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Committee for the Scrutiny of Bills

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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.

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[1] This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report Snapshot, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 189.

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.

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024[2]

Purpose	The bill seeks to reform Australia's anti-money laundering and counter-terrorism financing regime through amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act), and the repealing of the *Financial Transaction Reports Act 1988* (FTR Act). Schedule 1 seeks to replace Part 7 of the AML/CTF Act with outcomes-focused obligations for reporting entities. Schedule 2 seeks to update procedures relating to customer due diligence for reporting entities. Schedule 3 seeks to expand the AML/CTF regime to additional high-risk services such as real estate, professional services and dealers of precious metals and stones. Schedule 4 seeks to institute changes regarding legal professional privilege. Schedule 5 seeks to introduce new offences for 'tipping off' and provides for delegated legislation to determine which Commonwealth agencies, authorities, bodies and organisations are able to disclose Australian Transaction Reports and Analysis Centre (AUSTRAC) information to foreign governments and agencies. Schedule 6 seeks to extend the AML/CTF regime to virtual asset-related services, and in doing so, amends and inserts new definitions related to virtual assets.

[2] This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 190.

	Schedule 7 seeks to repeal and substitute a new description of a 'bearer negotiable instrument'. Schedule 8 seeks to reform frameworks which set out electronic fund transfer instructions and internation funds transfer instructions as well as the reporting requirements for these services. Schedule 9 seeks to provide new powers for AUSTRAC, primarily an examination power which allows the AUSTRAC CEO to require an individual produce documents to AUSTRAC or appear before an examiner on oath or affirmation and answer questions. Schedule 10 seeks to move exemptions from the AML/CTF Rules into the AML/CTF Act, while also amending exemption thresholds for various bodies. Schedule 11 seeks to repeal the FTR Act. Schedule 12 would provide for the making of transitional rules under the bill such as allowing the Attorney-General to make rules concerning any amendment introduced by the bill for up to four years after the bill's commencement.
Portfolio	Attorney-General
Introduced	House of Representatives on 11 September 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation[3]

1.2 Currently, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) provides that the heads of specified Commonwealth, State or Territory agencies, authorities, bodies and organisations are authorised to disclose AUSTRAC information to foreign governments and agencies.[4] AUSTRAC information includes financial reports and information relevant to anti-money laundering and counter-terrorism financing and financial intelligence.[5] This bill seeks to replace the

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3 Schedule 5, items 4 and 5, section 127 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

4 Schedule 5, items 4 to 6.

5 Definition of 'AUSTRAC information; in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* means information obtained by AUSTRAC entrusted persons under or for the purposes of that Act, another law, from a government body or information under the *Financial Transaction Reports Act 1988*.

existing limited list with a power for the Commonwealth, State or Territory agency to be prescribed by the rules.[6]

1.3 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. A legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.4 In relation to this the explanatory memorandum explains:

> Item 5 repeals the list of agencies, authorities, bodies or organisations of the Commonwealth authorised to disclose AUSTRAC information to the government of a foreign country, or to a foreign agency under subsection 127(3). This list is intended to be moved into the AML/CTF Rules when they are remade. Moving the list of agencies to the AML/CTF Rules would enable a greater degree of flexibility and would ensure this provision does not easily become outdated and require legislative amendment to correct.[7]

1.5 Allowing the rules to designate the Commonwealth, State and Territory entities which can disclose AUSTRAC information to foreign governments is a significant delegation of legislative power over matters that are more appropriate for Parliament to consider. While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. Noting that these matters are being removed from their existing status in primary law, the committee expects that a stronger justification should have been provided.

1.6 Further, it is unclear to the committee why flexibility may be needed in this instance given the list of Commonwealth, State and Territory agencies who can disclose such information is necessarily limited and not liable to frequent change. This issue has not been sufficiently explored in the explanatory materials.

1.7 In light of the above, the committee requests the Attorney-General's detailed advice as to why it is considered necessary and appropriate to leave the designation of Commonwealth, State and Territory entities who can disclose AUSTRAC information to foreign governments to delegated legislation.

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6 See Schedule 5, items 4 to 6.

7 Explanatory memorandum, p. 104.

Abrogation of privilege against self-incrimination[8]

1.8 The AML/CTF Act currently provides that an authorised officer may require a person to give information or documents relevant to the operation of the AML/CTF Act, regulations or rules.[9] Section 169 also provides that a person is not excused from giving that information or producing a document on the grounds that it might tend to incriminate them.[10] However, subsection 169(2) provides that the information or document is not admissible in evidence against the person in most civil or criminal proceedings (this provides a 'use' immunity). However, it then excludes certain proceedings, meaning the information or documents can be used against the person in those specified proceedings. This bill seeks to expand the proceedings that are excluded, in which case no use immunity would apply.[11] This is in relation to proceedings for an offence against a provision covered by the definitions of money laundering, the financing of terrorism, and proliferation financing in section 5 of the AML/CTF Act.

1.9 In addition, proposed section 172K of the bill provides that it would not be a reasonable excuse for an individual to refuse or fail to answer a question, produce a document or sign a record under new provisions in the bill on the grounds that doing so may incriminate them. However, the information would not be admissible in evidence against the individual in civil or criminal proceedings or in a proceeding for the imposition of a penalty other than in respect of making a false statement.[12] This provides a use immunity.

1.10 These provisions therefore override (or expand the existing overriding of) the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate them.[13]

1.11 The committee recognises there may be certain circumstances in which the privilege can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. The committee considers that any justification for abrogating the privilege against self-incrimination

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8 Schedule 9, item 5, proposed section 172K and item 17, proposed subparagraphs 169(2)(d)(iii), (iv) and (v) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

9 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, section 167.

