1997</i> to improve the operation of information disclosure provisions. The bill seeks to amend the record of disclosure requirements by increasing record keeping requirements to enable oversight of underlying laws or warrants which required or authorised a disclosure.</p> <p>In addition, the bill seeks to make two technical amendments to the <i>Telstra Corporation and Other Legislation Amendment Act 2021</i> to ensure that the obligations and measures in the Act will commence as originally intended.</p>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 10 November 2022

Privacy⁷

1.10 Under Part 13 of the *Telecommunications Act 1997* (Telecommunications Act), carriers, carriage service providers and others are prohibited from disclosing certain information, including personal information, except in limited circumstances.⁸ This includes where the use and disclosure of information is:

- made to deal with calls to emergency service numbers;⁹ or
- reasonably necessary to prevent or reduce a serious and imminent threat to the life or health of a person.¹⁰

1.11 The bill would expand these exceptions. As a result, the committee considers that the bill has the potential to trespass on an individual's right to privacy.

1.12 Section 285 of the Telecommunications Act establishes limited exceptions for use and disclosure of information contained in the Integrated Public Number Database

7 Schedule 1, items 6, 7, 8 and 9, proposed subsection 285(1B) and proposed sections 287 and 300. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

8 See, for example, the primary use and disclosure offences set out in sections 276 and 277.

9 Section 285.

10 Sections 287 (primary use and disclosure) and 300 (secondary use and disclosure).

(IPND).¹¹ At present, section 285 provides for the disclosure of information or a document contained in the IPND where it relates to a *listed* phone number in dealing with the matters raised by a call to an emergency service number.¹² Item 6 would insert proposed subsection 285(1B) into section 285 to authorise the use and disclosure of *unlisted* numbers and associated addresses. This exception would only apply when the disclosure of such information is for purposes connected with a call to an emergency service number and it is unreasonable to obtain the person's consent.¹³

1.13 The explanatory memorandum states that proposed subsection 285(1B) is necessary to allow access to unlisted numbers to emergency call persons in an emergency situation.¹⁴ It explains that:

This has the potential to save lives, especially since only 5% of the 72 million active numbers are listed (given that mobile numbers are unlisted by default). This amendment is in line with a privacy law review conducted by the [Australian Law Reform Commission] which recommended this amendment, noting that 'most individuals would reasonably expect the disclosure of an unlisted number in an emergency call situation.'¹⁵

1.14 While noting this explanation, the committee is concerned that persons to whom information may be disclosed are not restricted to emergency call persons within the bill. For example, it is unclear whether disclosure would be restricted to police, fire and ambulance call persons, or whether the bill would allow disclosure to any person so long as it related to a matter raised by an emergency services call. It is also unclear why such a provision is necessary, noting that existing provisions in the Telecommunications Act may already be used to disclose information associated with unlisted numbers.¹⁶ The committee's concerns in this instance are heightened as the explanatory memorandum does not identify any safeguards which would apply to information disclosed under proposed subsection 285(1B), nor are there any apparent safeguards on the face of the bill. Appropriate safeguards could include, for example, restrictions on how the data must be handled, used, stored and destroyed.

1.15 Section 287 of the Telecommunications Act currently provides a further exception to the use and disclosure offences in Part 13 by permitting disclosure or use of information or a document if the discloser believes on reasonable grounds that it is 'reasonably necessary to prevent or lessen a serious and imminent threat to the life or

11 The IPND is a database of Australian telephone numbers and customer details, currently managed by Telstra.

12 Subsection 285(1A).

13 Proposed paragraphs 285(1B)(c) and (d).

14 Explanatory memorandum, pp. 3 and 6.

15 Explanatory memorandum, p. 6.

16 See, for example, the exceptions provided under sections 289, 290 or 291.

health of a person'. Section 300 of the Telecommunications Act provides for the secondary use and disclosure of information that has been obtained under section 287.

1.16 Items 7 and 8 of Schedule 1 to the bill would amend section 287, while item 9 would repeal and substitute section 300. The effect of these provisions would be to:

- remove the qualifier of an 'imminent' threat; and
- impose an additional requirement that it must be unreasonable or impracticable to obtain the other person's consent to the proposed disclosure or use.

1.17 The explanatory memorandum states that sections 287 and 300, as amended, would strike an appropriate balance between protecting the confidentiality of personal communications and the public interest in preventing threats to a person's safety and wellbeing.¹⁷ In relation to the additional requirement that the discloser must be satisfied that it is unreasonable or impracticable to obtain the other person's consent to the proposed disclosure or use, the explanatory memorandum notes that this is consistent with the Office of the Australian Information Commissioner's *Australian Privacy Principles Guidelines*.¹⁸

1.18 The explanatory memorandum also states that the 'imminent' qualifier currently poses practical challenges for law enforcement agencies in ascertaining reasonable belief, even where the seriousness of a threat is clearly established. It notes that the proposed amendments would align with recommendations made by the Australian Law Reform Commission.¹⁹ The explanatory memorandum further states that:

... regulated entities would largely be reliant on the representations made by law enforcement or emergency service organisations to determine whether a threat was 'serious'. This approach is consistent with the existing operational approach of law enforcement agencies, and recognises that law enforcement or emergency service organisations will have access to information, systems and resources that telecommunications companies will not.²⁰

1.19 While the committee acknowledges the need to disclose information in order to protect the life and health of a person, it is unclear from the above explanation what safeguards, if any, would apply to information disclosed under sections 287 and 300, as amended. The committee notes that it does not appear that there are any safeguards included within the bill. Further, it is unclear what kinds of information may

17 Explanatory memorandum, p. 6.

18 Explanatory memorandum, p. 10.

19 Explanatory memorandum, p. 3.

20 Explanatory memorandum, p. 10.

be requested under these provisions and the process for making or considering such requests. As these matters are not addressed in the explanatory memorandum, or are apparent on the face of the bill, it is difficult for the committee to accurately assess whether appropriate safeguards will be in place to ensure that any personal information is appropriately managed. The committee reiterates that its scrutiny concerns in this instance are heightened given the potential impact on an individual's privacy that may result from the use and disclosure of personal information under these provisions.

1.20 In light of the above, the committee requests the minister's detailed advice as to the safeguards protecting information that may be used or disclosed under proposed subsection 285(1B) and proposed sections 287 and 300, including:

- **to whom information may be disclosed;**
- **what kinds of information may be disclosed;**
- **the process by which information may be requested and disclosed; and**
- **what safeguards would operate in respect of information disclosed under these provisions and why the minister considers that these safeguards are sufficient.**

Immunity from civil liability²¹

1.21 The bill seeks to amend paragraph 313(5)(a) of the Telecommunications Act to expand the circumstances in which carriers, carriage service providers and carriage service intermediaries are immune from civil liability. Item 10 of Schedule 1 would provide that a carrier or carriage service provider or intermediary is not liable to an action or other proceeding for damages for an act done (or omitted to be done) in good faith when providing help as is reasonably necessary in connection with an emergency in accordance with their duty under existing subsections 313(4A) and (4B).²²

1.22 The immunities provided for in proposed paragraph 313(5)(a) would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless a lack of good faith can be shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine

21 Schedule 1, item 10, proposed paragraph 313(5)(a). The committee draws senators' attention to this provisions pursuant to Senate Standing Order 24(1)(a)(i).

22 Subsection 313(4A) provides that a carrier or carriage service provider must, in connection with the operation or supply of services, give officers and authorities of the Commonwealth and the states and territories such help as is reasonably necessary for preparing for, responding to, or recovering from emergency. Proposed subsection 314(4B) provides for the same measures in relation to carriage service intermediaries.

attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.23 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified within the explanatory materials for the bill. In this instance, the explanatory memorandum states that:

The amendment is consistent with similar provisions relating to the 'giving of help as is reasonably necessary' in connection with safeguarding national security and protecting public revenue in the Act, and corrects a drafting error in the *National Emergency Declaration Act 2020*.²³

1.24 The committee notes the above explanation and advice that the intention of the bill is to restore the position that was intended when the *National Emergency Declaration Act 2020* was enacted. However, the committee also notes that it does not generally consider that consistency with existing provisions is, of itself, sufficient justification for provisions that confer immunity from liability, particularly where such immunity could affect individual rights. The committee therefore does not consider that the explanatory memorandum has sufficiently explained why it is necessary and appropriate to confer further civil immunity on carriers, carriage service providers and carriage service intermediaries. In this instance, the committee's concerns are heightened given the broad range of persons on whom immunity is conferred. For example, the committee notes that civil immunity would be extended to agents of a carrier or carriage service provider by virtue of existing subsection 313(6).

