The Senate

Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

It is the committee's usual practice to table a *Scrutiny Digest* (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.

Health Insurance Amendment (Prescribed Dental Patients and Other Measures) Bill 2023

Purpose	This bill seeks to amend the *Health Insurance Act 1973* to: • improve access to the Medicare Benefits Schedule for eligible persons requiring treatment for cleft and craniofacial conditions by removing the age restrictions in Section 3BA of the Act, which defines 'prescribed dental patients' (Schedule 1); • enable Services Australia to use a computerised system to action decisions made by a specified body to place doctors on, and remove doctors from, the Register of Approved Placements (Schedule 2); and • rectify inconsistencies between Part VD of the Act and the Health Insurance (Bonded Medical Program) Rule 2020 in relation to the length of a bonded participant's return of service obligation, and make related amendments to further enhance the administration of the Bonded Medical Program to ensure it can achieve its original policy intent (Schedule 3).
Portfolio	Health and Aged Care
Introduced	House of Representatives on 22 March 2023

Retrospective commencement[1]

1.2 Schedule 3 to the bill seeks to amend the inconsistency between references to 'years' in Part VD—Bonded Medical Program of the *Health Insurance Act 1973* and the requirements for how a participant can complete a 'week' of return of service obligation, as calculated under the *Health Insurance (Bonded Medical Program)*

1 Schedule 3. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

Rule 2020. The table set out at clause 2 of the bill provides that Schedule 3 commences, retrospectively, on 1 January 2020.

1.3 The committee has a long-standing scrutiny concern about provisions that commence retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.4 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.5 In this instance, the statement of compatibility notes that the Bonded Medical Program commenced on 1 January 2020 and the proposed amendments will address unintended consequences.[2] While the amendments are intended to be beneficial for participants, the committee notes that the explanatory materials do not clearly identify: why the commencement for Schedule 3 has been dated retrospectively; why it is considered necessary to retrospectively address unintended consequences; or whether any persons are likely to be detrimentally affected by the retrospective commencement and, if so, to what extent their interests are likely to be affected. The committee expects these matters to be sufficiently explained in the explanatory materials.

1.6 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the retrospective commencement for the matters set out in Schedule 3.

2 Statement of compatibility, p. 5.

Infrastructure Australia Amendment (Independent Review) Bill 2023

Purpose	This bill seeks to amend the *Infrastructure Australia Act 2008* to clarify Infrastructure Australia's role, redefine Infrastructure Australia's functions and products and establish a new governance structure.
Portfolio/Sponsor	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 22 March 2023

Tabling of documents in Parliament[3]

1.7 Item 4 of Schedule 1 to the bill seeks to replace sections 5A to 5C and add proposed sections 5D and 5E to the *Infrastructure Australia Act 2008* to clarify and update the functions of Infrastructure Australia. These functions include:

- conducting audits to determine the adequacy, capacity and condition of nationally significant infrastructure;[4]
- developing a national planning and assessment framework;[5]
- developing Infrastructure Priority Lists and Infrastructure Plans;[6] and
- providing advice on infrastructure matters.[7]

1.8 Some of these functions require the creation of documents and are coupled with requirements for this information to be published on the Infrastructure Australia website. For example, summaries of evaluations of proposed investments into nationally significant infrastructure must be published online every quarter,[8] targeted Infrastructure Priority Lists must be made available online 14 days after they are developed,[9] and advice provided on infrastructure matters must be published on the

3 Schedule 1, item 4, proposed sections 5A, 5B, 5C and 5D. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

4 Schedule 1, item 4, proposed subsection 5A(1).

5 Schedule 1, item 4, proposed subsection 5B(1).

6 Schedule 1, item 4, proposed subsections 5C(1) and 5C(3).

7 Schedule 1, item 4, proposed section 5D.

8 Schedule 1, item 4, proposed subsection 5B(9).

9 Schedule 1, item 4, proposed subsection 5C(6).

Infrastructure Australia website.[10] The national planning and assessment framework developed under proposed section 5B is required to be given to the Minister and published on the Infrastructure Australia website.[11]

1.9 The bill does not require any of the documents created under proposed sections 5A-5D to be tabled in the Parliament. The committee's consistent scrutiny view is that tabling documents in the Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not made available through other means, for example, by being published online. The committee is particularly concerned about documents developed under proposed section 5B which are required to be presented to the Minister but are not required to be presented to the Parliament.

1.10 The explanatory memorandum does not include any justification as to why these documents are not intended to be tabled in the Parliament and why it is considered appropriate to only publish them online.

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

- **whether the bill can be amended to provide that the documents created under proposed sections 5A to 5D of the bill must be tabled in the Parliament; or**
- **if the minister considers these documents are not appropriate for tabling in the Parliament, whether a justification can be provided as to why it is appropriate that the documents are not tabled.**

10 Schedule 1, item 4, proposed subsection 5D(4).

11 Schedule 1, item 4, proposed subsection 5B(3).

Inspector-General of Aged Care Bill 2023

Purpose	This bill seeks to support the establishment of the new Inspector-General of Aged Care, which will provide independent oversight of the aged care system.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 22 March 2023

Reversal of the evidential burden of proof[12]

1.12 The bill provides the new Inspector-General of Aged Care with extensive reporting functions, including to report to the Minister for Health and Aged Care and to the Parliament on the Commonwealth's administration of an aged care law, the operation of an aged care law, the exercise of functions and powers under an aged care law, systemic issues relating to an aged care law, any systems administering aged care laws, and the implementation by the Commonwealth of the recommendations of the Aged Care Royal Commission.[13] If the Inspector-General conducts a review into one of these matters they must prepare a draft report,[14] which must be provided to certain affected persons prior to being finalised.[15]

1.13 Subclause 23(1) of the bill sets out a new offence if a person receives a draft report, an extract of a draft report, or a document relating to a preliminary finding or recommendation of a draft report and subsequently discloses that information.

1.14 Subclause 23(2) provides that it is a defence to this new offence if the disclosure was made:

- in accordance with subclause 21(3);
- in accordance with subclause 22(1);
- to a lawyer for the purpose of obtaining legal advice;
- to the Commonwealth Ombudsman or an officer within the meaning of subsection 35(1) of the *Ombudsman Act 1976*; or
- with the consent of the Inspector-General.

