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.

Appropriation Bill (No. 3) 2024-2025
Appropriation Bill (No. 4) 2024-2025[2]

Purpose	The Appropriation Bill (No. 3) 2024-2025 seeks to appropriate additional money out of the Consolidated Revenue Fund for the ordinary annual services of the government. The Appropriation Bill (No. 4) 2024-2025 seeks to appropriate additional money out of the Consolidated Revenue Fund for services that are not the ordinary annual services of the government.
Portfolio	Finance
Introduced	House of Representatives on 4 February 2025
Bill status	Before the Senate

Parliamentary scrutiny—ordinary annual services of the government[3]

1.2 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.3 Appropriation Bill (No. 3) 2024-2025 (Appropriation Bill No. 3) seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it is unclear to the committee if all of the initial expenditure in relation to certain measures have been appropriately classified as ordinary annual services.

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Appropriation Bill (No. 3) 2024-2025 and Appropriation Bill (No. 4) 2024-2025, *Scrutiny Digest 2 of 2025*; [2025] AUSStaCSBSD 20.

3 Appropriation Bill (No. 3) 2024-2025, various provisions. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

1.4 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[4]

1.5 The Senate Standing Committee on Appropriations, Staffing and Security[5] has also actively considered the inappropriate classification of items as ordinary annual services of the government.[6] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[7]

1.6 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]

2) That appropriations for expenditure on:
    a) the construction of public works and buildings;
    b) the acquisition of sites and buildings;
    c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
    d) grants to the states under section 96 of the Constitution;
    e) new policies not previously authorised by special legislation;
    f) items regarded as equity injections and loans; and
    g) existing asset replacement (which is to be regarded as depreciation),

    are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

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4 See Senate standing order 24(1)(a)(v).

5 Formerly the Senate Standing Committee on Appropriations and Staffing.

6 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

7 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

1.7 The committee concurs with the view expressed by the Appropriations, Staffing and Security Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.[8]

1.8 The Appropriations, Staffing and Security Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[9]

1.9 Despite these comments, and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.[10] It appears likely that there may be measures in this bill that have been inappropriately classified as 'ordinary annual services', which would thereby impact on the Senate's ability to subject the measures to an appropriate level of parliamentary scrutiny

1.10 The committee has previously written to Ministers for Finance in relation to inappropriate classification of items in other appropriation bills on a number of

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8 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

9 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

10 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, *Senate Hansard*, 19 March 2018, pp. 1487–1490.

occasions;[11] however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

1.11 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.12 The committee draws to the Senate's attention that it appears likely that the initial expenditure of some items in Appropriation Bill (No. 3) 2024-2025 may have been inappropriately classified as ordinary annual services.

1.13 The committee reiterates its consistent position that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

Parliamentary scrutiny—appropriations determined by the Finance Minister[12]

1.14 Section 10 of *Appropriation Act (No. 1) 2024-2025* (Appropriation Act No. 1) enables the Finance Minister to allocate additional funds to entities when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance.

1.15 Subsection 10(2) of Appropriation Act No. 1 provides that when the Finance Minister makes such a determination the Appropriation Act has effect as if it were amended to make provision for the additional expenditure. Subsection 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Act No. 1

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11 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014,* pp. 402–406; *Fourth Report of 2015*, pp. 267–271; *Alert Digest No. 6 of 2015*, pp. 6–9; *Fourth Report of 2016*, pp. 249–255; *Alert Digest No. 7 of 2016*, pp. 1–9; *Scrutiny Digest 2 of 2017*, pp. 1–5; *Scrutiny Digest 6 of 2017*, pp. 1–6; *Scrutiny Digest 12 of 2017*, pp. 89–95; *Scrutiny Digest 2 of 2018*, pp. 1–7; *Scrutiny Digest 2 of 2019*, pp. 1–4, *Scrutiny Digest 3 of 2020*, pp. 1–4, *Scrutiny Digest 15 of 2020*, pp. 10–13, *Scrutiny Digest 8 of 2021*, pp. 5–8, *Scrutiny Digest 2 of 2022*, pp. 12–15; *Scrutiny Digest 7 of 2022*, pp. 10-21; *Scrutiny Digest 1 of 2023*, pp. 78–80; *Scrutiny Digest 6 of 2023*, pp. 2–5; *Scrutiny Digest 3 of 2024,* pp. 8-11.

12 Appropriation Bill (No. 3) 2024-2025, clause 10; Appropriation Bill (No. 4) 2024-2025, clause 12. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iv) and (v).

at $400 million. Identical provisions appear in *Appropriation Act (No. 2) 2024-2025* (Appropriation Act No. 2), with a separate $600 million cap in that Act.[13]

1.16 Subclause 10(1) of Appropriation Bill (No. 3) 2024-2025 seeks to provide that any determinations made under the AFM provisions in Appropriation Act No. 1 are to be disregarded for the purposes of the $400 million cap. The note to subclause 10(1) clarifies that this means that the Finance Minister would have access to the full $400 million for the purposes of making AFM determinations under section 10 of Appropriation Act No. 1, regardless of any amounts that have already been determined under that section. Clause 12 of Appropriation Bill (No. 4) 2024-2025 contains identical provisions, which apply to the $600 million cap in Appropriation Act No. 2.