1.25 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing carriers, carriage service providers and intermediaries with further civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

23 Explanatory memorandum, p. 11.

Private senators' and members' bills that may raise scrutiny concerns

1.26 The committee notes that the following private senators' bill may raise scrutiny concerns under Senate Standing Order 24. Should this bill proceed to further stages of debate, the committee may request further information from the bill proponent.

Bill	Relevant provisions	Potential scrutiny concerns
Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2022	Schedule 1, proposed subsections 314AR(1) and (4)	The provisions may raise scrutiny concerns under principle (iii) in relation to availability of merits review.

Bills with no committee comment

1.27 The committee has no comment in relation to the following bill which was introduced into the Parliament between 21 – 25 November 2022:

Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2022.

Commentary on amendments and explanatory materials

Biosecurity Amendment (Strengthening Biosecurity) Bill 2022

1.28 On 23 November 2022, the Minister for Agriculture, Fisheries and Forestry (Mr Watt) presented a supplementary explanatory memorandum to the bill.

1.29 On 25 November 2022, the Minister for Agriculture, Fisheries and Forestry (Mr Watt) presented an addendum to the explanatory memorandum.

1.30 The committee thanks the minister for tabling the addendum to the explanatory memorandum which includes key information requested from the committee in relation to the exemption from disallowance provisions in proposed sections 196A, 196B and 393B and the no-invalidity clauses in proposed sections 196A and 393B.

1.31 However, the committee notes that the addendum does not address the committee's scrutiny concerns in relation to the exemption from disallowance provisions in the bill.

1.32 The committee welcomes the information regarding the consultation processes for section 196A and 393B determinations, but reiterates that it would have been more appropriate had this information instead been included as a requirement on the face of the bill.

Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022

1.33 On 23 November 2022, the Senate agreed to one opposition amendment to the bill.

1.34 The committee welcomes the amendment to the bill which requires that advice given by the Future Fund Board in accordance with section 34A must be tabled in each House of the Parliament.

High Speed Rail Authority Bill 2022

1.35 On 21 November 2022, the assistant Minister for Infrastructure and Transport (Senator Brown) tabled an addendum to the explanatory memorandum.

1.36 The committee thanks the assistant minister for tabling the addendum to the explanatory memorandum which includes key information requested by the committee in relation to the exemption from disallowance provisions in the bill.

However, the committee reiterates its view that exemptions from disallowance provisions are only justified in exceptional circumstances.

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

- Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022
- Family Assistance Legislation Amendment (Cheaper Child Care) Bill 2022
- Social Services and Other Legislation Amendment (Workforce Incentive) Bill 2022

Chapter 2

Commentary on ministerial responses

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

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

Purpose	<p>This bill seeks to refine and strengthen the legal and regulatory frameworks relating to sexual harassment and discrimination in Australia.</p> <p>This bill seeks to amend the:</p> <ul style="list-style-type: none"> • <i>Australian Human Rights Commission Act 1986</i>; • <i>Sex Discrimination Act 1984</i>; • <i>Workplace Gender Equality Act 2012</i>; • <i>Disability Discrimination Act 1992</i>; • <i>Racial Discrimination Act 1975</i>; and • <i>Age Discrimination Act 2004</i>. <p>The bill would also make consequential amendments to the:</p> <ul style="list-style-type: none"> • <i>Federal Circuit and Family Court of Australia Act 2021</i>; • <i>Federal Court of Australia Act 1976</i>; and • <i>Inspector-General of Intelligence and Security Act 1986</i>.
Portfolio	Attorney-General
Introduced	House of Representatives on 27 September 2022
Bill status	Passed both Houses

Retrospective application

Broad discretionary power¹

2.2 The *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and *Age Discrimination Act 2004* (the anti-discrimination Acts) currently provide that it is a criminal offence to commit an act of victimisation against another person.² Part 1 of Schedule 7 to the bill seeks to insert new civil victimisation provisions into each of the anti-discrimination Acts,³ and make consequential amendments to the definition of 'unlawful discrimination' in the *Australian Human Rights Commission Act 1986* (the AHRC Act).⁴ The practical effect of these amendments is that victimising conduct could form the basis of civil or criminal proceedings, or both.

2.3 Items 17 and 18 of Schedule 7 to the bill provide application and transitional arrangements in relation to the proposed civil victimisation provisions. Item 17 provides that the proposed civil victimisation provisions would be retrospective in operation. While the existing definition of 'unlawful discrimination' would continue to apply in relation to complaints concerning victimising conduct engaged in prior to commencement of the bill, the President of the Australian Human Rights Commission (AHRC) would have a broad discretion to deal with complaints of victimisation lodged with the AHRC prior to commencement as if they were complaints lodged in relation to the proposed civil victimisation provisions.⁵

2.4 In *Scrutiny Digest 7 of 2022* the committee requested the Attorney-General's advice as to:

- why it is necessary and appropriate to apply the proposed civil victimisation provisions to acts of victimisation that occurred prior to the commencement of the bill;
- the extent to which individuals are expected to be affected by the retrospective application of the bill, including whether any court proceedings which have already been instituted are likely to be affected;

1 Schedule 7, Part 2, items 17 and 18. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

2 See section 42 of the *Disability Discrimination Act 1992*; subsection 27(2) of the *Racial Discrimination Act 1975*; and section 51 of the *Age Discrimination Act 2004*.

3 Proposed section 47A of the *Disability Discrimination Act 1992*; proposed section 58A of the *Racial Discrimination Act 1975*; and proposed section 18AA of the *Age Discrimination Act 2004*.

4 'Unlawful discrimination' is defined in subsection 3(1) of the AHRC Act. Individuals may lodge a complaint of 'unlawful discrimination' with the Australian Human Rights Commission under section 46P of the AHRC Act.

5 Item 18.

- why it is necessary and appropriate to provide the President with a broad discretion to deal with complaints concerning conduct that occurred prior to the commencement of the bill on the basis of the new civil victimisation provisions; and
- whether the bill can be amended to include at least high-level guidance regarding the exercise of the President's discretion or, at a minimum, whether the explanatory memorandum can be updated to include this guidance.⁶

Attorney-General's response⁷

2.5 The Attorney-General advised that the proposed civil victimisation provisions are intended to clarify judicial uncertainty arising from court cases in the past decade which have questioned whether federal courts have jurisdiction to hear a civil application of 'unlawful discrimination' under the AHRC Act relating to victimisation.

2.6 The Attorney-General also advised that retrospectivity is appropriate because it is restoring the law to its original intention. The Attorney-General advised that the President's discretion to deal with complaints concerning conduct that occurred prior to the commencement of the bill on the basis of the new civil victimisation provisions is needed to ensure that the AHRC can effectively deal with complaints. The Attorney-General further advised that individuals would not be adversely affected by these amendments.

Committee comment

2.7 The committee thanks the Attorney-General for this response. However, the committee notes that the Attorney-General's advice largely restates the information contained in the explanatory memorandum which the committee considered at length in *Scrutiny Digest 7 of 2022*.

2.8 The committee notes the Attorney-General's advice that retrospectivity is appropriate because it is restoring the law to its original intention and will clarify judicial uncertainty. However, the committee reiterates that while the intention of the bill may be to restore the position of the law to that which was intended when the original anti-discrimination Acts were made, from a rule of law perspective, individuals and entities should not be required to comply with laws that were not properly made. Any departure from this position must be comprehensively justified.

2.9 The committee notes that the Attorney-General's response did not address the extent to which individuals are expected to be affected by the retrospective application of the bill, other than to state that they would not be adversely affected.

6 Senate Scrutiny of Bills Committee, [Scrutiny Digest 7 of 2022](#), pp. 4–7.

7 The minister responded to the committee's comments in a letter dated 24 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

The committee notes that it would have been helpful if the advice provided by the Attorney-General had addressed whether any court proceedings which have already been instituted are likely to be affected, rather than merely stating that individuals would not be adversely impacted.

2.10 The committee also notes the Attorney-General's advice that the President's discretion to deal with complaints concerning conduct that occurred prior to the commencement of the bill on the basis of the new civil victimisation provisions is needed to ensure that the AHRC can effectively deal with complaints. However, it is unclear to the committee from this explanation why guidance as to circumstances in which it may be appropriate to exercise this discretion cannot be included in relation to the President's discretionary powers in item 18.