12 Subclauses 23(2) and 63(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

13 See clause 10 and clause 17.

14 Subclause 21(1).

15 Subclauses 21(3) and (4).

1.15 Similarly, subclause 63(1) of the bill provides that an entrusted person[16] commits an offence if they have obtained protected information in the course of their duties as an entrusted person and they use or disclose that information. It is a defence if the entrusted person uses or discloses the information under clause 64, which includes, among other things that the disclosure was:

- in accordance with their functions and duties;
- for the purposes of an enforcement related activity;
- required or authorised by an Australian law; or
- related to information which had already been lawfully made available to the public.[17]

1.16 Both offences would be punishable by up to two years imprisonment, 120 penalty units, or both. A defendant bears an evidential burden in relation to these defences.

1.17 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[18] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

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

> It is reasonable and necessary for the evidential burden of proof to be placed on the defendant where the facts in relation to the defence are peculiarly within the knowledge of the defendant, and where it would be significantly more difficult and costly for the prosecution to prove (see the Attorney General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers).
>
> Regarding clauses 23 and 63, it is reasonable and necessary for a defendant to bear the evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that their disclosure was authorised by subclause 23(2) or subclause 63(2) because:

16 As defined at clause 5.

17 Subclause 63(2).

18 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

- the purpose for which the person has made the disclosure will be solely and entirely within the person's knowledge, and it would not be onerous for the person to adduce or point to evidence that suggests a reasonable possibility of that purpose;
- requiring the prosecution to prove matters going to the relationship between the defendant and a lawyer or the Ombudsman would be onerous because the legal and ethical protections would make it difficult to obtain information as to their nature; and
- requiring the prosecution to disprove the existence of every circumstance or reason for which a disclosure was made would create a significant risk to successful prosecution and impact the deterrent effect of the offence.[19]

1.19 Some of the matters that the defendant would be required to adduce appear to be peculiarly within the knowledge of the defendant. For example, whether a disclosure was made to a person's lawyer may be an appropriate matter to require a defendant to adduce, in certain circumstances.

1.20 However, many of the matters listed under subclause 23(2) and subclause 63(2) appear to be matters which the prosecution could readily ascertain. For example, whether a disclosure was required or authorised by an Australian law, whether disclosure was made with the consent of the Inspector-General, or whether the information had already been lawfully made available to the public do not appear to be matters that would be *peculiarly* within the defendant's knowledge. Neither does it appear that these matters would be significantly more difficult or costly for the prosecution to establish the matters than for the defendant to establish them. These matters therefore appear to be matters that are more appropriate to be included as an element of the offence.

1.21 The committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[20]

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19 Statement of compatibility, p. 10.

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

Coercive powers[21]

1.22 Clause 50 of the bill provides that an authorised official may enter a premises for the purpose of performing the Inspector-General's monitoring, investigation and reporting functions under paragraphs 10(1)(a) to (d).

1.23 Paragraph 50(1)(a) provides that an authorised official may enter and remain on a premises controlled by the Commonwealth at all reasonable times. Paragraph 50(1)(b) provides that an authorised official may enter other kinds of premises at all reasonable times if the Inspector-General has issued a valid certificate stating that they may enter the premises. The Inspector-General may issue such a certificate if they are satisfied that it is reasonably necessary for the authorised official to have access to the premises in order to carry out the reporting functions referred to above.

1.24 The authorised officer must provide notice that they intend to enter the premises.[22] Once on the premises they must be given full and free access to documents or other property, and may examine and take copies of this material.[23] In addition, the occupier must provide reasonable facilities and assistance.[24]

1.25 Under common law, government officials cannot enter and search the premises of a person without consent. Although this common law position may be appropriately modified by legislation, the committee will closely scrutinise any conferral of coercive powers. As noted in the *Guide to Framing Commonwealth Offences,* the default position is that entry into a premises without consent should generally be authorised by a warrant issued by a judicial officer, such as a magistrate.[25]

1.26 Officials entering premises without consent should also generally be either police officers, or officers of another kind of investigatory body which has established clear guidelines on the appropriate conduct of an investigation.[26] A framework allowing Commonwealth officials to enter premises either with consent or with a warrant is set out in the *Regulatory Powers (Standard Provisions) Act 2014*.[27] However, that framework has not been applied in this case.

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21 Clause 50. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

22 Subclause 50(3).

23 Subclause 50(4).

24 Subclause 50(6).

25 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Chapter 8.

26 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Chapter 8.

27 *Regulatory Powers (Standard Provisions) Act 2014*, Part 3.

1.27 Any departure from this default position should be comprehensively justified within the bill's explanatory materials. In this instance, the explanatory memorandum explains that:

> The access to premises power and associated criminal offence model is broadly comparable to that set out in the *Auditor-General Act 1997*, albeit with a higher level of penalty to align with other Inspectors-General legislation. The inclusion of both a criminal and civil penalty recognises that the Inspector-General may be required to exercise the access to premises power on non-government entities, in addition to government entities.
>
> …
>
> The Inspector-General is not intended to have a regulatory or enforcement role. As such, the search and seizure powers in the Regulatory Powers Act that are necessary to support such a role are not appropriate for the Inspector-General. It is, for example, unnecessary for the Inspector-General to be required to execute a warrant to allow an authorised official to enter another Commonwealth entity's premises to undertake investigations. Legislative requirements for authorised officials to carry identity cards, as provided for in section 76 of the Regulatory Powers Act, are also unnecessary.
>
> Rather, the approach taken in relation to the access to premises power in clause 50 is framed by the Inspector-General's role in providing independent oversight of the Commonwealth's administration, governance and regulation of aged care, including the identification of systemic issues. Specifically, the primary intent of the power is to allow authorised officials of the Inspector-General to enter relevant premises and undertake direct observation, and to examine or take copies of documents or property, for information gathering purposes in support of that role.[28]

1.28 The committee acknowledges this explanation. However, the committee notes that the explanation appears to focus primarily on the role of the Inspector-General in undertaking investigations of Commonwealth controlled premises. The committee also notes that the Auditor-General's investigation powers, upon which the explanatory memorandum explains the Inspector-General's powers are based, differ from those of the Inspector-General in that they allow entry to Commonwealth controlled premises and to the premises of Commonwealth 'partners'. By contrast, paragraph 50(1)(b) would allow the entry of authorised officials onto non-Commonwealth premises. Given this, it is unclear to the committee why the standard protections set out within the *Regulatory Powers (Standard Provisions) Act 2014* are not required in the context of investigations taking place in non-Commonwealth premises.