1.17 While it does not appear any AFM determinations have been made since Appropriation Acts No 1 and 2 commenced, and as such the provisions are unlikely to have a substantive effect on the total amount of funds that may be allocated by the Finance Minister under the advances over 2024-25, this does not alleviate the committee's fundamental concerns with the AFM mechanism.

1.18 The committee considers that, in allowing the Finance Minister to allocate additional funds to entities via non-disallowable delegated legislation, in this case up to a total of $1 billion, the AFM provisions in Appropriation Acts Nos 1 and 2 delegate significant legislative power to the executive. While this does not amount to a delegation of the power to create a new appropriation, the committee notes that one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[14] The AFM provisions leave the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.19 The committee's significant scrutiny concerns in relation to these provisions are heightened given that AFM determinations are not subject to the usual parliamentary disallowance process. In this regard, the committee notes that neither of the explanatory memoranda to Appropriation bills Nos 3 and 4 note that the AFM provisions are exempt from disallowance. The explanatory memorandum to the bill for Appropriation Act No. 1 however suggests that disallowing an AFM determination:

> …would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure.

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13 *Appropriation Act (No. 2) 2024-2025*, section 12.

14 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017), [91].

> …
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> Disallowance of an AFM determination would reduce an entity's appropriation to its original level. Yet the urgent expenditure it had already undertaken validly prior to disallowance, in reliance upon the determination, would count towards the newly reduced appropriation…
>
> Accordingly, disallowance would leave the entity with a shortfall in the appropriation available to fund the ongoing expenditure for which the Government originally budgeted and which the Parliament approved when it passed the Appropriation Act.[15]

1.20 While noting this explanation, the committee is of the view that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless there are exceptional circumstances, and any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[16]

1.21 The committee concurs with the view expressed by the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the disallowance status of AFM determinations. In particular, the committee agrees that if the AFM is used for a genuine emergency situation, the likelihood of a determination subsequently being disallowed would be virtually non-existent. This explanation therefore is insufficient, from a scrutiny perspective, to justify an exemption from disallowance. Instead, the potential for disallowance would simply operate to ensure that the AFM is only utilised in genuinely urgent circumstances, as intended by the Parliament.[17]

1.22 The committee reiterates its long-standing scrutiny concerns in relation to the Advance to the Finance Minister provisions contained in the annual Appropriation Acts, which allow the Finance Minister to determine the purposes for which additional funds may be allocated in legislative instruments that are not subject to disallowance.

1.23 However, in light of the fact that these bills do not appear to have a substantive effect on the total amount of funds that may be allocated by the Finance Minister over 2024-25, the committee makes no further comment on this matter on this occasion.

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15 Explanatory memorandum to Appropriation Bill (No. 1) 2024-2025, p. 10.

16 Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

17 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2022* (25 January 2022) pp. 4–6.

Parliamentary scrutiny—measures marked as 'not for publication'[18]

1.24 Clause 4 of both Appropriation Bill (No. 3) 2024-2025 and Appropriation Bill (No. 4) 2024-2025 provide that portfolio statements (in this case known as Portfolio Additional Estimates Statements – or PAES) are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*. That is, clause 4 provides that the PAES may be considered in interpreting the provisions of each bill. Moreover, the explanatory memoranda to the bills state that they should be read in conjunction with the PAES.[19]

1.25 Noting the important role of the PAES in interpreting Appropriation Bills Nos 3 and 4, the committee expresses its scrutiny concerns in relation to the inclusion of measures within the PAES that are earmarked as 'not for publication' (nfp), meaning that the proposed allocation of funding to those budget measures is not published within the PAES. Various reasons are provided for marking a measure as nfp, including that aspects of the relevant program are legally or commercially sensitive.

1.26 Parliament has a fundamental constitutional role to scrutinise and authorise the appropriation of public money. As outlined by the High Court, the appropriation process is intended to 'give expression to the foundational principle of representative and responsible government that "no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself"'.[20] Given the importance of parliamentary scrutiny over the appropriation process, the committee considers that the default position should be to publish the full amount of funding allocated to each Budget measure. However, where it is considered to be necessary and appropriate not to publish the total funding amount for a measure, the committee considers that an explanation should be included within the PAES, noting that the onus is on those claiming confidentiality in relation to the provision of information to the Parliament to argue the case for it. The committee therefore has significant scrutiny concerns in relation to the inclusion of measures within the PAES that are earmarked as nfp where there is either no, or very limited, explanation as to why it is appropriate to mark the measure as nfp.

1.27 In *Scrutiny Digest 16 of 2021*, the committee requested that future Department of Finance guides on preparing portfolio budget statements be updated to include guidance that, where a measure is marked as nfp, a high-level explanation

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18 Appropriation Bill (No. 3) 2024-2025, clause 4; Appropriation Bill (No. 4) 2024-2025, clause 4. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

19 Explanatory memorandum to Appropriation Bill (No. 3) 2024-2025, p. 5; Explanatory memorandum to Appropriation Bill (No. 4) 2024-2025, p. 5.