2.11 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Broad delegation of administrative power⁸

2.12 Part 1 of Schedule 2 to the bill introduces a positive duty in the *Sex Discrimination Act 1984* for employers and persons conducting a business or undertaking to take measures to eliminate certain discriminatory conduct. Item 23 of Schedule 2 amends the AHRC Act to provide the AHRC with broad powers to monitor and assess compliance with this new positive duty.⁹ Under existing subsection 19(2) of the AHRC Act, the President of the AHRC would be able to delegate the majority of these powers to another member of the AHRC, a member of the staff of the AHRC or any other person. Proposed subsection 19(2C) would limit delegation of the powers to issue, reconsider and enforce compliance notices to members of the Senior Executive Service and Executive Level 2 employees of the AHRC.

2.13 In *Scrutiny Digest 7 of 2022* the committee requested the Attorney-General's advice as to:

- why it is necessary and appropriate to allow the President to delegate powers under proposed sections 35B–35E and 35H to another member of the AHRC, a member of the staff of the AHRC or any other person; and

8 Schedule 2, Part 2, Division 2, item 23. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

9 Item 23 provides that Division 2 of Part 2 of Schedule 2 to the bill commences 12 months after Royal Assent.

- whether the bill can be amended to provide legislative guidance as to the scope of powers that might be delegated, or to further limit the categories of people to whom those powers might be delegated.¹⁰

Attorney-General's response¹¹

2.14 The Attorney-General advised that the AHRC has a diverse range of functions, including new inquiry functions in proposed sections 35B–35E relating to the positive duty for employers and persons conducting a business or undertaking to take measures to eliminate certain discriminatory conduct. The Attorney-General advised that it is therefore necessary to delegate functions to a wide range of staff in order to ensure the AHRC functions effectively. The Attorney-General further advised that the delegation of the AHRC's functions under section 19 of the AHRC Act is an established practice and that the measures in the bill are consistent with existing procedures.

2.15 Finally, the Attorney-General noted that proposed subsection 19(2C) limits the delegation of certain powers regarding compliance notices in sections 35F, 35G and 35J to members of the Senior Executive Service and Executive Level 2 employees of the AHRC.

Committee comment

2.16 The committee thanks the Attorney-General for this response. However, the committee notes that the Attorney-General's advice largely restates the information contained in the explanatory memorandum which the committee considered at length in *Scrutiny Digest 7 of 2022*.

2.17 The committee notes the Attorney-General's advice that the broad delegation of the President's powers and functions under section 19 of the AHRC Act is an established practice. The committee reiterates its consistent scrutiny view that consistency with existing legislation is not sufficient justification for allowing the broad delegation of administrative powers and functions.

2.18 The committee also notes that the Attorney-General's response does not address whether the bill can be amended to provide legislative guidance as to the scope of powers that might be delegated, or to further limit the categories of people to whom those powers might be delegated. It is unclear to the committee why it would not be possible to include further guidance or limitations.

2.19 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

10 Senate Scrutiny of Bills Committee, [Scrutiny Digest 7 of 2022](#), pp. 7–9.

11 The minister responded to the committee's comments in a letter dated 24 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Tabling of documents in Parliament¹²

2.20 Schedule 3 to the bill seeks to amend the AHRC Act to confer a new inquiry function on the AHRC to enable it to inquire into, and report on, issues of systemic unlawful discrimination. Proposed subsection 35Q(1) provides that the AHRC may report to the minister or publish a report at the conclusion of an inquiry into systemic unlawful discrimination, or both. Item 10 of Schedule 3 amends section 46 of the AHRC Act so that any reports provided to the minister under proposed subsection 35Q(1) would not have to be tabled in the Parliament.

2.21 In *Scrutiny Digest 7 of 2022* the committee requested the Attorney-General's advice as to why reports prepared for the minister under proposed subsection 35Q(1) are not required to be tabled in the Parliament.¹³

Attorney-General's response¹⁴

2.22 The Attorney-General advised that a report prepared under proposed subsection 35Q(1) may identify recommendations for a range of actors to implement. The Attorney-General advised that providing the AHRC with discretion to publish reports as it sees fit, rather than requiring that reports be tabled in the Parliament, ensures that it has the necessary flexibility to consider the contextual circumstances of an inquiry. The Attorney-General also advised that publication of these reports, where the AHRC chooses to do so, may promote greater transparency and understanding of systemic discrimination, both for employers and the broader community.

Committee comment

2.23 The committee thanks the Attorney-General for this response.

2.24 The committee notes the Attorney-General's advice that the publication of reports prepared under proposed subsection 35Q(1) may promote greater transparency and understanding of systemic discrimination. The committee also notes the Attorney-General's advice that, as a report prepared under proposed subsection 35Q(1) may identify recommendations for a range of actors to implement,

12 Sch 3, item 10, proposed section 46. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

13 Senate Scrutiny of Bills Committee, [Scrutiny Digest 7 of 2022](#), p. 9.

14 The minister responded to the committee's comments in a letter dated 24 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

it is therefore appropriate to provide the AHRC with discretion as to whether these reports are published.

2.25 While noting this advice, 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. The committee does not consider the Attorney-General's advice has adequately justified why reports prepared under subsection 35Q(1) cannot be required to be tabled in the Parliament, subject to any redactions genuinely required to ensure that sensitive information is not inappropriately disclosed.

2.26 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

National Anti-Corruption Commission Bill 2022

National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

Purpose	<p>The National Anti-Corruption Commission Bill 2022 (NACC Bill) seeks to create a new Commonwealth anti-corruption agency, the National Anti-Corruption, that would investigate and report on serious or systemic corruption in the Commonwealth public sector, refer evidence of criminal corrupt conduct for prosecution, and undertake education and prevention activities regarding corruption.</p> <p>This National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 seeks to support the NACC Bill, which would amend various Acts to give effect to the NACC.</p>
Portfolio	Attorney-General
Introduced	House of Representatives on 28 September 2022
Bill status	Before the House of Representatives

Overview

2.27 The committee first commented on the National Anti-Corruption Commission Bill 2022 (the bill) and National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Consequential Bill) in *Scrutiny Digest 6 of 2022*.¹⁵ The Attorney-General responded to the committee's comments in a letter dated 21 November 2022,¹⁶ and subsequently circulated an addendum to the explanatory memorandum for both bills addressing matters raised by this committee, the Parliamentary Joint Committee on Human Rights and the Joint Select Committee on National Anti-Corruption Commission Legislation.¹⁷

15 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#), 26 October 2022, pp. 16–41.

16 A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

17 [Addendum to the explanatory memorandum](#), p. 1.

Retrospective application¹⁸

2.28 The bill would provide the Commissioner with broad discretion to deal with 'corruption issues', referring to whether a person has engaged, is engaging, or will engage in 'corrupt conduct'.¹⁹ Clause 8 clarifies that corrupt conduct may include:

- conduct that occurs before the commencement of the section; and
- conduct of a former public official,²⁰ even if they are no longer a public official on commencement of the section.²¹

2.29 In *Scrutiny Digest 6 of 2022* the committee noted that while the bill does not seek to retrospectively impose criminal liability for past corrupt conduct, such provisions may subject affected persons to processes in relation to past conduct that could have adverse impacts, such as damage to a person's reputation.²²

2.30 Referring to paragraph 8(1)(e), which defines corrupt conduct to include any conduct of a public official that constitutes 'corruption of any other kind', the committee requested that the explanatory memorandum be updated to:

- explain why it is appropriate to allow the bill to have retrospective application, given that it appears that the bill is intended to cover investigations of 'emerging areas of corruption that may not currently be foreseen' in relation to the conduct of a public official; and
- to provide a more detailed list of examples of the kinds of conduct of a public official that is likely to constitute 'corruption of any other kind', noting the importance of this definition for the overall operation of the bill.²³

2.31 More generally, the committee drew senators' attention to its long-standing scrutiny concerns regarding legislation that seeks to have a retrospective effect.

18 Clause 8 and subclause 9(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

19 Defined in clause 9.

20 Paragraph 8(1)(d).

21 Subclause 8(5).

22 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#) (26 October 2022) pp. 16–19.

23 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#), (26 October 2022) pp. 16–19.