28 Explanatory memorandum, pp. 41-42.

1.29 The committee therefore requests the minister's advice as to why it is necessary and appropriate to provide a coercive power to enter non-Commonwealth premises without also providing that the framework set out at Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* applies.

1.30 The committee's consideration of this issue will be assisted if the minister's response addresses the intended scope and operation of paragraph 50(1)(b), including which non-Commonwealth premises it is envisaged may be entered by authorised officials. The committee's consideration will also be assisted if the minister outlines whether there are any non-legislative safeguards in place in relation to the use of this power.

Protection from civil and criminal liability
Reversal of the evidential burden of proof[29]

1.31 Clause 58 of the bill provides that a person is not subject to any civil, criminal or administrative liability, or subject to a contractual or other remedy, for making a disclosure that qualifies for protection under clause 57. Clause 58 also grants a person qualified privilege in proceedings for defamation in certain circumstances. Clause 57 provides protection for disclosures made to an official of the Office of the Inspector-General of Aged Care, or a disclosure made in compliance with a request, or mandated requirement, of the Inspector-General. Clause 59 provides that the protection against liability does not apply if a person knowingly made a false or misleading statement.

1.32 This provision therefore removes any common law right to bring an action to enforce legal rights, unless it can be demonstrated that the person knowingly made a false or misleading statement. The committee expects that if a bill seeks to provide immunity from civil liability this should be soundly justified. The committee expects that any such justification should outline why the limitation on individual rights is justified and would address the limited nature of the exception set out at clause 59.

1.33 In this instance, the explanatory memorandum provides no explanation for the protection from liability, merely restating the terms of the provision.[30]

1.34 Paragraph 61(1)(a) of the bill provides that if a person wants to rely on the protection afforded by clause 58 in respect of criminal proceedings, that person bears the onus of adducing or pointing to evidence that suggests a reasonable possibility that clause 58 applies to them.

1.35 This has the effect of reversing the evidential burden of proof.

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29 Paragraph 61(1)(a). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

30 See explanatory memorandum, pp. 47-49.

1.36 As noted above, reversing the evidential burden of proof is appropriate when the matter to be adduced would be peculiarly within the knowledge of the defendant, and where it would be significantly more difficult for the prosecution to establish that matter than for the defendant to establish it. In this instance, the explanatory memorandum has not justified the approach taken, merely restating the terms of the provision.[31] It appears that the relevant matters may not be peculiarly within the knowledge of the defendant, noting that it would be open to the prosecution to contact the Inspector-General's office about these matters.

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

- **why it is necessary and appropriate to provide civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations in which false or misleading conduct can be demonstrated; and**
- **why it is necessary and appropriate to reverse the evidential burden of proof in this instance.**

Protection from civil liability[32]

1.38 Clause 70 of the bill provides that a protected person is not liable to civil proceedings for loss, damage or injury of any kind suffered by another person as a result of anything done, or omitted to be done, by them in good faith. Protected persons include officials of the Office of the Inspector-General, delegates of the Inspector-General and persons performing functions on behalf of, or assisting, the Inspector-General.

1.39 As noted above, the committee expects that any protection from civil liability will be comprehensively justified in the bill's explanatory materials. In this instance, the explanatory memorandum states:

> This will enable protected persons to perform their functions and exercise their powers without being obstructed by challenges to the performance of those functions or the exercise of those powers through civil proceedings for loss, damage or injury. This clause also ensures persons who are delegates, or who are assisting in the performance of functions or powers, of the Inspector-General are protected from liability. In addition, the provision will provide immunity from civil liability for conduct that may otherwise constitute a tort (for example, damage to property). The Inspector-General and those working for or with the Office of the Inspector-

31 See explanatory memorandum, pp. 48-49.

32 Clause 70. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

> General should be able to perform their functions and exercise their powers under the Bill without fear of being sued when they act in good faith.[33]

1.40 While noting this explanation, the committee considers that it would have been more appropriate had the explanatory materials addressed the limited nature of the 'good faith' safeguard. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine 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. It would also have been appropriate to more directly address the broad class of persons upon whom the protection has been granted.

1.41 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing protected persons with civil immunity 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.

33 Explanatory memorandum, p. 53.

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

1.42 The committee notes that the following private senator's 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
Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023	Schedule 1, item 1, proposed paragraphs 81.1(3)(a), and 81.1(3)(d)	The provisions may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof.

Bills with no committee comment

1.43 The committee has no comment in relation to the following bills which were introduced into the Parliament between 6 – 9 March 2023:

- Customs Tariff Amendment (Incorporation of Proposals) Bill 2023
- Fair Work Amendment (Right to Disconnect) Bill 2023
- Inspector-General of Aged Care (Consequential and Transitional Provisions) Bill 2023
- Jobs and Skills Australia Amendment Bill 2023
- Northern Australia Infrastructure Facility Amendment (Miscellaneous Measures) Bill 2023
- Productivity Commission Amendment (Electricity Reporting) Bill 2023
- Special Recreational Vessels Amendment Bill 2023
- Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023

Commentary on amendments and explanatory materials

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

1.44 On 8 March 2023, the Minister for Communications, the Honourable Michelle Rowland MP, presented a replacement explanatory memorandum to the bill.

1.45 The committee thanks the minister for tabling a replacement explanatory memorandum, which includes key information requested by the committee.[34]

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

- Education Legislation Amendment (Startup Year and Other Measures) Bill 2023;[35]
- National Reconstruction Fund Corporation Bill 2022;[36]
- Private Health Insurance Legislation Amendment (Medical Device and Human Tissue Product List and Cost Recovery) Bill 2022;[37]
- Public Interest Disclosure Amendment (Review) Bill 2022;[38]

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34 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2022* (30 November 2022) pp. 3–6;
Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 106–109; and
Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2023* (8 March 2023) pp. 69–71.