10 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, section 169.

11 Schedule 9, item 17, proposed subparagraphs 169(2)(d)(iii), (iv) and (v).

12 Proposed subsection 172K(3).

13 *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

will be more likely to be considered appropriate if accompanied by both a 'use immunity' and a 'derivative use immunity'. A use immunity provides that information or documents produced are not admissible in evidence in most proceedings. By contrast, a derivative use immunity provides that anything obtained as a direct, or indirect, consequence of the information or documents is not admissible in most proceedings. The committee will also consider the extent to which safeguards to protect individual rights and liberties, such as a use or a derivative use immunity, are included within the bill.

1.12 In relation to the expansion of subsection 169(2) the explanatory memorandum states:

> This expansion of the abrogation of the privilege against self-incrimination is proportionate and reasonable, as it balances the rights and interests of the individual with benefits to the public that arise from the investigation and prosecution of serious criminal offences such as money laundering and the financing of terrorism. Further, the abrogation is no more than necessary to ensure AUSTRAC's effectiveness in monitoring and ensuring compliance with the AML/CTF Act, the AML/CTF Rules and the regulations.[14]

1.13 The committee notes with concern that in this instance these amendments mean that neither use nor derivative use immunity has been provided. It is unclear to the committee why the explanatory materials state that the abrogation is 'no more than necessary' given these important safeguards have not been provided for. It is also not clear why it is necessary to remove all immunities in relation to criminal proceedings relating to offence against a provision covered by the definitions of money laundering, the financing of terrorism, and proliferation financing.

1.14 Further, in relation to proposed section 172K the explanatory memorandum states:

> If the criteria at subsection 172K(2) are met, subsection 172K(3) provides that the statement or the fact that the individual has signed the record of the examination is not admissible in evidence against the person other than in a proceeding relating to the falsity of the statement or the falsity of any statement contained in a signed record of the examination.
>
> The Guide to Framing Commonwealth Offences indicates that where a law excludes the privilege against self-incrimination as in section 172K, it is 'usual to include a use immunity or a derivative use immunity provision'. The Guide explains that the rationale for this protection is that 'removing the privilege against self-incrimination represents a significant loss of personal liberty for an individual who is forced to give evidence that would tend to incriminate him or herself'.[15]

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14 Explanatory memorandum, p. 153.

15 Explanatory memorandum, pp. 143-4.

1.15 It is clear to the committee that a use immunity has been provided for in proposed subsection 172K(3). However, it does not appear that a derivative use immunity, preventing anything obtained as an indirect, consequence of the information or documents provided from being admitted in proceedings, has been provided. The committee considers that the information set out in the explanatory memorandum does not provide a justification for not including a derivative use immunity.

1.16 The committee requests the Attorney-General's advice as to:

- **why it is necessary and appropriate to expand the abrogation of the privilege against self-incrimination in relation to all offences against a provision covered by the definitions of money laundering, the financing of terrorism, and proliferation financing;**
- **why is it necessary and appropriate not to provide for any use or derivative use immunity in this context; and**
- **why no derivative use immunity has been provided in proposed section 172K.**

1.17 The committee's consideration of the appropriateness of this response will be assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[16]

Reversal of the evidential burden of proof
Significant matters in delegated legislation[17]

1.18 The bill proposes inserting a new offence of 'tipping off' into the AML/CTF Act for specified persons,[18] such as reporting entities and their employees who disclose specified information[19] to a person other than an AUSTRAC entrusted person, where the disclosure would or could reasonably be expected to prejudice an investigation of a Commonwealth offence or one being undertaken under the *Proceeds of Crime Act 2002* or equivalent State and Territory laws.[20]

1.19 There are two exceptions to this offence. The first is where a person is a reporting entity or an officer, employee or agent of a reporting entity who is a lawyer, an accountant, or a person specified in the rules, and the information relates to a

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16 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 86–88.

17 Schedule 5, item 2, proposed subsections 123(4) and (5) of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

18 Proposed paragraph 123(1)(a).

19 Proposed subsection 123(2).

20 Proposed paragraph 123(1)(d).

customer of that entity.[21] The information must be disclosed in good faith for the purpose of dissuading the customer from engaging in conduct that does or may constitute an offence.[22] The second exception is where the disclosure is made to another reporting entity for the purposes of detecting, deterring or disrupting money laundering, the financing of terrorism, proliferation financing or other serious crimes and the conditions prescribed in the regulations are met.[23] The evidential burden of proof is reversed for each of these offence-specific exceptions due to the operation of the Criminal Code.

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

1.21 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers* which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[24]

1.22 The committee notes in this instance that the exceptions require evidence of the reason a defendant has made a disclosure, which is likely to be a matter that is peculiarly within a defendant's knowledge. However, the explanatory memorandum does not provide any justification as to why it is appropriate to reverse the evidential burden of proof in this context.

1.23 In addition, the explanatory memorandum should have addressed why elements relevant to the exceptions, such as whether a person is a person specified in the rules or the conditions prescribed by regulations are met, are appropriate to be left to delegated legislation. The committee's expectation is that offence provisions are limited to primary law and including matters relevant to the exceptions in delegated legislation should have been justified in the explanatory materials.

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21 Proposed paragraphs 123(4)(a) and (b).

22 Proposed paragraph 123(4)(c).

23 Proposed subsection 123(5).

24 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, p. 48.