Attorney-General's response²⁴

2.32 The Attorney-General advised that the government intends to omit paragraph 8(1)(e) on the recommendation of the Joint Select Committee on the National Anti-Corruption.²⁵ The relevant amendments were circulated in the House of Representatives on 24 November 2022.

2.33 The Attorney-General further advised that:

... neither paragraph 8(1)(e) nor the other elements of the definition of 'corrupt conduct' in the Bill create any retrospective standards. Whether or not conduct is corrupt will be determined with regard to the laws or standards that applied to the conduct at the time it was engaged in.

Committee comment

2.34 The committee thanks the Attorney-General for this response. The committee welcomes the proposed omission of paragraph 8(1)(e) from the bill and the Attorney-General's clarification that the other elements of the definition of corrupt conduct will be determined by reference to laws or standards that applied at the time the conduct was engaged in.

2.35 Noting that a broad definition of corrupt conduct is central to the operation of the bill, including conduct which may have occurred prior to the commencement of the bill, the committee leaves to the Senate as a whole the appropriateness of the retrospective application of the bill.

Reversal of the evidential burden of proof²⁶

2.36 The bills seek to create several offences which reverse the evidential burden of proof by requiring the defendant to raise evidence to disprove one or more element of the offence. Such provisions disrupt the common law duty of the prosecution to prove all elements of an offence, which is an important aspect of the common law

24 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

25 Joint Select Committee on National Anti-Corruption Commission Legislation, [*Advisory Report on the provisions of the National Anti-Corruption Commission Bill 2022 and the National Anti-Corruption Commission \(Consequential and Transitional Provisions\) Bill 2022*](#), November 2022, p. xii.

26 Subclauses 60(2), 61(2) 69(2), 71(2), 98(3), 229(1), 229(4) and 234(2); and Schedule 1, item 203, proposed subsections 355-192(1) and (2) in the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

right to be presumed guilty. The committee generally considers that this is only appropriate if the matters required to be proved by the defendant are peculiarly within the defendant's knowledge and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. This is consistent with the test set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.²⁷

2.37 In *Scrutiny Digest 6 of 2022* the committee expressed concern that several provisions do not appear to comply with this test. The committee therefore recommended that:

- where there is sufficient justification for providing that a matter is *peculiarly* within the knowledge of the defendant, the explanatory memorandum be updated to reflect this justification; and
- where there is not a sufficient justification, consideration be given to amending the bill so that the matters specified by the committee are included as elements of the relevant offence, rather than as offence-specific defences.²⁸

2.38 In addition, in relation to subclauses 60(2) and 69(2), the committee recommended that:

- where there is sufficient justification for providing a general defence, the explanatory memorandum be updated to reflect this justification; and
- where there is not a sufficient justification, consideration be given to amending the bill so that more specific defences apply.²⁹

Attorney-General's response³⁰

2.39 The Attorney-General advised that the government agreed with the committee's recommendations regarding the reversal of the evidential burden of proof and would update the explanatory memorandum accordingly.

2.40 In relation to each of the provisions highlighted by the committee, the addendum to the explanatory memorandum provides that:

27 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp. 50–52.

28 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#), 26 October 2022, p. 23.

29 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#), 26 October 2022, p. 23.

30 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

- the relevant matters are likely to be, or will be, peculiarly within the knowledge of the defendant;
- it would be onerous for the prosecution to disprove the relevant matters; and
- it would be unlikely for prosecution to be brought where information indicating the availability of the defence was available to the prosecution.³¹

2.41 In addition, regarding clauses 61 and 71, the addendum to the explanatory memorandum provides that it would be simple for the defendant to adduce or point to the relevant evidence.³² In relation to clauses 60, 69, 98 and 234, the addendum also states that requiring the prosecution to prove the relevant matters would risk a successful prosecution and 'affect the deterrent effect of the offence'.³³

2.42 The addendum to the explanatory memorandum also provides relevant information as to why clauses 60 and 69 include an offence-specific defence of 'reasonably practicable', rather than relying on the general defences in the Criminal Code:

These standard or general defences would not be sufficient to excuse a person from criminal liability in circumstances where they accurately understand the requirement to give information, or produce documents or things, and there is no third party or external factor that prevents their compliance with the requirement, but the person is nevertheless unable to comply either within the timeframe specified or at all.³⁴

2.43 On the broader question as to the need for a general defence in these provisions, the addendum to the explanatory memorandum states:

It is appropriate to include a reasonable practicability-based defence to requirements to produce information, documents or things, to cover a diverse range of circumstances situations in which, for example:

- it would be physically possible but extraordinarily onerous for a person to comply with a requirement—such as where it would only be possible for the person to comply if they (and all available staff) went without sleep for an extended period of time; or
- the person is dependent on a third party to access or produce a document or thing (such as a lawyer, bank or accounting firm that holds the document or thing on behalf of the person), and the person has taken all reasonably practicable steps to obtain the

31 Addendum to the explanatory memorandum, pp. 2–5, 8–11, 13 and 16.

32 Addendum to the explanatory memorandum, pp. 3, 9 and 11.

33 Addendum to the explanatory memorandum, pp. 3, 4, 9, 10, 13 and 17.

34 Addendum to the explanatory memorandum, p. 10.

document or thing from the third party, but has been unable to do so.³⁵

Committee comment

2.44 The committee thanks the Attorney-General for this response. The committee welcomes the inclusion of additional information in the addendum to the explanatory memorandum to justify the reversal of the evidential burden of proof in relation to offences within the bill, including by explaining why the Attorney-General considers that the relevant matters are peculiarly within the knowledge of the defendant and would be significantly more onerous for the prosecution to disprove than for the defendant to prove.

2.45 The committee also welcomes the inclusion of additional information about the need for a general defence in subclauses 60(2) and 69(2), in preference to relying on the general defences in the Criminal Code or designing more specific defences.

2.46 However, the committee considers that questions remain as to whether some matters would be peculiarly within the knowledge of the defendant, so as to justify the reversal of the evidential burden of proof. For example, regarding the defences to the offences of failure to comply with non-disclosure notations in clause 98, the addendum to the explanatory memorandum does not appear to specifically address how the lawful publication of the relevant information would be peculiarly within the defendant's knowledge. In such instances, the committee considers that it would be more appropriate to include the relevant matters as elements of the offence, such that the evidential burden remains with the prosecution.

2.47 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

Abrogation of privilege against self-incrimination

Abrogation of legal professional privilege³⁶

2.48 The Commissioner would be empowered to require that a person give information to the NACC where it is reasonably believed they have information, or a document or thing, relevant to a corruption investigation. This could apply to persons who have separately been charged with a relevant offence, or been subject to relevant confiscation proceedings.³⁷ Clause 105 provides that a person or body that may

35 Addendum to the explanatory memorandum, p. 10.

36 Clauses 113 and 114. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

37 See clauses 58, 63 and 105. 'Investigation material' is defined at clause 99.

lawfully disclose investigation material, or material derived from the investigation material, may disclose it to a prosecutor of the witness. In the case of investigation material (but not derivative material) this is subject to any direction to the contrary by the Commissioner.³⁸ In the case of material obtained post-charge, it may only be disclosed with a court order. The court may order that investigation material or derivative material may be disclosed to prosecutors of the witness if satisfied that the disclosure is required in the interests of justice, but this does not restrict a court's power to make any orders necessary to ensure that the witness' fair trial is not prejudiced.³⁹

2.49 Clause 113 would provide that a person is not excused from answering a question or producing a document or thing as required by a notice to produce, or at a hearing, on the ground that doing so would tend to incriminate the person or expose the person to a penalty. That is, the bill would abrogate a person's common law privilege against self-incrimination. Clause 113 will provide a use immunity, but not a derivative use immunity.

2.50 In addition, clause 114 of the bill provides that a person is not excused from giving an answer, or producing a document or thing, under a notice to produce or at a hearing on the grounds that the information is protected against disclosure by legal professional privilege. There is no derivative use immunity provided in relation to clause 114.

- In *Scrutiny Digest 6 of 2022* the committee recommended that consideration be given to amending the bill:
- so that the privilege against self-incrimination and legal professional privilege are only abrogated to the extent that both use and derivative use immunity are available; or
- at a minimum, to provide that the NACC must consider whether less coercive avenues are available to obtain the information prior to compelling a person to give information in circumstances which would abrogate the privilege against self-incrimination or legal professional privilege.⁴⁰

38 See clause 100 and subclause 105(2).

39 Clause 106.

40 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#), pp. 23–28.