35 On 23 March 2023, Dr Scamps moved 93 amendments to the bill. The amendments were agreed in the House.

36 On 20 March 2023, Senator Brown tabled a revised explanatory memorandum relating to the bill.

37 On 21 March 2023, the Attorney-General (the Hon Mark Dreyfus KC MP) tabled a supplementary explanatory memorandum to the bill.

38 On 21 March 2023, the Attorney-General (the Hon Mark Dreyfus KC MP) tabled a supplementary explanatory memorandum to the bill.

- Referendum (Machinery Provisions) Amendment Bill 2022;[39]
- Therapeutic Goods Amendment (2022 Measures No. 1) Bill 2022;[40] and
- Treasury Laws Amendment (2022 Measures No. 4) Bill 2022.[41]

39 On 22 March 20223, the Senate agreed to 7 Government amendments to the bill. Additionally, the Minister for Trade and Tourism (Senator Farrell) tabled two supplementary explanatory memoranda relating to the government amendments to be moved to the bill.

40 On 8 March 2023, the Minister for Health and Aged Care (the Hon Mark Butler MP) presented a supplementary explanatory memorandum to the bill.

41 On 8 March 2023, the Assistant Treasurer and Minister for Financial Services (the Hon Stephen Jones MP) presented a supplementary explanatory memorandum to the bill.

Chapter 2

Commentary on ministerial responses

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

Export Control Amendment (Streamlining Administrative Processes) Bill 2022

Purpose	This bill seeks to amend the *Export Control Act 2020* to ensure an appropriately flexible and fit-for-purpose information-sharing framework, and to improve administrative processes and clarify the intent of a provision of the Act.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 30 November 2022
Bill status	Before the Senate

Privacy

Significant matters in delegated legislation[1]

2.2 Schedule 1 to the bill seeks to set out new information disclosure requirements for the Export Control Framework. The explanatory memorandum states that the intention of Schedule 1 is to provide for specific authorisations for the use and disclosure of relevant information, while ensuring that protected information is afforded appropriate safeguards.[2] Much of the detail as to how the new information disclosure scheme would work is proposed to be set out in delegated legislation.

2.3 The committee initially scrutinised this bill in *Scrutiny Digest 1 of 2023* and requested the minister's advice.[3] The committee considered the minister's response in *Scrutiny Digest 2 of 2023* and requested the minister's further justification in relation to allowing non-Commonwealth employees to exercise broadly drafted information disclosure powers. The committee's consideration of this justification will be assisted

1 Schedule 1, item 12. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

2 Explanatory memorandum, p. 5.

3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 6–9.

if the minister outlines what safeguards are in place in relation to this aspect of the new disclosure powers, and whether those safeguards are contained in law or policy.[4]

Minister for Agriculture, Drought and Emergency Management Australia's response[5]

2.4 The Minister for Agriculture, Drought and Emergency Management Australia (the minister) advised that the new information sharing framework introduced by the bill introduces a safeguard in relation to the disclosure of personal information by explicitly listing persons who may access disclosure powers. The current information sharing provisions within the *Export Control Act 2020* (Export Act) provide that a 'person' may disclose information. However, under proposed subsection 388(2) persons who may exercise disclosure powers are now exhaustively defined.

2.5 In relation to these persons, the minister advised:

> Each of the persons identified in proposed subsection 388(2) have specific roles and responsibilities under the Act, which are necessary to facilitate trade, ensure the integrity of goods that are exported and to implement Australia's obligations under the relevant international treaties. The proper, effective and efficient performance of functions or duties, or the exercise of powers, under the Act will often involve the use or disclosure of relevant information. For this reason, it is important that these persons have the ability to use or disclose relevant information, in the course of, or for the purposes of, performing functions or duties, or exercising powers under the Act, or assisting another person to do so. It is also crucial that they are able to perform their roles or carry out their responsibilities effectively, without being subject to other statutory or common law restrictions that would prevent them from doing so.

2.6 In relation to the committee's specific concerns on the use and disclosure of information by non-Commonwealth officers, the minister provided a detailed list of legislative safeguards. For example, the minister noted:

> To the extent that a person identified in proposed subsection 388(2) is a non-Commonwealth employee, there are additional requirements that apply before the person is approved, authorised or accredited to perform such functions or duties, or to exercise powers under the Act. For example, under section 291 of the Act, the Secretary may authorise a person to be a third party authorised officer, only if specific requirements set out under the Act or prescribed by the rules are met. Similar requirements apply to the approval of auditors and assessors (see sections 273 and 281), as well as the accreditation of veterinarians (see section 312). Under section 151, the Secretary may also decide whether to approve a proposed arrangement for

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4 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2023*, (8 March 2023) pp. 25–27.

5 The minister responded to the committee's comments in a letter dated 23 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

> a nominated kind of export operations in relation to prescribed goods, which includes whether to approve a nominated export permit issuer identified in the arrangement.
>
> In addition, as these non-Commonwealth employees are regulated entities under the Act, the Secretary also has the power under the Act to vary, suspend or revoke the relevant approval, authorisation or accreditation, if the Secretary considers it appropriate to do so. For example, sections 295 to 297 of the Act allow the Secretary to vary, suspend or revoke the authorisation of third party authorised officers, while sections 165, 171 and 179 of the Act allow the Secretary to vary, suspend or revoke an approved arrangement, which includes a nominated export permit issuer identified in the arrangement. These provisions of the Act provide an important safeguard to ensure that the non-Commonwealth employees who are identified in proposed subsection 388(2), will demonstrate the skills, experience and integrity necessary to uphold the requirements of the Act, including in relation to the proposed framework in the Bill for the use and disclosure of relevant information.

2.7 The minister noted that non-Commonwealth officers should reasonably expect that the Commonwealth will take action against them should they act beyond the scope of their roles in respect of the use and disclosure of information. Including the variation, suspension or revocation of the relevant approval, authorisation or accreditation or the imposition of civil penalties.

2.8 In relation to the rule-making power set out under proposed section 397E the minister advised:

> There may be situations where it is necessary for rules to be made by the Secretary to authorise the use or disclosure of relevant information under the Act by a class of persons who are non-Commonwealth employees. This is because the future needs of the Australian agricultural export industry are vast and diverse, spanning across agricultural production, export certification and trade opportunities in a changing global environment. To this end, there may be instances where it is necessary for relevant information to be used or disclosed by non-Commonwealth employees, who are working in partnership with the Commonwealth to achieve those objectives. For example, relevant information may be obtained or generated under the Act that could assist Australian farmers to improve the quality and yield of prescribed goods for export, or to assist Australian exporters with meeting importing country requirements or trade negotiations.

