



Senate Standing

Committee for the Scrutiny of Bills

---

Scrutiny Digest 11 of 2023

13 September 2023

© Commonwealth of Australia 2023

ISSN 2207-2004 (print)

ISSN 2207-2012 (online)

PO Box 6100  
Parliament House  
Canberra ACT 2600

Phone: 02 6277 3050

Email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)

Website: [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny)

This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2023*; [2023] AUSStaCSBSD 173.

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

Fattimah Imtoul, Secretary (A/g)  
Hannah Wilkins, Principal Research Officer  
Stephanie Lum, Senior Research Officer  
Nidhi Venkatesan, Senior Research Officer  
Mia Pafumi, Legislative Research Officer (A/g)

## Committee legal adviser

Professor Leighton McDonald



# Contents

<b>Membership of the committee .....</b>	<b>v</b>
<b>Committee information .....</b>	<b>1</b>
<b>Chapter 1 : Initial scrutiny .....</b>	<b>3</b>
Social Security Amendment (Australian Government Disaster Recovery Payment) Bill 2023 .....	3
<b>Private senators' and members' bills that may raise scrutiny concerns .....</b>	<b>6</b>
<b>Bills with no committee comment.....</b>	<b>7</b>
<b>Commentary on amendments and explanatory materials .....</b>	<b>8</b>
Customs Legislation Amendment (Controlled Trials and Other Measures) Bill 2022 .....	8
Export Control Amendment (Streamlining Administrative Processes) Bill 2022...	8
Crimes and Other Legislation Amendment (Omnibus) Bill 2023 .....	8
<b>Chapter 2 : Commentary on ministerial responses .....</b>	<b>10</b>
<b>Chapter 3 : Scrutiny of standing appropriations .....</b>	<b>11</b>



## Committee information

### 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 nonpartisan 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, standing order 24 enables senators to ask in the Senate Chamber, the responsible minister, for an explanation as to 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.

### Social Security Amendment (Australian Government Disaster Recovery Payment) Bill 2023<sup>1</sup>

<b>Purpose</b>	The Social Security Amendment (Australian Government Disaster Recovery Payment) Bill 2023 amends the <i>Social Security Act 1991</i> to provide greater certainty in supporting automation processes and ensure the timely payment of claims for the Australian Government Disaster Recovery Payment in the 2023/24 High Risk Weather Season and beyond.
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of Representatives on 6 September 2023
<b>Bill status</b>	Before the House of Representatives

#### Instruments not subject to an appropriate level of parliamentary oversight<sup>2</sup>

1.2 Item 2 of Schedule 1 to the bill seeks to insert proposed subparagraph 1061K(1)(b)(v) into the *Social Security Act 1991* (the Act), which will have the effect of requiring anyone who is eligible for an Australian Government Disaster Recovery Payment ('AGDRP') to be covered by a determination made under proposed subsection 1061K(3A). Item 3 of Schedule 1 seeks to insert proposed subsection 1061K(3A), which allows the minister to determine, by notifiable instrument, that a person is eligible for an AGDRP if they:

- have been in Australia for a specified period, ending on the day a major disaster is determined under the Act; and
- are an Australian citizen, permanent visa holder or a protected special category visa holder.

1.3 As instruments made under proposed subsection 1061K(3A) are specified to be notifiable instruments, they are not subject to the tabling, disallowance or

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Social Security Amendment (Australian Government Disaster Recovery Payment) Bill 2023, *Scrutiny Digest 11 of 2023*; [2023] AUSStaCSBSD 174.

<sup>2</sup> Schedule 1, item 3, proposed subsection 1061K(3A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

sunsetting requirements that apply to legislative instruments. As such, there is no parliamentary scrutiny of notifiable instruments. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why instruments made under proposed subsection 1061K(3A) are not legislative in character.

1.4 In this instance, the committee notes that the explanatory memorandum provides the following justification relating to the content of the instruments:

An instrument made under new subsection 1061K(3A) is administrative in nature as it gives content to the law, rather than prescribes a substantive exemption from the requirements of the Legislation Act.

...

In the same way the Minister may determine that an event is a major disaster in a non-legislative instrument at section 36 of the Act, the Minister may also appropriately determine the specific time period to apply to new qualification criteria for AGDRP. The determinations made for these purposes are non-legislative in nature in that they provide operational detail on how the relevant law is to be applied.<sup>3</sup>

1.5 However, it is unclear to the committee that the content of an instrument under proposed subsection 1061K(3A) is administrative, rather than legislative in character. The committee first notes the instruments will determine the circumstances in which a person will have an entitlement to an AGDRP following the occurrence of a major disaster. The committee therefore considers that these instruments have the potential to directly or indirectly affect privileges or interests or create a right.<sup>4</sup> In addition, the provision of the notifiable instrument which sets the time a person must be in Australia before they are entitled to a benefit appears to alter the content of the law and has the effect of affecting an interest, falling within the definition of 'legislative' in the *Legislation Act 2003* (Legislation Act). The committee also notes that subsection 8(4) of the Legislation Act does not preclude the minister from prescribing these matters be set out in legislative instruments.