1.24 The committee considers that where a provision reverses the burden of proof the explanatory memorandum should explicitly address relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[25]

1.25 The committee requests that an addendum to the explanatory memorandum containing a justification of these reverse burden provisions 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.[26]

Strict liability offences[27]

1.26 The bill provides that persons required to appear for examination in accordance with a notice given under the bill may be required by the examiner to take an oath or give an affirmation that the statements made will be true.[28] The bill proposed that this be an offence of strict liability to fail to comply with these requirements, which would carry a sentence of up to three months imprisonment.[29]

1.27 Under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so. As the imposition of strict liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[30] The committee notes in particular that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered

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25 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, p. 48.

26 See section 15AB of the Acts Interpretation Act 1901.

27 Schedule 9, item 5, proposed section 172C of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

28 Schedule 9, item 5, proposed subsections 172C(1) and (2).

29 Schedule 9, item 5, proposed subsection 172(3).

30 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 24–26.

appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[31]

1.28 In relation to this the explanatory memorandum states:

> The strict liability offence in subsection 172C(3) is appropriate as the information that would be obtained through an examination will be critical to AUSTRAC's ability to monitor compliance with the AML/CTF Act, the AML/CTF Rules or the regulations. In turn, this information will assist AUSTRAC in detecting, deterring and disrupting money laundering, the financing of terrorism, and other serious offences. The penalty is sufficient enough as a deterrent to potential conduct that may undermine the exercise of the power, and falls well below the threshold for strict liability offences under the Guide to Framing Commonwealth Offences.[32]

1.29 It is unclear to the committee why the explanatory memorandum argues that the penalty in this instance is below the threshold in the Guide to Framing Commonwealth Offences, as three months imprisonment is a considerably higher penalty than 60 penalty units, and is not consistent with the requirement that offences subject to strict liability are not punishable by imprisonment. Further, the explanatory memorandum has not provided any justification as to why this particular offence is appropriate for strict liability, including why it is necessary and appropriate to remove the fault element.

1.30 The committee requests a detailed justification from the Attorney-General for the proposed strict liability offence in section 172C of the bill with reference to the principles set out in the *Guide to Framing Commonwealth Offences*, and in particular why it is considered necessary and appropriate to impose a period of imprisonment in relation to a strict liability offence.

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31 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, p. 25.

32 Explanatory memorandum, p. 140.

Criminal Code Amendment (Hate Crimes) Bill 2024[33]

Purpose	The bill seeks to amend the *Criminal Code Act 1995* (the Criminal Code) by restructuring offences related to urging or threatening violence by replacing 'intent' with 'recklessness' so to lower the threshold of prosecution. At the same time, the bill introduces new offences for threatening force or violence against groups or members of a group while expanding the definition of those groups to gender and disability-based identities. Finally, the bill removes the good faith defence for urging or threatening violence in relation to these offences.
Portfolio	Attorney-General
Introduced	House of Representatives on 12 September 2024
Bill status	Before the House of Representatives

Undue trespass on rights and liberties[34]

1.31 The bill seeks to amend two existing offences in the Criminal Code[35] that make it an offence to urge violence against groups or members of groups with specified attributes. Currently it is an offence to target a group or member of a group as 'distinguished by race, religion, nationality, national or ethnic origin or political opinion'. This bill seeks to expand the list of protected attributes to also include 'sex, sexual orientation, gender identity, intersex status and disability'.[36] It also seeks to lower the fault element to provide that while a person must have intentionally urged another person or group to use force or violence, instead of doing so *intending* the force or violence will occur, the bill would amend this to provide that they be *reckless* as to whether the force or violence will occur.[37]

1.32 The bill also seeks to insert a new offence, punishable by up to five years imprisonment, of threatening to use force or violence (rather than urging) against a group on the basis of the expanded protected attributes (as set out above), where a reasonable member of the group would fear the threat would be carried out. It would also be an offence punishable by seven years imprisonment to do the same conduct

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33 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Criminal Code Amendment (Hate Crimes) Bill 2024, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 191.

34 Schedule 1, item 21. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

35 See Criminal Code, sections 80.2A and 80.2B

36 Schedule 1, items 4, 7, 12 and 15.

37 Schedule 1, items 3, 6, 11 and 14.

with the added requirement that the threat, if carried out, would threaten the peace, order and good government of the Commonwealth.[38]

1.33 Currently, section 80.3 provides defences to the existing urging force or violence offences, if the person who took the action, in good faith:

- tries to show that the Sovereign, Governor-General, State Governors, their advisers or a person responsible for the government of another country are mistaken;
- points out, with a view to reforming, errors or defects in the government, the Constitution, legislation or administration of justice;
- urges a person to attempt to lawfully procure a change in law, policy or practice in Australia or internationally;
- points out matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to remove that;
- does anything in connection with industrial dispute or matter; or
- publishes a report or commentary about a matter of public interest.

1.34 Item 21 of the bill seeks to remove this defence for the two existing offences and the proposed two new offences.

1.35 By removing this defence, this removes an existing safeguard that aims to ensure the offences are not overly broad, noting the potential impact of these offences on freedom of expression.

1.36 The statement of compatibility states that disapplying these defence provisions would make clear that 'urging force or violence against people on the basis of their protected attributes can never be done in 'good faith', and would remove an avenue for a defendant to avoid criminal responsibility if they engage in conduct of this kind'.[39] The explanatory memorandum further states:

> The defence for acts in good faith in section 80.3 was carried over from the repealed section 24F of the Crimes Act and drafted specifically to apply to the offence of sedition. In 2006, the Australian Law Reform Commission recommended that section 80.3 of the Criminal Code be amended so that the good faith defences do not apply to the offences of urging violence and that instead, the focus should be on 'proving that a person intentionally urges the use of force or violence, with the intention that the force or violence urged will occur'.
>
> The disapplication of this defence reflects that a person cannot legitimately act in good faith for the purposes set out in section 80.3 while intentionally urging force or violence of a group distinguished by a protected attribute.