2.9 The minister also advised that there is scope to limit the information disclosure powers within the rules by, for example, limiting the purposes for which information may be used or disclosed, limiting the types of information that may be used or disclosed, or providing that use or disclosure must occur under certain conditions.

Committee comment

2.10 The committee thanks the minister for this detailed response and welcomes the existence of several important safeguards within the bill.

2.11 However, the committee remains concerned that the information use and disclosure powers remain overbroad, particularly noting that non-Commonwealth officers may use such powers and that, in certain cases, it will be permissible to share personal or sensitive information. These concerns could be addressed with the inclusion of more explicit safeguards within the bill. For example, while proposed sections 388, 390 and 397D provide an important limitation by providing that the powers may only be used by entrusted persons, there are no such limitations on whom the information must be disclosed to.

2.12 In addition, the committee considers that further requirements should be introduced to guide the process a decision-maker must undertake prior to using or disclosing information. For instance, it may be appropriate to provide that the bill require entrusted persons to consider the effect on an individual's privacy prior to disclosing or using the information; that a decision-maker must take steps to assess whether the person to whom personal information is proposed to be disclosed has appropriate processes in place to protect the information; or to require the de-identification of personal information prior to disclosure. Where relevant, these safeguards should be included within rules made under proposed section 397E.

2.13 The committee welcomes the minister's advice that non-Commonwealth officers who use information disclosure powers inappropriately may have the relevant approval, authorisation or accreditation varied, revoked or suspended. However, the committee notes that there does not appear to be a clear process in place within either the bill or the Export Act to identify when these powers have been used inappropriately or to ensure a consistent response to wrongdoing. The committee recommends that such a process should be implemented. For example, by providing that an audit under section 267 of the Act must explicitly consider these matters. Further, the committee recommends that officers who are authorised to use information disclosure powers undertake relevant training, noting that this could be incorporated into existing training requirements already included within the Export Act.[6]

2.14 The committee welcomes safeguards in the *Export Control Act 2020* and the bill which protect against the inappropriate use or disclosure of personal information. However, the committee considers that it would be appropriate to amend the bill to introduce further safeguards in relation to the use of these powers, particularly where they may be used by non-Commonwealth officers.

6 For example, see subsection 291(8) of the *Export Control Act 2020* for the training and qualification requirements relevant to authorised officers.

2.15 At a minimum, the committee considers that it would be appropriate to ensure that any rules made under proposed section 397E contain appropriate safeguards and that non-legislative guidance is developed to guide the process a decision-maker must undertake prior to using or disclosing information.

2.16 The committee also recommends that a process is established to detect inappropriate use of information or disclosure powers, and that relevant decision-makers be required to undergo training on the appropriate use of such powers.

2.17 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.18 In light of the information provided, the committee makes no further comment on this matter.

Housing Australia Future Fund Bill 2023
Treasury Laws Amendment (Housing Measures No. 1) Bill 2023

Purpose	The Housing Australia Future Fund Bill 2023 seeks to establish the Housing Australia Future Fund to create a funding source to support and increase social and affordable housing, as well as other acute housing needs. The Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 seeks to amend the *National Housing Finance and Investment Corporation Act 2018* to improve the affordability and accessibility of housing for Australians.
Portfolio	Finance
Introduced	House of Representatives on 9 February 2023
Bill status	Before the Senate

Significant matters in delegated legislation
Exemption from disallowance[7]

2.19 Clause 10 of the Housing Australia Future Fund Bill 2023 (HAFF Bill) provides for the establishment of a Housing Australia Future Fund Special Account (the Special Account). Clause 13 of the HAFF Bill sets out a list of purposes for which money may be credited from the Special Account, including paying for the acquisition of financial assets, paying the expenses of an investment of the Housing Australia Future Fund, paying for the acquisition of derivatives, and paying or discharging the costs, expenses and other obligations incurred by the Future Fund Board.

2.20 Under subclause 11(1) of the HAFF Bill, $10 billion will be credited into the Special Account upon commencement of the bill. However, subclause 11(2) provides that the responsible Ministers[8] may determine additional specified amounts to be credited into the Special Account. Subclause 11(3) states that these determinations are legislative instruments but are not subject to the usual parliamentary disallowance process.

2.21 In *Scrutiny Digest 2 of 2023* the committee requested the minister's further detailed advice in relation to the exceptional circumstances that are said to justify

7 Clause 11 of the Housing Australia Future Fund Bill 2023 (HAFF Bill). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

8 Defined under clause 5 as the Treasurer and the Finance Minister.

exempting an instrument made under subclause 11(2) from the usual parliamentary disallowance process.[9]

Minister for Finance's response[10]

2.22 The Minister for Finance (the minister) advised that there is an appropriate level of parliamentary authorisation and oversight over a subclause 11(2) determination because any appropriated amount would first be required to be approved by the Parliament. The minister advised that a subclause 11(2) determination would be an administrative tool intended to manage financial arrangements related to such appropriations.

2.23 The minister also advised that subjecting a determination to potential disallowance would undermine the ability of the Future Fund Board of Guardians to invest the additional credits in suitable investments. This is because exposing a determination to potential disallowance would require the Board to provide an acceptable level of investment returns prior to the completion of the disallowance period, as the additional credits would need to be readily available to be returned should the determination be disallowed. The minister considered that this would be the case whether disallowance is likely or not, as the Board would be obliged to act in a manner that ensured that the additional credits were available to be returned at any time before the disallowance period expired.

2.24 Finally, the minister noted that the exemption is consistent with existing legislation, such as section 8 of the *Fuel Indexation (Road Funding) Special Account Act 2015*.

Committee comment

2.25 The committee thanks the minister for this response.

2.26 While the committee acknowledges that instruments made under subclause 11(2) will not directly appropriate money from the consolidated revenue fund, it is nonetheless true that these instruments will be legislative in nature. As such, the committee's position is that these instruments should be subject to an appropriate level of parliamentary scrutiny unless exceptional circumstances can be demonstrated. It is not sufficient to simply state that the instruments will deal with administrative matters without linking this to the appropriateness of exempting the instrument from disallowance. For instance, it may be relevant if an administrative decision is unlikely to affect an individual's rights, obligations or interests. In this case,

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9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2023* (8 March 2023) pp. 1–4.