1.6 The committee has previously commented on the use of notifiable instruments in the context of the Act. In *Scrutiny Digest 11 of 2021*<sup>5</sup>, the committee noted that the technical nature of an instrument is not sufficient in and of itself for providing that an instrument will be notifiable, rather than legislative.

1.7 While acknowledging the justification in the explanatory memorandum, the committee reiterates its longstanding concerns regarding the inappropriate use of notifiable instruments. As noted above, notifiable instruments are not subject to

---

<sup>3</sup> Explanatory memorandum, paragraphs [11] and [13].

<sup>4</sup> Legislation Act 2003, paragraph 8(4)(b).

<sup>5</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2021* (16 June 2021), pp. 43–44.

parliamentary oversight and processes such as tabling, disallowance and sunseting. The committee considers that instruments made under proposed subsection 1061K(3A) are more appropriately classified as legislative instruments given they appear to affect the content of the law and individuals' interests.

**1.8 The committee requests the minister's detailed advice as to:**

- **why it is considered appropriate that instruments made under proposed subsection 1061K(3A) are notifiable instruments; and**
- **whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

## Private senators' and members' bills that may raise scrutiny concerns<sup>6</sup>

The committee notes that the following private senators' and members' bills may raise scrutiny concerns under Senate standing order 24. Should these bills proceed to further stages of debate, the committee may request further information from the bills' proponents.

Bill	Relevant provisions	Potential scrutiny concerns
<b>Electoral Legislation Amendment (Fairer Contracts and Grants) Bill 2023</b>	Schedule 1, item 6, proposed subsection 302L(3)	The provisions may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to significant penalties.

---

<sup>6</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 11 of 2023*; [2023] AUSStaCSBSD 175.

---

## **Bills with no committee comment<sup>7</sup>**

The committee has no comment in relation to the following bills:

- Commonwealth Electoral Amendment (Lowering the Donation Disclosure Threshold) Bill 2023
- Commonwealth Electoral Amendment (Real Time Disclosure of Political Donations) Bill 2023
- National Housing Finance and Investment Corporation Amendment (Unlocking Regional Housing) Bill 2023
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Domestic Reserve) Bill 2023
- Royal Commissions Amendment (Private Sessions) Bill 2023
- Statutory Declarations Amendment Bill 2023

---

<sup>7</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 11 of 2023*; [2023] AUSStaCSBSD 176.

## Commentary on amendments and explanatory materials<sup>8</sup>

### Customs Legislation Amendment (Controlled Trials and Other Measures) Bill 2022

1.9 On 4 September 2023, the Minister for Home Affairs, (the Hon. Clare O’Neil MP) circulated an addendum to the explanatory memorandum to the bill.

**1.10 The committee thanks the minister for providing an addendum to the explanatory memorandum, which includes key information requested by the committee in relation to significant matters in delegated legislation.<sup>9</sup>**

---

### Export Control Amendment (Streamlining Administrative Processes) Bill 2022

1.11 On 4 September 2023, the Minister for Agriculture, Fisheries and Forestry, (Senator the Hon. Murray Watt) circulated an addendum to the explanatory memorandum to the bill.

**1.12 The committee thanks the minister for providing an addendum to the explanatory memorandum, which includes key information requested by the committee in relation to privacy.<sup>10</sup>**

---

### Crimes and Other Legislation Amendment (Omnibus) Bill 2023

1.13 On 4 September 2023, six Government amendments were made to the bill. On the same day, the Attorney-General (the Hon. Mark Dreyfus KC MP) circulated an addendum to the explanatory memorandum to the bill as well as a supplementary explanatory memorandum.

**1.14 The committee welcomes the Senate amendments to the bill, which address the committee's concerns in relation to the definition of the term assistant**

---

<sup>8</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 11 of 2023*; [2023] AUSStaCSBSD 177.

<sup>9</sup> Senate Standing Committee for the Scrutiny of Bills, *Digest 1 of 2023* (8 February 2023) pp. 1–3; Senate Standing Committee for the Scrutiny of Bills, *Digest 5 of 2023* (10 May 2023) pp. 51–53.

<sup>10</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 6–9; Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2023*, (8 March 2023) pp. 25–27; Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2023*, (30 March 2023) pp. 20–21.

**commissioner, broad discretionary powers and the availability of independent merits review.**<sup>11</sup>

---

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

- Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023
  - On 6 September 2023, the Attorney-General (the Hon Mark Dreyfus KC MP) circulated a supplementary explanatory memorandum to the bill.

---

<sup>11</sup> Senate Standing Committee for the Scrutiny of Bills, *Digest 5 of 2023* (10 May 2023) pp. 17–18, Senate Standing Committee for the Scrutiny of Bills, *Digest 6 of 2023* (14 June 2023) pp. 46–48.

## **Chapter 2**

### **Commentary on ministerial responses**

- 2.1 This chapter considers the responses of ministers to matters previously raised by the committee.
- 2.2 In this Digest, the committee is not commenting on any ministerial responses.



## Chapter 3

### Scrutiny of standing appropriations<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

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**

---

<sup>12</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 11 of 2023*; [2023] AUSStaCSBSD 178.

<sup>13</sup> 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*.

<sup>14</sup> For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).