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38 Schedule 1, item 19, proposed new section 80.2BA.

39 Statement of compatibility, p. 9.

> This is consistent with the approach taken in New South Wales, for example, where the equivalent good faith defence does not apply to offences involving intentionally inciting or threatening physical harm to persons or property.
>
> For the same reason, the defence for acts done in good faith would similarly not apply to the new offences of threatening to use force or violence in new sections 80.2BA and 80.2BB. Intentionally threatening to use force or violence against groups or members of groups distinguished by a protected attribute cannot be done in 'good faith'.[40]

1.37 While the committee acknowledges the difficulty of establishing 'good faith' in these defences, it is not clear that it is appropriate to remove this defence entirely without providing any ability for the court to consider the circumstances in which the conduct occurred. In this regard, it is noted that the Australian Law Reform Commission (ALRC), in the report cited by the explanatory memorandum, did not simply recommend that the section 80.3 defences not apply to the offences of urging force or violence. Rather, the ALRC report, after considering submissions on this matter, recommended that the offences should provide that the person must 'intend' that the urged force or violence will occur and the court, in determining whether a person intends this, must have regard to the context in which the circumstance occurred, including whether the conduct was done:

(a) in the development, performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in connection with an industrial dispute or an industrial matter; or

(d) in the dissemination of news or current affairs.[41]

1.38 The committee therefore considers it is somewhat misleading for the explanatory memorandum to state that the ALRC report recommended only that the good faith offences not apply and the focus instead should be on intention. Rather, the ALRC stated:

> Rather than attempt to protect freedom of expression through a 'defence' that arises after a person has been found to satisfy all the elements of the offence, the ALRC believes it would be better in principle and in practice to reframe the criminal offences in such a way that they do not extend to

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40 Explanatory memorandum., p. 39.

41 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report 104, 2006) recommendations 8-1 and 12-2.

legitimate activities or unduly impinge on freedom of expression in the first place.[42]

1.39 Instead of adopting the ALRC recommendations, this bill removes the requirement for intention, together with removing the availability of the defence, without making any other amendments to allow for any consideration of the circumstances in which the conduct occurred. The committee considers it unlikely there are many circumstances where a person could threaten the use of force or violence against a particular group in ways that would be considered legitimate. However, it is not possible for the committee, or the Parliament, to understand the full range of possibilities that could be captured by these provisions. The committee considers it has not been established why it is necessary to remove the defences entirely from these provisions without providing the court any discretion to consider the circumstances in which the speech was made. For example, under the bill it would appear likely that if a person posts a message saying they intend to forcibly stop neo-Nazis (who would arguably have the protected attribute of a 'political opinion') from disrupting a planned multicultural event, this might be considered a threat to use force against a targeted group, subject to up to five years imprisonment. This would not appear to be conduct that the explanatory materials suggest are intended to be captured by these offences. Much would also depend on the meaning of 'use of force'. It is not clear if this would extend to force against property rather than people, in which case the offence would have a broader application.

1.40 The committee considers further information is required to fully assess the appropriateness of removing existing defences, the effect of which may mean the overly broad criminalisation of certain speech. The committee therefore seeks the Attorney-General's advice as to:

- **why is it necessary to seek to remove the application of the good faith defences in section 80.3 to these offences (noting the explanatory materials provide that no relevant speech could ever be made in good faith);**
- **why it is proposed to remove the defences in section 80.3 entirely without implementing the other part of the ALRC recommendation to reframe the criminal offences so that the court, in determining whether a person intends the urged force or violence will occur, must have regard to the context in which the circumstance occurred;**
- **what conduct would 'use of force' include and would it include use of force against property; and**

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42 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report 104, 2006) [2.70].

- **what type of groups or members of a group would be captured by the attribute of 'political opinion', and why the inclusion of this attribute is appropriate in the context of freedom of expression.**

Future Made in Australia (Guarantee of Origin) Bill 2024 Future Made in Australia (Guarantee of Origin Consequential Amendments and Transitional Provisions) Bill 2024[43]

Purpose	The Future Made in Australia (Guarantee of Origin) Bill 2024 (main bill) seeks to establish the voluntary Guarantee of Origin scheme to track and verify attributes associated with low-emissions products, starting with hydrogen, and establish an enduring certification mechanism for renewable electricity. The Future Made in Australia (Guarantee of Origin Consequential Amendments and Transitional Provisions) Bill 2024 seeks to make amendments to the *National Greenhouse and Energy Reporting Act 2007*, the *Clean Energy Regulator Act 2011*, and the *Renewable Energy (Electricity) Act 2000* to align them with the main bill.
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representatives on 12 September 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Modification of primary legislation by delegated legislation akin to Henry VIII clause[44]

1.41 A number of provisions in the Future Made in Australia (Guarantee of Origin) Bill 2024 (the main bill) seek to allow for the rules, made for the purpose of the main bill, to determine or provide various matters that are relevant to the Guarantee of Origin scheme that the bill seeks to establish. Similarly, the Future Made in Australia (Guarantee of Origin Consequential Amendments and Transition Provisions) Bill 2024 (consequential bill) seeks to amend the *National Greenhouse and Energy Reporting Act 2007* and the *Renewable Energy (Electricity) Act 2000* to provide that the requirements for audits, audit reports and the inspection of the performance of

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43 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Future Made in Australia (Guarantee of Origin) Bill 2024, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 192.