10 The minister responded to the committee's comments in a letter dated 20 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

however, the large sums of money involved mean that subclause 11(2) appear to be significant despite the fact that they deal with administrative arrangements.

2.27 The committee also notes the minister's explanation that exposing a subclause 11(2) determination to the disallowance process may undermine the ability of the Future Fund Board of Guardians to invest. The committee acknowledges this point. However, the committee is concerned that the minister's response has not outlined any evidence that appropriate modifications to the disallowance process were considered to address this issue. For example, it would have been possible to provide that a subclause 11(2) determination does not come into effect until after the disallowance period has ended. Given the significance of abrogating parliamentary oversight of legislation, the committee considers that alternative methods for ensuring certainty should be considered before exempting an instrument from disallowance and that evidence of this should be included in the explanatory materials for the bill.

2.28 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the responsible Ministers with a power to make non-disallowable legislative instruments under subclause 11(2) of the bill.

Section 96 grants to the states[11]

2.29 Subclause 18(3) of the HAFF Bill provides that a designated Minister may make a grant of financial assistance to a state or territory in relation to acute housing needs, social housing or affordable housing. A grant of financial assistance may not amount to a loan,[12] and must not be made before 1 July 2023.[13] The terms and conditions on which financial assistance may be granted must be set out in a written agreement between the Commonwealth and the state or territory.[14] However, there is nothing in the bill providing guidance as to what the terms and conditions may be, nor any requirement for the written agreement to be tabled in the Parliament.

2.30 In *Scrutiny Digest 2 of 2023* the committee requested the minister's advice as to:

- how the criteria for the award of grants of financial assistance will be developed, noting that there is limited guidance on the face of the Housing

11 Subclause 18(3) of the HAFF Bill; Schedule 2, item 5, proposed subsection 8(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

12 Subclause 18(6).

13 Subclause 18(8).

14 Subclause 19(2).

Australia Future Fund Bill 2023 as to how the power to make grants is to be exercised;

- whether the HAFF Bill can be amended to include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and
- whether the HAFF Bill can be amended to include a requirement that written agreements with the states and territories for grants of financial assistance made under subclause 18(3) are:
  - tabled in the Parliament within 15 sitting days after being made; and
  - published on the internet within 30 days after being made.[15]

Minister for Finance's response[16]

2.31 The minister advised that, where appropriate, HAFF funding programs will have guidelines published on the relevant departmental website to ensure that applicants are treated equitably, and that funding recipients are selected based on merit addressing the program's objectives.

2.32 The minister advised that grant programs under the HAFF will be developed in accordance with the *Commonwealth Grant Rules and Guidelines 2017* (CGRG) and the requirements of the *Public Governance, Performance and Accountability Act 2013*.

2.33 The minister also advised that grant guidelines will be developed for all new grant opportunities and approved grants will be reported on the GrantConnect website no later than 21 days after the grant agreement takes effect. HAFF grant administration will be conducted in a manner consistent with the CGRG's principles of:

- robust planning and design;
- collaboration and partnership;
- proportionality;
- an outcomes orientation;
- achieving value with relevant money;
- governance and accountability; and
- probity and transparency.

2.34 In relation to the approach taken to the terms and conditions attaching to any grants to the states, the minister advised that this is consistent with the CGRGs. The

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2023* (8 March 2023) pp. 4–6.

16 The minister responded to the committee's comments in a letter dated 20 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

minister did not consider that an amendment was necessary to provide that these agreements be tabled, or that such an amendment would add to the effective administration of the HAFF. In this context, the minister noted that there are sufficient reporting obligations in the HAFF Bill and that, when combined with the existing requirements in existing Commonwealth legislation and frameworks, these ensure that detailed information on grants and arrangements is available to the general public.

2.35 Similarly, the minister considered the HAFF Bill includes sufficient high-level guidance on the terms and conditions for financial assistance to be granted. Where appropriate, terms and conditions will be included in grant guidelines and funding agreements with recipients, rather than placing it within the primary legislation.

2.36 The minister also advised that any disbursements from the HAFF to states and territories will be subject to the Federation Funding Agreements (FFA) Framework. The Intergovernmental Agreement on Federal Financial Relations (IGA FFR), under the FFA Framework, outlines the objectives, principles and institutional arrangements governing financial relations between the Commonwealth and state and territory governments.

2.37 The minister advised that a clause 18 written agreement will form a new Schedule under the Federation Funding Agreement (FFA) - Affordable Housing, Community Services and Other, which sets out the standard terms and conditions for funding agreements with the states and territories in these sectors. FFA schedules can be tailored to: establish milestones for initiatives; their relationship to program activities; expected completion dates; relevant reporting dates; and expected payments to be made. The parties agree to meet the milestones and/or performance benchmarks set out in the Schedule.

2.38 Finally, the minister advised that to ensure transparency, all funding agreements with state governments are published on the Federal Financial Relations website and detailed in Budget Paper 3: Federal Financial Relations, and equivalent documents in the Mid-Year Economic and Fiscal Outlook and the Final Budget Outcome.

Committee comment

2.39 The committee thanks the minister for this response.

2.40 The committee notes the minister's advice in relation to the reporting requirements that apply to grants to the states under clause 18 and the guidelines that will direct the administration of such grants. The committee welcomes these measures.

2.41 The committee also welcomes the minister's advice that the terms and conditions attaching to clause 18 grants will be based on the standard terms and conditions within the Federation Funding Agreement.

2.42 However, while welcoming this advice, the committee remains concerned that written agreements with the states will not be required to be tabled in the Parliament. The committee also remains concerned that there are no explicit requirements within the bill setting out what the terms and conditions of a grant may be.

2.43 The minister has advised that they do not consider that additional tabling requirements would assist with the administration of the HAFF. While acknowledging this advice, the committee notes that its scrutiny concerns relate specifically to the appropriateness of delegating to the executive Parliament's constitutional power to provide grants to the states, in circumstances in which there is little information as to the terms and conditions of those grants within the primary legislation. While relevant, it is not sufficient to note that the administrative arrangements for the HAFF are appropriate.