Attorney-General's response⁴¹

2.51 The Attorney-General advised that the ability to use and disclose information derived from information obtained in abrogation of the privilege against self-incrimination or legal professional privilege is necessary to achieve the legitimate objective of facilitating the investigation and prevention of serious or systemic corruption, including through the prosecution of corruption-related offences.

2.52 The Attorney-General advised that the measures would support this objective by ensuring that material obtained through the Commission's investigations can be used to disrupt and prevent serious harm to the community, including by prosecuting persons who have been witnesses and who may have also engaged in criminal conduct. The Attorney-General considered that the effective prosecution of people who have been subject to the Commission's investigations or witnesses in Commission investigations is crucial to enabling the Commission to fulfil its statutory functions and ensure public confidence in its effectiveness. The Attorney-General advised that allowing for both use and derivative use immunity to apply would significantly hinder the success of criminal investigations and prosecutions.

2.53 The Attorney-General also noted the existing safeguards in the bill, such as clause 106 which preserves the power of the Court to make orders necessary to ensure a fair trial.

2.54 On this basis, the Attorney-General advised that it was not necessary to amend the bill to provide that both use and derivative use immunity apply.

2.55 Finally, the Attorney-General advised that he does not consider it necessary or appropriate to require the Commissioner to first consider whether less coercive measures to obtain self-incriminatory or legally privileged information are available. The Attorney-General noted that this would have the practical effect of requiring the Commissioner to consider or use less effective, efficient or proportionate powers to obtain information.

Committee comment

2.56 The committee thanks the Attorney-General for this response.

2.57 However, the committee remains concerned that the bill would abrogate the privilege against self-incrimination and legal professional privilege in circumstances in which derivative use immunity is not available.

2.58 Abrogating either the privilege against self-incrimination or legal professional privilege represents a serious loss of personal liberty. In considering whether it is

41 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

appropriate to abrogate these privileges, the committee will consider whether the public benefit in doing so significantly outweighs this loss to personal liberty. The committee will also consider whether appropriate safeguards apply. The committee notes the Attorney-General's advice as to the perceived public benefits of abrogating the privileges in this case. However, given the limited practical protection provided by use immunity without an accompanying derivative use immunity, the committee is concerned that the bill would abrogate the privilege against self-incrimination and legal professional privilege without providing sufficient safeguards. In this regard, the committee notes that, excepting circumstances in which the relevant matters are peculiarly within a person's knowledge, use immunity provides very little protection against compelled self-incrimination and would allow fundamental principles of the criminal justice system to be set aside.

2.59 In relation to the Attorney-General's advice that it would not be appropriate to provide that abrogating the privilege against self-incrimination or legal professional privilege should be conditional upon first considering other less coercive measures, the committee notes that it would be open to the Attorney-General to amend the bill such that the Commissioner would not be required to authorise measures if they are reasonably considered to be less effective or proportionate. The committee does not consider that administrative efficiency is a sufficient justification for limiting important common law rights in the manner proposed by the Attorney-General.

2.60 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination and legal professional privilege without providing appropriate safeguards, such as by providing that both use and derivative use immunity apply, or by stating that the abrogation is conditional upon first considering other less coercive measures.

Broad scope of offence provisions⁴²

2.61 Subclause 72(1) provides that a person would commit an offence if they 'obstruct' or 'hinder' a staff member of the NACC in the performance or exercise of the staff member's functions, powers or duties in connection with a hearing. Similarly, subclause 72(2) provides that a person commits an offence if they 'disrupt' a hearing.

2.62 Both offences carry a maximum penalty of 2 years' imprisonment.

2.63 Clause 82 similarly provides that a person is in contempt of the NACC for engaging in the same conduct.

42 Subclauses 72(1) and 72(2), paragraphs 82(g) and 82(f). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2.64 In *Scrutiny Digest 6 of 2022* the committee expressed concern about the lack of guidance in the bill and explanatory memorandum as to the meaning of 'disrupt', 'obstruct' and 'hinder', noting that they could conceivably cover a broad range of conduct from minor offences to serious misconduct.

2.65 The committee therefore recommended that:

- unless sufficient justification can be provided as to why it is necessary and appropriate to make it both an offence, and a contempt of court, to disrupt a hearing or obstruct or hinder a staff member of the Commission, consideration be given to amending the bill to remove clause 72; and
- if clause 72 is not removed, that consideration be given to amending the bill to better clarify what conduct is intended to be covered by this clause or, at a minimum, that the explanatory memorandum to the bill be updated to include specific examples of the kinds of conduct that the provisions are intended to cover.⁴³

2.66 The committee also stated that it was unclear why there was a need for both offence and contempt provisions covering the same conduct.⁴⁴

Attorney-General's response⁴⁵

2.67 The Attorney-General advised that the government will update the explanatory memorandum to the bill to include specific examples of the types of conduct that the provisions are intended to cover.

2.68 The subsequent addendum to the explanatory memorandum states that the terms 'obstructs' and 'hinders' 'take their ordinary meanings', and provides several specific examples as to the types of conduct that may be captured by these terms.⁴⁶ These include:

- preventing the Commissioner or another staff member of the Commission from entering the hearing room;
- interfering with recording devices to prevent a staff member of the Commission from recording a hearing, resulting in the loss of evidence; or
- assaulting or restraining a Commission staff member responsible for ensuring the physical security of a hearing, with the effect of enabling another person to enter a private hearing.

43 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#) (26 October 2022) pp. 28–29.

44 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#) (26 October 2022) p. 29.

45 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

46 Addendum to the explanatory memorandum, pp. 11–12.

2.69 The addendum to the explanatory memorandum also provides a justification as to the need for clauses 72 and 82. It notes, for example, that in some instances contempt proceedings may be preferable where the relevant conduct is 'at the lower end of the range in terms of its severity, and it is desirable to have the matter dealt with expeditiously and without a convictions being recorded'.⁴⁷

Committee comment

2.70 The committee thanks the Attorney-General for this response and the inclusion of additional information in the addendum to the explanatory memorandum, including examples of conduct that may fall within the scope of the relevant offence and contempt provisions.

2.71 In light of the detailed information provided by the Attorney-General, the committee makes no further comment on this matter.

Evidentiary certificates⁴⁸

2.72 The bill would provide that a person is in contempt of the NACC where they engage in certain conduct.⁴⁹ Clause 83 provides that the Commissioner may subsequently make an application for the court to deal with contempt. Subclause 83(3) states that an application to the court must be accompanied by a certificate that states the grounds for making the application and the evidence in support of the application. Subclause 84(2) provides that a subclause 83(3) certificate is prima facie evidence of the matters specified in the certificate. Generally, the committee only considers the use of such certificates to be appropriate when they cover technical matters sufficiently removed from the main facts at issue. This is consistent with the advice set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.⁵⁰

2.73 In *Scrutiny Digest 6 of 2022* the committee recommended that unless sufficient justification can be provided as to why it is necessary and appropriate to provide that a certificate given under subclause 83(3) is an evidentiary certificate, noting that such certificates are generally only considered appropriate when they

47 Addendum to the explanatory memorandum, pp. 12–13.

48 Subclause 84(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

49 See clause 82.

50 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 55.

cover formal or technical matters, consideration be given to amending the bill to remove subclause 84(4).⁵¹

Attorney-General's response⁵²

2.74 The Attorney-General advised that the government will update the explanatory memorandum to the bill to provide the justification requested by the committee.

2.75 The subsequent addendum to the explanatory memorandum states that:

... the use of prima facie evidentiary certificates for substantive matters in contempt proceedings facilitates their prompt resolution, by enabling the Commission to place evidence before the court and enabling the court to treat that evidence as correct unless it is rebutted.⁵³

2.76 In addition, the addendum to the explanatory memorandum states that the use of these certificates is justified because:

This approach minimises the potential delay associated with calling witnesses or adducing evidence to establish uncontested facts, or negotiating an agreed statement of facts. This is important to facilitate the timely investigation of corruption issues that could involve serious or systemic corrupt conduct, consistent with the objects of the NACC Bill set out in clause 3. This is particularly important in cases of contempt by non-compliance, to mitigate the risk that an alleged contemnor may draw out contempt proceedings to further delay and frustrate an ongoing investigation. The use of a prima facie evidentiary certificate for contempt proceedings in this clause is consistent with existing approaches in the *Law Enforcement Integrity Commissioner Act 2006* and the *Australian Crime Commission Act 2002*.⁵⁴

Committee comment

2.77 The committee thanks the Attorney-General for this response and the inclusion of additional information in the addendum to the explanatory memorandum.