44 Parts 2-7 of the Future Made in Australia (Guarantee of Origin) Bill 2024. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

auditors in carrying out audits may be provided for by the regulations made for the purposes of these acts. [45]

1.42 Where a bill includes matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.43 In this instance, the committee notes that many of the matters that would be included in delegated legislation in the bill are likely appropriate for inclusion in delegated legislation as they appear highly technical in nature. However, the explanatory materials provide no explanation as to their inclusion in delegated legislation and it is not clear that it would be appropriate in all instances. For example, subclause 88(2) would allow the rules to prescribe circumstances in which the Clean Energy Regulator (the Regulator) is able to cancel or suspend the registration of a renewable electricity facility. The explanatory memorandum does not provide a justification for why this is appropriate for inclusion in delegated legislation rather than in primary legislation, noting that the cancellation or suspension of registration is a matter that can affect rights and interests.

1.44 The committee's concerns are heightened as one of the matters that may be included in the rules allows for a provision akin to a Henry VIII clause. Subclause 81(10) of the bill provides that the rules can prescribe circumstances in which paragraph 81(4)(d) of the bill, which relates to components that make up the facility, is not applicable.

1.45 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.

1.46 In relation to this, the explanatory memorandum merely restates the operation of the provision and does not provide a justification for why it is appropriate to allow the rules to prescribe a circumstance in which paragraph 81(4)(d) does not apply. Although this provision may be highly technical in nature and appropriate for inclusion in delegated legislation, the committee considers that a sound justification

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45 Schedule 1, item 5, proposed subsection 75(1) and item 7, proposed paragraph 75A(5)(ic) of the Future Made in Australia (Guarantee of Origin Consequential Amendments and Transition Provisions Bill) 2024.

addressing its inclusion in delegated legislation should have been provided for in the explanatory memorandum.

1.47 Finally, the consequential bill provides that the minister may determine, by legislative instrument, the requirements to be met by registered greenhouse and energy auditors in relation to preparing for guarantee of origin audits and preparing guarantee of origin audit reports.[46] This bill also provides that the regulations made under the *National Greenhouse and Energy Reporting Act 2007* may provide for the inspection of the performance of registered greenhouse and energy auditors in carrying out guarantee of origin audits.[47] The explanatory memorandum to this bill also only restates the operation of these provisions and does not address the necessity of including these matters in delegated, rather than primary legislation.

1.48 The committee considers that it is likely that most of the matters specified for inclusion in the rules are of a nature that is appropriate to include in delegated legislation. However, the committee considers that a justification should have been provided in the explanatory memoranda of both bills as to why it is necessary and appropriate to include these matters in delegated legislation.

1.49 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation,[48] the committee considers that a justification for the inclusion of the specified matters should be included in the explanatory memoranda of the Future Made in Australia (Guarantee of Origin) Bill 2024 and the Future Made in Australia (Guarantee of Origin Consequential Amendments and Transitional Provisions) Bill 2024.

1.50 The committee requests that the explanatory memoranda to both bills be updated to include information addressing the committee's concerns.

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46 Schedule 1, item 5 proposed subsection 75(1) of the Future Made in Australia (Guarantee of Origin Consequential Amendments and Transition Provisions Bill) 2024.

47 Schedule 1, item 7 proposed subsection 75A(5)(ic) of the Future Made in Australia (Guarantee of Origin Consequential Amendments and Transition Provisions Bill) 2024.

48 See *Acts Interpretation Act 1901*, section 15AB.

Wage Justice for Early Childhood Education and Care Workers (Special Account) Bill 2024[49]

Purpose	The bill seeks to provide the legal framework for the establishment and operation of a special account, known as the Wage Justice for Early Childhood Education and Care Workers Special Account (the Account), which will be used to administer grant funding for the Early Childhood Education and Care (ECEC) Worker Retention Payment Program (the Program). The measures under this grant program are intended to fund a 15 per cent wage increase for ECEC workers over two years.
Portfolio	Education
Introduced	House of Representatives on 12 September 2024
Bill status	Before the House of Representatives

Broad discretionary powers[50]

1.51 The bill provides that the Secretary may, on behalf of the government, make a grant of financial assistance to a person or body that is an approved provider[51] in relation to the remuneration of workers engaged by the provider.[52] There are no criteria set out on the face of the bill by which the Secretary is to assess whether an application from a provider will be granted. In relation to the eligibility criteria the explanatory memorandum states:

> Grants under section 10 will be subject to, and administered in accordance with, the Commonwealth grants policy framework as established through the Commonwealth Grants Rules and Guidelines 2017 (CGRGs) (noting these will be replaced by the Commonwealth Grants Rules and Principles 2024 (CGRPs) from 1 October 2024). The CGRGs (and the CGRPs in due course) provide for best practice and apply to all grants administration conducted on behalf of the Commonwealth. In this respect, the Grant Opportunity Guidelines for these grants will, amongst other things, set out

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49 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Wage Justice for Early Childhood Education and Care Workers (Special Account) Bill 2024, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 193.

50 Subclause 10(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

51 A provider is an approved provider under the *A New Tax System (Family Assistance) Administration Act 1999*. Section 3 defines an approved provider as a provider for which an approval is in effect under Division 1 of Part 8.