2.44 The committee further notes that the process of tabling documents in the Parliament provides opportunities for debate that are otherwise not available if the documents are merely available online and is therefore an important element of parliamentary scrutiny and oversight. Appropriate parliamentary scrutiny over grants agreements contributes to the maintenance of the Parliament's role under section 96 of the Constitution.

2.45 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring a broad power to make grants to the states in circumstances where there is no guidance in the bill as to the terms and conditions on which grants may be made, and no requirement to table written agreements with the states containing those terms and conditions in the Parliament.

Exemption from disallowance[17]

1.17 Subclause 41(1) of the HAFF Bill provides that the responsible Ministers may give the Future Fund Board written directions about the performance of its Housing Australia Future Fund investment functions. These directions are to be collectively known as the Housing Australia Future Fund Investment Mandate (the Investment Mandate).[18] These directions are legislative instruments, but a note under clause 41 clarifies that the directions are not subject to disallowance or sunsetting due to the operation of the Legislation (Exemptions and Other Matters) Regulation 2015.

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17 Clause 41. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

18 Subclause 41(3).

1.18 A similar power is set out at section 12 of the *National Housing Finance and Investment Corporation Act 2018* (NHFIC Act). Instruments made under section 12 of the NHFIC Act are also exempt from disallowance.

2.46 In *Scrutiny Digest 2 of 2023* the committee requested the minister's further detailed advice in relation to the exceptional circumstances that are said to justify exempting an Investment Mandate from the usual parliamentary disallowance process.[19]

Minister for Finance's response[20]

2.47 The minister advised that, similar to the other long-term Commonwealth investment funds (including the Future Fund, the Medical Research Future Fund, the Future Drought Fund, and the Disaster Ready Fund), it is expected that the investment mandate will set a long-term target rate of return. In these cases, it is envisaged that investment mandates would only be reissued if there was a significant change in government policy or a structural change in the investment landscape.

2.48 The minister noted that, in setting the investment mandates for the different investment funds, responsible Ministers would need to ensure that:

- targeted returns are consistent with the policy intent (including consideration of the intended cash flows from the fund and growth of the underlying capital);
- resultant risks are aligned with the targeted returns, are reasonable and within tolerances; and
- the mandate is informed by appropriate and expert advice and set with regard to current and expected economic and financial market conditions.

2.49 The minister also noted that exempting investment mandates from disallowance is consistent with the long-standing and established operational arrangements for other funds currently managed by the Board. The minister additionally noted that such directions are part of a class of instruments that are routinely exempt under item 2 of the table at section 9 of the Legislation (Exemption and other Matters) Regulation 2015.

2.50 The minister advised that the bill provides for appropriate parliamentary and public scrutiny over investment mandates because investment mandates are a legislative instrument, because they are subject to mandatory consultation requirements with the Board and because any submission subsequently received from the Board must be tabled in both Houses of the Parliament. Finally, the minister

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19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2023* (8 March 2023) pp. 6–7.

20 The minister responded to the committee's comments in a letter dated 20 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

advised that the process for setting non-disallowable investment mandates provides the Board with an appropriate level of operational certainty in managing their investments over the long term, while also allowing the government to issue updated directions to the Board when appropriate.

Committee comment

2.51 The committee thanks the minister for this response.

2.52 While the committee acknowledges that ministerial directions are routinely exempt from disallowance under the Legislation (Exemption and other Matters) Regulation 2015, the committee does not consider that this is a sufficient justification for exempting an instrument from disallowance. Rather, each exemption must be individually justified based on the specific circumstances of the case at hand. To this end, the committee notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has expressed particular concern about broad classes of exemptions from disallowance based exclusively on the form of the relevant instrument,[21] emphasising that 'any exclusion from parliamentary oversight…requires that the grounds for exclusion be justified in individual cases, not merely stated'.[22]

2.53 Neither is it a sufficient justification to state that appropriate parliamentary scrutiny is provided because investment mandates are legislative instruments. Scrutiny concerns stem from exactly this point, given that exempting an instrument from disallowance has the effect of removing parliamentary oversight over its constitutionally enshrined legislative function. That is, the default scrutiny position is that the Parliament should have oversight over all instruments of a legislative character, unless exceptional circumstances can be demonstrated.

2.54 Further, while consultation requirements and tabling requirements are welcome, such arrangements are not enough, of themselves, to justify removing parliamentary oversight over a Commonwealth law.

2.55 Finally, the committee reiterates that it has not considered a desire for certainty to be a sufficient justification for exempting an instrument from disallowance. The minister's response has not adequately explained why this general principle would not apply in this case. It also remains unclear why there would be a need for urgency,[23] given that it appears there is sufficient time to draft the first mandate.

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21 See, for example, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 5 of 2022* (7 September 2022) p. 103.

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

23 As stated in the explanatory memorandum, see page 30.

2.56 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the Ministers with a power to make non-disallowable Investment Mandates under subclause 41 of the bill.

Tabling of documents in Parliament[24]

2.57 Subclause 44(2) provides that any submission made by the Future Fund Board on a draft direction must be tabled in each House of the Parliament along with the direction. The committee notes that no timeframe is specified setting out when the minister must table the submission after they receive it.

2.58 In *Scrutiny Digest 2 of 2023* the committee requested the minister's advice as to whether the bill could be amended to provide that a submission made by the Future Fund Board in accordance with paragraph 44(1)(b) must be tabled in both Houses of the Parliament within an explicitly stated timeline, for example, within 15 sitting days of the minister receiving a submission.[25]

Minister for Finance's response[26]

2.59 The minister advised that any submissions received from the Future Fund Board of Guardians (the Board) under paragraph 44(1)(b) would be considered by the government at the time of settling the investment mandate direction. The minister considered that it is therefore appropriate to table the Board's submission at the same time as the investment mandate direction itself, noting that this would also allow members and senators to review the direction and any submission of the Board together. On this basis, the minister did not consider that the bill would be improved by requiring the Board's submission to be tabled within a set timeframe.

Committee comment

2.60 The committee thanks the minister for this response.

2.61 In light of the information provided by the minister, the committee makes no further comment on this matter.

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24 Subclause 44(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2023* (8 March 2023) pp. 7–8.