2.78 The committee acknowledges the benefits identified in the explanatory memorandum in relation to the use of evidentiary certificates. However, the committee is concerned by the use of these certificates in relation to substantive

51 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 30–31.

52 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

53 Addendum to the explanatory memorandum, p. 13.

54 Addendum to the explanatory memorandum, p. 13.

matters, given that the effect of their use is to reverse the burden of proof. The committee reiterates that it generally only considers the use of certificates which constitute prima facie evidence to be appropriate when the certificate relates to technical matters sufficiently removed from the main facts at issue.

2.79 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the use of evidentiary certificates under subclause 83(3), noting that it appears that a subclause 83(3) certificate could cover substantive matters related to contempt proceedings.

Immunity from civil liability⁵⁵

2.80 The bill seeks to introduce several provisions which provide immunity from civil liability. Subdivision D of Part 10 of the bill would provide certain immunities for the Inspector and persons assisting the Inspector. Subdivision C of Part 12 of the bill provides similar immunities for a staff member of the NACC or a person whom the Commissioner requests assists a staff member of the NACC.

2.81 In *Scrutiny Digest 6 of 2022* the committee recommended that:

- the explanatory memorandum be updated to explain why it is necessary and appropriate to confer immunity from civil proceedings on a potentially broad range of persons, so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown; and
- where there is not a sufficient justification, consideration be given to amending the bill so that a more limited immunity is conferred.⁵⁶

Attorney General's response⁵⁷

2.82 The Attorney-General advised that the government will update the explanatory memorandum to the bill to provide the justification requested by the committee.

2.83 The subsequent addendum to the explanatory memorandum states that the immunity from civil liability for acts or omissions done in good faith would reduce the

55 Clauses 196 and 269. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

56 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 31–32.

57 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

risk that decision-makers would adopt a less rigorous approach to the performance of their functions to protect their personal interests at the expense of the public interest.⁵⁸

2.84 The explanatory material also states that:

The immunities would not prevent an affected person from bringing an action to seek a remedy where the Inspector or persons assisting acted in good faith. The immunities are conferred on the individuals, not on the Commonwealth. It would be open to an affected person to seek a remedy from the Commonwealth, but not from the Inspector or a person assisting where they have acted in good faith.⁵⁹

Committee comment

2.85 The committee thanks the Attorney-General for this response and the inclusion of additional information in the addendum to the explanatory memorandum.

2.86 However, the committee remains concerned that the immunity conferred by clauses 196 and 269 is overly broad, particularly given that the effect of these clauses is that affected persons will have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

2.87 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring a broad immunity from civil liability on persons under clauses 196 and 269 of the bill.

Privacy⁶⁰

2.88 The bill seeks to confer a broad range of powers on the Commissioner, Inspector and authorised officers to obtain information—including personal information—relevant to an investigation or public inquiry.⁶¹ The bill also includes a number of provisions which would allow for the disclosure of this information, including through the tabling or publication of reports, public hearings and the

58 Addendum to the explanatory memorandum, p. 14.

59 Addendum to the explanatory memorandum, p. 14.

60 Paragraphs 54(6)(b), 74(b)(iii) and 151(1)(b), subparagraphs 154(5)(b)(i), 158(3)(b)(i), 159(4)(b)(i) and 160(6)(6)(b), paragraph 164(3)(c), subparagraph 167(3)(b)(i), paragraphs 171(6)(b) and 227(3)(n) and subclause 272(b). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

61 This includes conducting searches and compelling people to give evidence, information and produce documents at a hearing or for the purpose of an investigation. See Part 7 of the bill.

disclosure of other information relevant to the NACC.⁶² As a result, the committee considers that the bill trespasses on an individual's right to privacy.

2.89 The bill proposes several measures which would provide protections around the use and disclosure of 'sensitive information'.⁶³ Under proposed paragraph 227(3)(n), this includes information the disclosure of which the relevant authorised discloser (defined in clause 227 to include the Commissioner and the Inspector) is satisfied would unreasonably disclose a person's personal affairs.

2.90 In *Scrutiny Digest 6 of 2022* the committee recommended that:

- consideration be given to amending the bill to include a list of considerations that an authorised discloser must have regard to in order to be satisfied that disclosure of information would unreasonably disclose a person's personal affairs; or
- at a minimum, that the explanatory memorandum be updated to include such a list of considerations and to provide specific examples of circumstances in which this threshold is likely to be met.⁶⁴

Attorney-General's response⁶⁵

2.91 The addendum to the explanatory memorandum states that, while it would not be possible or desirable to define the concept exhaustively, a person's 'personal affairs' means the affairs of, or relating to, the private aspects of an individual's life. This would include information relating to a person's health and wellbeing, intimate relationships, domestic responsibilities, financial situation, criminal history and government identifiers.⁶⁶ It also clarifies that information about an individual's work or their conduct as a public official would not usually qualify as information about their personal affairs, nor would the concept be limited to information that is confidential or not widely known.⁶⁷

62 For example, reports are required to be tabled in the Parliament where a public hearing has been held in the course of an investigation, NACC investigation, public inquiry or where public submissions were invited on matters that were the subject of a public inquiry (clauses 155, 168 and 221). The Commissioner and Inspector would be able to publish reports and disclose other information if satisfied it is in the public interest to do so (clauses 156, 169, 222 and 230).

63 Subclause 227(3) would define a class of information to be known as sensitive information.

64 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 32–35.

65 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

66 Addendum to the explanatory memorandum, p. 14.

67 Addendum to the explanatory memorandum, pp. 14–15.

2.92 The addendum to the explanatory memorandum also outlines relevant considerations that an authorised discloser would need to have regard to in order to be satisfied that disclosure of information would unreasonably disclose a person's personal affairs. This would include:

- **the public interest in the disclosure of the information** (considerations may include the public interest in the public exposure of serious or systemic corrupt conduct, the relevance and salience of the information to the corruption investigation and the provision of information to enable people to understand how such conduct has arisen and may arise in the future); and
- **the impact or consequences that would reasonably be expected to occur if the information were disclosed** (considerations may include whether particular information is confidential or not widely known and whether the disclosure would protect the person from undue reputational harm).⁶⁸

2.93 The addendum to the explanatory memorandum also provides specific examples of circumstances in which it may be reasonable for the Commissioner or Inspector to disclose information about an aspect of the person's personal affairs. This includes where a particular aspect of a person's personal affairs is directly relevant to their corrupt conduct, or where the information is central to understanding the reasons for the person's corrupt conduct.⁶⁹

2.94 Finally, the addendum to the explanatory memorandum notes that similar considerations would apply to the question of whether the disclosure of particular confidential commercial information would be 'unreasonable'.⁷⁰

Committee comment

2.95 The committee welcomes the inclusion of this additional information in the addendum to the explanatory memorandum.

2.96 In particular, the committee welcomes the inclusion of additional information which outlines what information may be captured by the term 'personal affairs', noting that this term is key to the operation of the sensitive information framework and its effectiveness in protecting against undue trespass on an individual's right to privacy.

2.97 The committee also welcomes the inclusion of relevant matters which the Commissioner or Inspector must have regard to in determining whether they are

68 Addendum to the explanatory memorandum, pp. 14–15.

69 For example, where an official engages in corrupt conduct to benefit a person with whom the official is in a relationship, or to obtain a corrupt benefit to cover a significant personal debt, it may be reasonable for the Commissioner or Inspector to disclose information about the relationship or debt because that information would be central to understanding the reasons for the person's corrupt conduct. Addendum to the explanatory memorandum, p. 15.

70 Addendum to the explanatory memorandum, p. 16.

satisfied that disclosure would involve the unreasonable disclosure of a person's personal affairs. However, it is unclear to the committee why these considerations cannot be included on the face of the bill. In this regard, the committee notes that other similar discretionary powers, such as those in the *Freedom of Information Act 1982*, include similar mandatory considerations in primary legislation.⁷¹ The committee reiterates that this approach would be appropriate in this instance.

2.98 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing guidance on the face of the bill as to what the Commissioner or Inspector would need to consider in order to be satisfied that disclosure of information would unreasonably disclose a person's personal affairs.