52 Subclause 10(1).

eligibility criteria for grant applicants and the purposes for which grant funding must be used by grant recipients.[53]

1.52 While the explanatory memorandum has noted that the criteria, by which a grant will be made, will be set out in the Grant Opportunity Guidelines, there has been no justification provided as to why it is necessary and appropriate for these important considerations to be set out in non-legislative guidance which are exempt from parliamentary oversight. Given that the eligibility criteria are key to determining whether a grant of public money will be awarded, the committee expects that such criteria would be more appropriately set out on the face of the bill, or, at the very least, in a disallowable legislative instrument.

1.53 The committee is therefore concerned that the bill confers on the Secretary a broad power to make grants in relation to remuneration of early childhood education centre workers with no parliamentary oversight of the eligibility criteria on which grants will be awarded or refused. This is especially concerning as merits review is not available for decisions to refuse grants under the bill.[54]

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

- **why it is necessary and appropriate for the eligibility criteria for decisions to grant remuneration made under clause 10 of the bill to be left to non-legislative guidance;**
- **the eligibility criteria for decisions made under clause 10 of the bill; and**
- **whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation.**

53 Explanatory memorandum, p. 12.

54 Explanatory memorandum, p. 12.

Bills with no committee comment[55]

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

- Blayney Gold Mine Bill 2024
- Customs Tariff Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Expansion) Bill 2024
- Future Made in Australia (Guarantee of Origin Charges) Bill 2024
- Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024
- Universities Accord (National Student Ombudsman) Bill 2024

Deferred bills[56]

The committee has deferred the following bills for future consideration:

- Aged Care Bill 2024
- Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024
- Privacy and Other Legislation Amendment Bill 2024

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55 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 194.

56 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Deferred bills, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 195.

Commentary on amendments and explanatory materials[57]

Australian Naval Nuclear Power Safety Bill 2023

1.55 On 12 September 2024, the House of Representatives agreed to 27 Government amendments. The Minister for Defence also tabled a supplementary explanatory memorandum and an addendum to the explanatory memorandum.

1.56 Of the 27 Government amendments, one was in response to concerns raised by the committee in *Scrutiny Digest 1 of 2024* on coercive powers.[58]

1.57 The addendum to the explanatory memorandum addressed a request from the committee in *Scrutiny Digest 4 of 2024* to include key information provided by the Minister for Defence to the committee.[59]

1.58 The committee welcomes amendments made in response to scrutiny concerns raised by the committee, relating to coercive powers. The committee also thanks the minister for tabling an addendum to the bill including key information requested by the committee.

Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024

1.59 On 11 September 2024 the House of Representatives agreed to 7 Government amendments in relation to the bill.

1.60 Item 7 of the amendments inserts Schedule 7 into the bill. Schedule 7 seeks to amend the *Criminal Code Act 1995* (the Criminal Code) to repeal and substitute the definition of *hors de combat* ('out of the fight'). This definition is relevant to the applicability of a number of offences relating to war crimes, as to whether a person is considered an enemy combatant at the time they were killed or ill-treated.[60] The amendments also seek to retrospectively apply this definition to any conduct engaged in on or after 26 September 2002, as well as any legal proceedings commenced on or after that day and not concluded before the commencement of this Part of the bill.

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57 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 196.

58 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 6–10.

59 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2024* (20 March 2024) pp. 22–30.

60 See *Criminal Code Act 1995*, sections 268.40, 268.65, 268.70 – 268.76.

1.61 The committee has long-standing scrutiny concerns about provisions that have the effect of applying retrospectively as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.62 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials should 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. The supplementary explanatory memorandum states that the objective of the amendments is to 'correct an anomaly in the current drafting and confirm consistency between Australian domestic law and international law, in line with Parliament's intention when Division 268 and the definition of *hors de combat* were introduced in 2002.'[61]

1.63 Under the current definition provided in the Criminal Code, a person is considered *hors de combat* if:

> (a) the person is in the power of an adverse party; **and**
>
> (b) the person:
>
> i. clearly express an intention to surrender; or
>
> ii. has been rendered unconscious or is otherwise incapacitated by wounds or sickness and is therefore incapable of defending himself or herself; and
>
> (c) the person abstains from any hostile act and does not attempt to escape.[62]

1.64 Under the current definition, a person would qualify as being *hors de combat* only if they are both 'in the power of an adverse party' and fulfill one or more of the subsequent qualifiers.

1.65 The proposed change to the definition would allow individuals, under Australian law, to be classed as *hors de combat* when fulfilling only one of the first three qualifiers in the definition, namely a person is hors de combat if:

> (a) any of the following apply:
>
> (i) the person is in the power of an adverse party;
>
> (ii) the person clearly expresses an intention to surrender;
>
> (iii) the person has been rendered unconscious or is otherwise incapacitated by wounds or sickness and is therefore incapable of defending himself or herself; and
>
> (b) the person abstains from any hostile act and does not attempt to escape.

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61 Supplementary explanatory memorandum, p. 3.

62 *Criminal Code Act 1995*, dictionary definition of hors de combat. Emphasis added.

1.66 This will bring Australia's definition in line with the definition provided in the Geneva Conventions.[63] The supplementary explanatory memorandum states that the law was always intended to operate in line with the current amendments, that the Australian Defence Force provides training and carries out activities on the basis of the international law definition of hors de combat, and that investigating and prosecuting conduct of this kind is critical to upholding Australia's obligations as a party to the Rome Statute of the International Criminal Court.[64]

1.67 The committee acknowledges the importance of ensuring Australian law relating to war crimes is consistent with our international law obligations. However, the committee notes that applying this amendment retrospectively appears to change the operation of existing domestic law. No information has been provided as to whether the retrospective application of this definition will have a detrimental impact on any person. This is particularly relevant noting that this could potentially make a person liable to a criminal offence of having committed a war crime, punishable by life imprisonment, that they may otherwise not be liable for (under Australian law). It may also apply to existing court proceedings (if they have not been finally determined).