26 The minister responded to the committee's comments in a letter dated 20 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Bill 2023

Purpose	This bill seeks to amend the *Migration Act 1958* to allow the minister to implement a visa pre-application process, involving random selection of eligible persons who will then be permitted to apply for a relevant visa.
Portfolio	Home Affairs
Introduced	House of Representatives on 16 February 2023
Bill status	Before the Senate

Significant matters in delegated legislation

Automated decision-making[27]

2.62 The bill proposes to establish a new framework for a visa pre-application process. However, much of the detail of this framework is left to delegated legislation.

2.63 In *Scrutiny Digest 2 of 2023* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to include much of the detail of the operation and requirements of a visa pre-application process in delegated legislation;
- what safeguards are in place, if any, to ensure that automated decisions will be made appropriately and not subject to legal error;
- whether the bill can be amended to include specific safeguards that ensure the transparency and integrity of any automated system used; and
- why it is considered necessary to provide for such a general power to create visa pre-application processes in relation to any category of visa.[28]

27 Schedule 1, item 3, proposed section 46C and subsection 46C(11). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii) and (iv).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2023* (8 March 2023), pp. 14–17.

Minister for Home Affair's response[29]

2.64 The Minister for Home Affairs (minister) advised that it is necessary and appropriate to include the detail of the operation and requirements of a visa pre-application process in delegated legislation because of the requirement for flexibility. As the visa pre-application process in the form of a ballot will be a novel methodology, the minister considers that it would be inappropriate to lock down the detailed eligibility requirements or procedures surrounding the ballot within the *Migration Act 1958* (Migration Act).

2.65 The minister further advised that the migration system needs to be adaptable and responsive to economic changes and the policies of the Australian Government of the day, with adaptation and response occurring as quickly as possible. The minister advised that primary legislation is not suitable for this purpose.

2.66 The minister outlined that the use of regulations to prescribe criteria for an application for classes of visa is consistent with the structure of the Migration Act. The minister considered that this does not present a loss of accountability to the Parliament as the ministerial determinations are subject to disallowance.

2.67 In relation to the existence of safeguards to ensure automated decisions will be made appropriately and not subject to legal error, the minister advised that there does not appear to be any risk of legal error in the process of automation as the eligibility requirements, which will be few in number, are required to be objective (for example age and passport held) and the process of random selection will involve a simple algorithm. As such, it does not appear necessary to provide for legislative safeguards to ensure appropriate decision-making or to avoid legal error.

2.68 In relation to the existence of safeguards to ensure transparency and integrity of any automated system used, the minister advised that the use of an automated process to conduct the random selections is itself an assurance of transparency and integrity, in that it eliminates manual intervention in the process. The operation of the computer system will be subject to standard quality assurance processes within the Department of Home Affairs and the Department's operations are subject to review by the Australian National Audit Office.

2.69 In relation to why it is considered necessary to provide for a general power to create a visa pre-application process in relation to any category of visa, the minister advised that the use of a ballot is an accepted part of immigration systems around the world including the United States and New Zealand, and the methodology has potential for use in visas where the number of eligible applications greatly exceeds the number of places available under the visa program. Any ballot created will be subject

29 The minister responded to the committee's comments in a letter dated 23 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

to necessary, disallowable future amendments to the Migration Regulations 1994 (Migration Regulations). The minister listed a number of benefits of a ballot to select eligible visa applications. These are outlined in page 3 of the explanatory memorandum to the bill.

Committee comment

2.70 The committee thanks the minister for this response.

2.71 The committee notes the minister's advice that delegated legislation is appropriate and necessary to establish the visa pre-application process because flexibility is required, particularly given this is a new process, and the Parliament can still consider the instruments as they are subject to disallowance.

2.72 However, the committee does not consider the need for flexibility and the need for responsiveness to be an appropriate reason to include significant matters in delegated legislation in this context. On the contrary, the committee considers it is particularly important for new legislative schemes to be included within primary legislation to ensure adequate oversight and scrutiny over the proposed scheme. While the Parliament retains the ability to disallow instruments, a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill and may considerably limit the ability of the Parliament to exercise appropriate oversight over the new visa pre-application process.

2.73 The committee further does not consider that because the Migration Act and Migration Regulations provide for the making of delegated legislation to determine eligibility requirements for visas that this is how the visa pre-application scheme *must* be made, particularly given this is a new process which is proposed to be introduced for any class of visa.

2.74 The committee notes the minister's advice that further safeguards are not considered necessary as there does not appear to be a risk of legal error as the decisions are non-discretionary, limited to few factors and will involve a simple algorithm. The committee further notes the minister's advice that the use of an automated system in itself provides for transparency and integrity of the decision-making process and is subject to internal quality assurance.

2.75 The committee, however, reiterates that while the risk of legal error may be low where automated non-discretionary decisions are being made, there may be errors or unintended effects within the computerised system itself. Safeguards are necessary to ensure that these risks are minimised and protected against, for example a requirement that a person may substitute a decision made by an automated process that they consider on reasonable grounds to have been made incorrectly. These safeguards should be included within the bill itself rather than relying on delegated legislation.

2.76 In *Scrutiny Digest 2 of 2023*, the committee provided some examples of safeguards that could be included within the bill, for example:

- ensuring publicly available information about the use and operation of the automated system;
- allowing a departmental officer to review data inputted to ensure any mistakes made by an individual do not preclude them from eligibility; and
- ongoing monitoring and evaluation of the computer system to ensure it is operating as intended.[30]

2.77 The committee considers that any future review of the operation of this scheme, or the establishment of a similar scheme, should consider the inclusion of appropriate safeguards within primary legislation to ensure the appropriateness, transparency and integrity of the scheme, and particularly the use of automated systems.

2.78 The committee considers that delegated legislation, and non-legislative guidance, made in relation to the visa pre-application process should include appropriate safeguards, including to ensure oversight over automated decisions. Any future review of the operation of the scheme should consider the inclusion of these safeguards within primary legislation.

2.79 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including significant matters within delegated legislation, in this case a new visa pre-application process with broad application to any category of visa in circumstances where few safeguards relating to the oversight of the process have been included within the bill.

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

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2023* (8 March 2023), pp. 16–17.

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

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

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.