Broad delegation of administrative powers and functions⁷²

2.99 Division 2 of Part 13 to the bill sets out the circumstances in which the Commissioner may delegate their functions, powers and duties under the bill.

2.100 In *Scrutiny Digest 6 of 2022* the committee recommended that:

- the explanatory memorandum be updated to explain why it is necessary and appropriate to delegate:
 - *all* of the Commissioner's functions, powers or duties to Executive Level 2 staff members of the NACC; and
 - the Commissioner's powers under subclause 41(6) to *any* staff member; and
 - the Commissioner's functions, powers or duties to an individual who is concerned in, or takes part in, the management of the agency; and
- that consideration be given to amending the bill to limit these broad delegations by, at a minimum, providing that only delegates in possession of the appropriate training, qualifications, skills or experience are able to exercise decision-making powers or carry out administrative functions.⁷³

71 Section 47F of the *Freedom of Information Act 1982* provides relevant matters which the Attorney-General must have regard to in determining whether the disclosure of a document would involve the unreasonable disclosure of personal information (as defined by the *Privacy Act 1988*).

72 Subparagraph 276(1)(b)(ii), and paragraphs 276(2)(b) and 277(1)(b). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

73 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#), pp. 35–38.

Attorney-General's response⁷⁴

2.101 The Attorney-General advised that the government will update the explanatory memorandum to the bill to include the justification requested by the committee.

2.102 In relation to the Commissioner's delegation power under subparagraph 276(1)(b)(ii), the addendum to the explanatory memorandum states:

Executive Level 2 staff in the Commission would be expected to lead investigation teams or supporting functions, similar to a Superintendent in the Australian Federal Police or a state or territory police force. It is appropriate that the Commissioner be able to delegate certain statutory powers to the senior official leading investigation teams or supporting functions, subject to appropriate conditions and directions.⁷⁵

2.103 In relation to the Commissioner's delegation power under paragraph 276(2)(b), the addendum to the explanatory memorandum states:

The delegation of the decision to take no action would be expected to be accompanied by Guidelines under clause 279 about the kinds of unmeritorious referrals that can be expeditiously dispensed with, and the kinds of referrals that should be elevated for more senior decision making. This could include guidance that, for example referrals that contain no discernible connection with the Commonwealth public sector or corruption of any kind, are nonsensical, are duplicates of a previous referral, or that relate to a matter that a Commissioner or senior delegate has determined should not continue to be escalated (such as continued referrals into a matter that has been fully investigated and that do not contain fresh evidence) can be expeditiously dispensed with by a more junior delegate.⁷⁶

2.104 In relation to the Commissioner's delegation power under clause 277, the addendum to the explanatory memorandum states that the phrase 'concerned with the management of an agency' is 'inherently limited to senior officials or officers of the agency or Commonwealth company in question, and should be regarded as being comparable to an SES officer.'⁷⁷ The addendum to the explanatory memorandum also sets out some useful examples of the intended practical effect of the delegations power.⁷⁸

74 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

75 Addendum to the explanatory memorandum, p. 18.

76 Addendum to the explanatory memorandum, p. 18.

77 Addendum to the explanatory memorandum, p. 18.

78 Addendum to the explanatory memorandum, pp. 18–19.

Committee comment

2.105 The committee thanks the Attorney-General for this response and the inclusion of additional information in the addendum to the explanatory memorandum.

2.106 In relation to the Commissioner's delegation power under subparagraph 276(1)(b)(ii) the committee welcomes the advice as to why it is appropriate to delegate powers and functions to an Executive Level 2 (EL2) staff member, or equivalent. However, the committee remains concerned that subparagraph 276(1)(b)(ii) allows the delegation of *all* or *any* of the Commissioner's functions or powers. The committee considers that it would have been possible to specify with greater precision which functions or powers were appropriate to delegate to the EL2 level.

2.107 In relation to the Commissioner's delegation power under paragraph 276(2)(b) the committee welcomes the advice that decision-making powers to take no action would be accompanied by guidelines, and the inclusion of examples as to the matters to be included within those guidelines. The committee acknowledges that it may sometimes be appropriate to delegate powers to junior staff members in order to ensure an appropriate level of administrative efficiency. However, the committee also considers that it would have been possible to amend the bill to provide at least some limits on the persons to whom the power to take no action could be delegated. For example, by providing that delegates possess the appropriate training, qualifications, skills or experience to exercise the power.

2.108 In relation to the Commissioner's delegation power under clause 277, the committee welcomes the inclusion of information within the explanatory memorandum that the phrase 'concerned with the management of an agency' should be read as inherently limited to officials or officers who are equivalent to Senior Executive officers.

2.109 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing a broad delegation of *any* or *all* of the Commissioner's functions or powers under subparagraph 276(1)(b)(ii) to Executive Level 2 officers, and of allowing a broad delegation to *any* staff member under paragraph 276(2)(b).

Availability of judicial review⁷⁹

2.110 Item 2 of Schedule 1 to the Consequential Bill seeks to insert paragraph (zi) into Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). Proposed paragraph (zi) would have the effect of excluding certain decisions made

79 Schedule 1, item 2 of the Consequential and Transitional Bill. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

under the NACC Bill from judicial review by the Federal Court. The committee acknowledged that it may be appropriate to exclude judicial review over certain kinds of intermediate or procedural decisions in order to ensure the administrative efficiency of the NACC. However, the committee was concerned that the exclusion set out in proposed paragraph (zi) was overbroad, because it includes decisions which do not appear to be procedural or intermediate, or which were otherwise significant.

2.111 In *Scrutiny Digest 6 of 2022* the committee recommended that:

- the explanatory memorandum be updated to explain why the court's ruling in relation to the ADJR Act's review jurisdiction is not sufficient to ensure administrative efficiency, and to justify the breadth of the exclusion at item 2, Schedule 1 to the Consequential Bill; and
- consideration be given to amending the Consequential Bill to provide that ADJR Act review is available for decisions made under jurisdiction-conferring provisions, such as clause 40, and for significant intermediate decisions, such as a decision under clause 71.⁸⁰

Attorney-General's response⁸¹

2.112 The Attorney-General advised that the government will update the explanatory memorandum to the Consequential Bill to provide the justification requested by the committee.

2.113 The subsequent addendum to the explanatory memorandum sets out information outlining why the Attorney-General considers it to be appropriate to exclude review over intermediate decisions in the circumstances of the bill. For example, the addendum to the explanatory memorandum states:

Excluding decisions made under these provisions from the ADJR Act would ensure that well-resourced subjects of investigations cannot use the ADJR Act to fragment, delay and frustrate corruption investigations by seeking review of the Commissioner's foundational and intermediate decisions on the way to reaching findings.⁸²

2.114 The addendum also sets out the remedies that would be available to a person seeking judicial review under the *Judiciary Act 1903* or in the High Court's original jurisdiction.

80 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 40–41.

81 The Attorney-General responded to the committee's comments in a letter dated 21 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

82 Addendum to the explanatory memorandum, p. 20.

Committee comment

2.115 The committee thanks the Attorney-General for this response and the inclusion of additional information in the addendum to the explanatory memorandum.

2.116 The committee welcomes the inclusion of additional information within the explanatory memorandum which outline the appropriateness of excluding review over intermediate decisions. However, the committee reiterates that it appears that at least some of the decisions excluded by proposed paragraph (zi) could not be classified as intermediate decisions. For example, a decision made under clause 40 appears to be a jurisdiction-conferring decision. In addition, the committee reiterates that some decisions which could be described as intermediate may nevertheless be appropriate for judicial review due to their significant nature.

2.117 The committee also notes that the addendum to the explanatory memorandum does not contain any explanation as to why the court's ruling in relation to the ADJR Act's review jurisdiction is not sufficient to ensure administrative efficiency. The committee reiterates that, in interpreting the ADJR Act's review jurisdiction, the courts have held that, in general, decisions must be final and determinative before they will be reviewable decisions.⁸³ It is not clear to the committee why the court's ruling is not sufficient to ensure that intermediate decisions are excluded from review where such an exclusion is appropriate.

2.118 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of excluding decisions made under Part 6, Part 7 and clauses 161, 162, 209, 210 and 213 from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

83 *Bond v Australian Broadcasting Tribunal* (1990) 170 CLR 321.