1.68 However, the committee also notes that the amended definition is consistent with Australia's important obligations under international law to investigate and prosecute war crimes. In this regard, the committee notes that under international law, the prohibition on retrospective criminal laws does not apply to recognisable war crimes.[65] In this context, the committee notes Justice Dawson's statement in *Polyukhovich v Commonwealth*, the case that upheld the validity of the *War Crimes Act 1945* that retrospectively created under Australian law the offence of war crimes:

> War crimes of the kind created by the Act simply could not, in any civilized community, have been described as innocent or blameless conduct merely because of the absence of proscription by law.[66]

1.69 The committee acknowledges the importance of amending the definition of when a person is considered to be *hors de combat* to align with Australia's international law obligations. However, the committee notes that applying this retrospectively may have a detrimental impact on individuals, and as such leaves to the Senate as a whole the appropriateness of the retrospective application of this amendment.

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63 Additional Protocol I of the Geneva Conventions, article 41.

64 Supplementary explanatory memorandum, pp. 3–5.

65 See International Covenant on Civil and Political Rights, article 15(3).

66 *Polyukhovich v Commonwealth* [1991] HCA 32; (1991) 172 CLR 501, [18].

Illegal Logging Prohibition Amendment (Strengthening Measures to Prevent Illegal Timber Trade) Bill 2024

1.70 On 9 September 2024 the Minister for Agriculture, Fisheries and Forestry (the Hon Julie Collins MP) tabled an addendum to the revised explanatory memorandum to the bill.

1.71 **The committee thanks the minister for tabling an addendum to the revised explanatory memorandum to the bill. The committee notes this responds to the committee's request in *Scrutiny Digest 6 of 2024* to provide additional explanatory material in relation to the use of negligence as a fault element for the offence in subsection 9(1) of the bill.** [67]

[67] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 17–19.

Chapter 2
Commentary on ministerial responses

2.1 This chapter considers the response of a minister to a matter previously raised by the committee.

Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Bill 2024[68]

Purpose	The bill seeks to amend the *Paid Parental Leave Act 2010* (the Act) to add superannuation contributions to the Commonwealth funded Paid Parental Leave Scheme. The bill would also introduce superannuation contributions for paid parental leave (PPL) into other Acts, creating legislative frameworks for entities such as the Commissioner of Taxation and superannuation groups when interacting with PPL.
Portfolio	Social Services
Introduced	House of Representatives on 22 August 2024
Bill status	Before the Senate

Automated decision-making[69]

2.2 The bill seeks to amend the Act to provide that the Commissioner may arrange for the use of computer programs for any purposes for which the Commissioner may make decisions under Chapter 3A of the bill or the Paid Parental Leave Rules, which will be made for the purposes of Chapter 3A.

2.3 The decisions that may be made under Chapter 3A include:

(a) a determination of the amount of a Paid Parental Leave (PPL) superannuation contribution that is payable for an eligible person;[70]

(b) a determination as to where the PPL superannuation contribution must be paid to, including which account;[71]

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68 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Bill 2024, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 197.

69 Schedule 1, item 5, proposed section 115ZD. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

70 Proposed subsection 115D(1).

71 Proposed subsections 115F(1) and 115F(2).

(c) a determination to revoke a previous determination as to where the PPL superannuation contribution must be paid;[72]

(d) if a person has been paid less than the correct amount of PPL superannuation contribution, a determination of the underpaid amount,[73] and where the underpaid amount must be paid to, including the account;[74] and

(e) a determination to revoke a determination of the underpaid amount.[75]

2.4 In *Scrutiny Digest 11 of 2024* the committee requested the minister's advice as to whether any discretionary decisions could be made under relevant provisions of the bill and the Paid Parental Leave Rules 2021, what oversight mechanisms were applicable to the use of computer programs and whether these could be included in the bill, and finally whether the Attorney-General's Department had been consulted regarding consistent legal framework for automated decision-making.[76]

Minister for Social Services' response[77]

2.5 The minister advised that the Commissioner's core functions in proposed Chapter 3A are non-discretionary, such as requiring the calculation of an individual's PPL Superannuation Contribution using objective input.

2.6 However, the minister noted that some discretionary functions would be conferred on the Commissioner, for example proposed subsection 115P(5) which would allow the Commissioner to revoke an overpayment recovery notice if satisfied it is appropriate to do so in the circumstances. The minister also confirmed that currently the Paid Parental Leave Rules 2021 do not confer any functions on the Commissioner, they though they may be amended if necessary.

2.7 The minister advised that the proposed automated decision-making power would not be used if it would unlawfully fetter statutory discretion and advised that any automated decision-making computer programs would be designed in accordance with government policy and with the guidance of the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide*.

2.8 The minister also noted that the Australian Taxation Office (ATO) already possess internal assurance mechanisms to ensure computer programs involved with discretionary processes operate lawfully, appropriately and effectively. Finally, the

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72 Proposed subsection 115F(5).

73 Proposed subsection 115K(3).

74 Proposed subsections 115K(4) and (5).

75 Proposed subsection 115K(7).

76 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2024* (11 September 2024) pp. 12–14.

77 The minister responded to the committee's comments in a letter dated 17 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 12 of 2024*).

minister concluded that, given the largely mechanical and non-discretionary nature of the Commissioner's proposed functions, it was considered unnecessary to include further assurance arrangements which would only be applicable to administering the PPL Superannuation Contribution. The minister advised that given all of this, the decision was made to not include additional statutory safeguards as were recommended by the Attorney-General's Department during consultation.