Treasury Laws Amendment (2022 Measures No. 3) Bill 2022

Purpose	<p>Schedule 1 to the bill amends the <i>Foreign Acquisitions and Takeovers Act 1975</i> to double the maximum financial penalties for contraventions of provisions that relate only to residential land.</p> <p>Schedule 2 to the bill amends the <i>Taxation Administration Act 1953</i> to allow protected information to be disclosed to Australian government agencies for the purpose of administering major disaster support programs approved by the minister.</p> <p>Schedule 3 to the bill amends Schedule 5 of the <i>Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020</i> to extend a temporary mechanism for responsible ministers to make alternative arrangements for meeting information and documentary requirements under Commonwealth legislation, including requirements to give information and produce, witness and sign documents, in response to COVID-19.</p> <p>Schedule 4 to the bill make amendments to reduce the tax rate on certain income earned by foreign resident workers participating in the Pacific Australia Labour Mobility scheme from marginal rates starting at 32.5 per cent to a flat 15 per cent.</p> <p>Schedule 5 to the bill amends the <i>Superannuation Industry (Supervision) Act 1993</i> to provide for an alternative annual performance test for faith-based products.</p>
Portfolio	Treasury
Introduced	House of Representatives on 8 September 2022
Bill status	Before the Senate

Significant matters in delegated legislation⁸⁴

2.119 Schedule 2 to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (Your Future, Your Super Act) requires the Australian Prudential Regulation Authority (APRA) to conduct an annual superannuation performance test for certain superannuation products. Schedule 5 to the bill seeks to amend this process to provide

⁸⁴ Schedule 5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

for an alternative supplementary performance test for faith-based superannuation products. The amendments introduced by Schedule 5 of this bill mirror the framework approach already taken by the Your Future, Your Super Act by leaving significant elements of the new supplementary test scheme to the regulations. The committee has longstanding concerns in relation to bills which include 'framework provisions' that contain only the broad principles of a legislative scheme while relying heavily on delegated legislation to determine the scheme's scope and operation.

2.120 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2022* and requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to leave almost all of the information relating to the scope and operation of the new supplementary performance test for faith-based superannuation products to delegated legislation and non-legislative instruments; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.⁸⁵

2.121 The minister advised that regulations are the appropriate mechanism for dealing with administrative details relating to the operation of the supplementary test and that he does not propose to amend the bill to incorporate further guidance regarding these matters.

2.122 The committee considered the minister's response in *Scrutiny Digest 6 of 2022* and requested that an addendum to the explanatory memorandum containing the advice provided by the minister be tabled in the Parliament as soon as practicable.⁸⁶

Minister's response⁸⁷

2.123 The minister advised that it is not necessary to table an addendum to the explanatory memorandum, because the explanatory memorandum to this bill, when read in conjunction with the explanatory memorandum to the Treasury Laws Amendment (Your Future Your Super) Bill 2021, already adequately explains the use of delegated legislation for the performance test framework.

Committee comment

2.124 The committee thanks the minister for this response.

2.125 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation

85 Senate Scrutiny of Bills Committee, [Scrutiny Digest 5 of 2022](#), pp. 33–35.

86 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#), pp. 88–90.

87 The minister responded to the committee's comments in a letter dated 17 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

(see section 15AB of the *Acts Interpretation Act 1901*) the committee considers that it would have been appropriate had the minister updated the explanatory memorandum, as requested.

2.126 In light of the fact that that this bill has already passed both Houses of the Parliament in an amended form, with Schedule 5 removed, the committee makes no further comment on this matter.

Availability of merits review⁸⁸

2.127 Item 2 of Schedule 5 to the bill seeks to insert proposed section 60L into the *Superannuation Industry (Supervision) Act 1993*. As noted above, Schedule 5 to the bill introduces a new supplementary performance test for faith-based superannuation products. Proposed subsection 60L(4) provides that APRA may determine that a product is a faith-based product for a financial year if a trustee provides APRA with a valid application between 1 February of the prior financial year and 31 January of the relevant financial year. Under proposed subsection 60N(1), APRA may decide to revoke a subsection 60L(4) determination.

2.128 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2022* and requested the minister's advice as to whether the bill can be amended to provide that independent merits review will be available in relation to decisions made under proposed subsections 60L(4) and 60N(1) of the bill.⁸⁹ The minister advised that APRA may not make a determination or revoke a determination where it reasonably considers that the declarations are false. However, it was not clear that there was any such legal requirement on APRA to make a decision in this way.

2.129 The committee considered the minister's response in *Scrutiny Digest 6 of 2022* and requested the minister's further advice as to:

- where it is stated within the bill, or within other legislation, that it is only open to APRA not to make a determination or revoke a determination where APRA reasonably considers that a declaration is false; or
- if there is no such legal requirement, whether the bill can be amended to include this requirement and to provide that decisions made under proposed subsections 60N(1) and 60L(4) be subject to independent merits review.⁹⁰

88 Schedule 5, item 2, proposed subsections 60L(4) and 60N(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

89 Senate Scrutiny of Bills Committee, [Scrutiny Digest 5 of 2022](#), pp. 36–37.

90 Senate Scrutiny of Bills Committee, [Scrutiny Digest 6 of 2022](#), pp. 90–91.

Minister's response⁹¹

2.130 The minister confirmed that the bill does not contain a requirement that APRA may only refuse to determine that a product is a faith-based product where APRA reasonably considers that information in the application is false. However, the minister advised that, in practice, this is generally the only circumstance where APRA will refuse to make such a determination. Despite this, the minister did not propose to amend the bill to explicitly provide this limitation because he considered that doing so would introduce a special case to a relatively new regime. The minister advised that integrity issues may arise which are separate to concerns around false information, and that APRA should be able to respond to those as appropriate.

2.131 In relation to APRA's discretionary decision to revoke a determination, the minister advised that APRA may only exercise this power if it reasonably considers that the product does not invest according to faith-based principles, the investment strategy has not been disclosed to beneficiaries or in marketing materials, or the trustees have not complied with section 60R. In this context, the minister noted that proposed paragraph 60L(2)(b) provides that trustees must include this information in their application for faith-based status and that proposed section 60R requires trustees to provide APRA with any new information. The minister therefore considered that proposed subsection 60N(1) of the bill operates such that APRA may only revoke a determination due to declarations being or becoming untrue, or trustees not providing APRA with updated information.

2.132 The minister also advised that a decision under proposed subsections 60N(1) or 60L(4) would not be an automatic decision. However, the minister still considered it to be appropriate to exclude such decisions from merits review because the minister considers them to be of a procedural nature and, therefore, that allowing merits review could frustrate APRA's ability to make the substantive decision of whether a product has passed the performance test. The minister advised that APRA's decision to determine that a product is a faith-based product, or to revoke such a determination, is a procedural step taken before determining whether the product has passed or failed the performance test. The minister advised that APRA must make the original determination by 31 August each year and that the deadline for the supplementary performance test will also be 31 August, to ensure that all consequences occur at the same time.

2.133 The minister advised that if merits review were available and initiated regarding one of these decisions, it is unlikely that resolution would occur before the 31 August performance test deadline. The minister considered that, with merits review ongoing, if a product failed the original performance test APRA would not know

91 The minister responded to the committee's comments in a letter dated 17 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

whether to assess it against the supplementary performance test. Without a result for the annual performance test, the minister considered that trustees would not be able to meet the requirements of their annual outcomes assessment.

Committee comment

2.134 The committee thanks the minister for this response.

2.135 The committee reiterates that even if the discretion afforded under proposed subsections 60L(4) and 60N(1) were limited, this would not justify removing merits review over a decision made under those subsections. In this regard, the committee notes that there is nothing in the Administrative Review Council's guide, *What decisions should be subject to merits review?*, that suggests decisions with 'limited' discretion should not be subject to merits review.

2.136 The committee notes the minister's advice that he considers that decisions made under proposed subsections 60L(4) and 60N(1) would be procedural in nature, and therefore not appropriate for independent merits review. The committee acknowledges that a decision made under either of those proposed subsections would precede a determination as to whether a product has passed or failed the performance test. However, it appears to the committee that a decision under either proposed subsections 60L(4) or 60N(1) would have the potential to have substantive consequences for affected persons. The committee therefore does not consider it would be appropriate to exclude independent merits review of those decisions.

2.137 In light of the fact that that this bill has already passed both Houses of the Parliament in an amended form, with Schedule 5 removed, 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 notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Dean Smith
Chair

1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).