Committee comment

2.9 The committee thanks the minister for this response. The committee notes the minister's advice that the Commissioner's core functions in proposed Chapter 3A are non-discretionary and that the Paid Parental Leave Rules 2021 do not currently confer any functions on the Commissioner.

2.10 However, the committee is concerned that the bill seeks to confer some discretionary decisions, such as through proposed subsection 115P(5) which would allow the Commissioner to revoke an overpayment if satisfied it is appropriate to do so. While the committee understands that largely proposed section 115ZD will be applied to decisions that are mechanical and non-discretionary in nature, it may also be applied to decisions that have a discretionary element and are not appropriate to be subject to automated decision-making.

2.11 Further, while the committee notes the minister's advice that proposed section 115ZD will only be relied on where the computer programs would not unlawfully fetter the discretion afforded by statute, the committee remains concerned that this safeguard is not provided for on the face of the bill. The committee also does not consider that this addresses its queries in relation to the transparency element of automated decisions, such as a requirement to review and report on decisions made by computer programs and to publish these reports and other safeguards on a website.

2.12 It is also not apparent to the committee why it is unnecessary to incorporate specific automation assurance arrangements and why the additional statutory safeguards recommended by the Attorney-General's Department were not pursued. While the ATO may have robust oversight and assurance mechanisms, these do not appear to be statutory safeguards. It does not appear that it would be unlawful to use computer programs in a way that fetters discretion.

2.13 Finally, the committee does not consider that inconsistency with the Commissioner's administration of superannuation generally is a reason not to incorporate or pursue additional statutory safeguards. Rather, the committee considers incorporating all applicable safeguards on the face of the law in a manner that is consistent with the Commissioner's existing functions in relation to superannuation should have been considered.

2.14 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for the use of

computer programs in making all decisions under proposed chapter 3A of the bill, noting that while most decisions under this Chapter are non-discretionary in nature, the computer program may be applied to certain discretionary decisions.

Reversal of the burden of evidential proof[78]

2.15 This bill seeks to amend the Act by inserting subsections 115S(2) and 115S(3), which would make it an offence for a superannuation provider:

(a) not to maintain records in writing in English, or maintain them so as to enable them to be readily accessible and convertible into writing in English;[79] and

(b) to fail to retain any records kept or obtained for the purposes of Chapter 3A of this bill until the later of the end of five years after they were prepared or obtained and the completion of the transactions or acts to which those records relate.[80]

2.16 The maximum penalties for these offences would be 30 penalty units. Proposed paragraph 115S(4)(a) provides a defence to these offences where the superannuation provider has been notified by the Commissioner of Taxation (the Commissioner) that the retention of records is not required. By making this an exception to the offence, this reverses the evidential burden of proof. As a superannuation provider can include the trustee of a complying superannuation fund, the committee understands this defence may be applicable to individuals.[81]

2.17 In *Scrutiny Digest 11 of 2024*, the committee noted that a justification regarding the reversal of the burden of evidential proof should have been provided in the explanatory memorandum and left the matter to the Senate as a whole to consider.[82]

Additional correspondence from Minister for Social Services[83]

2.18 The minister advised that there is little likelihood, in practice, of action being taken against a superannuation provider for failure to adhere to proposed subsections 115S(2) or (3). This is on the basis that if the Commissioner had exempted

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78 Schedule 1, item 5, proposed subsection 115S(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

79 Proposed subsection 115S(2).

80 Proposed subsection 115S(3).

81 Schedule 1, item 6, proposed section 6.

82 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2024* (11 September 2024) pp. 10–12.

83 The minister responded to the committee's comments in a letter dated 17 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 12 of 2024*).

the provider from those requirements, that information would be known to the Commonwealth, or ascertained prior to any initiated action.

2.19 However, if proceedings were taken despite the provider having been notified (for example, due to an error in internal administrative systems) a defence is available. In such cases the minister advised that a notification from the Commissioner would be knowledge peculiar to the defendant, and that it would be more difficult and costly for the prosecution to disprove this than for the defendant to establish.

2.20 The minister concluded by noting that an addendum to the explanatory memorandum has been prepared which includes the key information provided to the committee.

Committee comment

2.21 The committee thanks the minister for this additional advice.

2.22 The committee remains unconvinced that a notification by the Commissioner is something that would be peculiarly within the knowledge of the defendant (noting that the Commissioner gave the notification initially). However, noting the advice that the defence may apply if there is an administrative error that means the Commissioner has incorrectly commenced proceedings, despite having provided an exemption, the committee makes no further comment in relation to this matter.

2.23 The committee welcomes the minister's undertaking to provide an addendum to the explanatory memorandum to include information provided in the response to the committee.

Chapter 3
Scrutiny of standing appropriations[84]

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.[85] 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.[86]

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84 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 12 of 2024*; [2024] AUSStaCSBSD 198.

85 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*.

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

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

- Wage Justice for Early Childhood Education and Care Workers (Special Account) Bill 2024[87]

Senator Dean Smith
Chair

[87] Subclause 8(1) of the bill established the Wage Justice for Early Childhood Education and Care Workers Special Account. Subclause 8(2) provides that the Account is a special account for the purposes of the *Public Governance, Performance and Accountability Act 2013*. A note to the subclause confirms that an Appropriation Act may contain a provision to the effect that, if any of the purposes of a special account is a purpose that is covered by an item in the Appropriation Act then amounts may be debited against the appropriation for that item and credited to the special account.