20 *Wilkie v Commonwealth* (2017) 263 CLR 487, 523 [61] citing Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, 1910, pp. 522–523.

should at least be included within the portfolio budget statements explaining why this is appropriate.[21] As a result, the Department of Finance updated the Guide to Preparing the Portfolio Budget Statements to reflect the committee's scrutiny concerns.[22] The committee notes that the most recent Department of Finance *Guide to preparing the 2024-25 Portfolio Additional Estimates Statements* also includes similar advice.[23]

1.28 The committee takes this opportunity to again welcome the inclusion of this advice in the Department's guides. However, the committee notes that despite the inclusion of this advice it nevertheless continues to have scrutiny concerns in relation to the lack of detail in the explanations provided in the PAES. For example, a number of explanations for measures marked as nfp within the 2024-25 PAES merely state that the funding for a measure is not for publication due to commercial sensitivities.

1.29 The committee notes that the very high-level nature of these explanations makes it difficult to assess whether several of the measures categorised as nfp within the PAES are appropriately categorised as such. More detailed explanations as to why it is appropriate to mark a budget measure as nfp would allow for a greater level of parliamentary scrutiny over these explanations. For example, it is unclear to the committee why it is appropriate not to publish total amounts in relation to the decommissioning of the Northern Endeavour floating oil production storage and offtake facility, as it is not explained why the provision of any financial information is considered to be commercially sensitive.[24]

1.30 To this end, the committee notes that the mere existence of a commercial element in relation to a Budget measure is not sufficient, of itself, to justify the non-publication of any of the funding amount for that measure. The lack of detailed explanation makes it difficult for the Parliament and others to interrogate the rationale behind this classification of a measure as nfp. The committee considers that an explanation as to why a measure is marked as nfp, beyond simply stating that commercial elements apply, should be included within the budget documents and that this would not compromise commercial sensitivities.

1.31 The committee is therefore of the view that if it is decided that the financial details of a measure should not be published for public interest reasons, as much detail should be provided in the portfolio budget or additional estimates statement as is necessary to substantiate that decision. For instance, where a claim of commercial

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21 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021* (21 October 2021) pp. 47–51.

22 See comments on Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022* (18 March 2022) pp. 19–21.

23 Department of Finance, *Guide to preparing the 2024-25 Portfolio Additional Estimates Statements*, p. 34.

24 Mid-Year Economic and Fiscal Outlook 2024–25, pp. 279-280; Department of Industry, Science and Resources, *Portfolio Additional Estimates Statements 2024-25,* p. 33.

confidentiality or sensitivities is to be raised, it would be of assistance to the committee and to the Parliament for detail to be provided of how the publication of the financial details of the measure could 'damage the commercial interests of a commercial trader in the market place, including the Commonwealth'.[25]

1.32 In considering the necessary extent of any such explanation, departments should be mindful of the Parliament's fundamental role in scrutinising the appropriation of money from the Consolidated Revenue Fund and the need to keep to a minimum the number of instances in which the full financial details of a measure are not published.

1.33 The committee draws to the Senate's attention the committee's consistent scrutiny concern that the Parliament is being asked to authorise appropriations without clear information about all of the amounts that are to be appropriated under each individual budget measure.

Parliamentary scrutiny—section 96 grants to the states[26]

1.34 Clause 14 of Appropriation Bill (No. 4) 2024-2025 deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'.

1.35 Clause 14 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- terms and conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;[27] and
- the amounts and timing of those payments.[28]

1.36 Subclause 14(4) provides that determinations made under subclause 14(2) are not legislative instruments. The explanatory memorandum states that this is:

> because these determinations are not altering the appropriations approved by the Parliament. Determinations under subclause 14(2) are administrative

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25 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 664.

26 Appropriation Bill (No. 4) 2024-2025, clause 14 and Schedules 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iv) and (v).

27 Appropriation Bill (No. 4) Bill 2024-2025, paragraph 14(2)(a).

28 Appropriation Bill (No. 4) Bill 2024-2025, paragraph 14(2)(b).

in nature and will simply determine how payments to or for a State, ACT, NT or a local government authority will be made.[29]

1.37 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[30]

1.38 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine the terms and conditions attaching to them is conferred on the *Parliament* by section 96 of the Constitution. While the Parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.39 The committee notes, and welcomes, that important progress has been made to improve the provision of information regarding section 96 grants to the states since the 2017-18 Budget, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.[31] These improvements include: the addition of an Appendix E to Budget Paper No. 3, which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them; and a mandatory requirement for the inclusion of further information in PAES where departments and agencies are seeking appropriations for payments to the states, territories and local governments.[32]

1.40 The committee considers that these measures improve the ability of the Parliament to scrutinise the executive's use of the delegated power to make grants to the states and to determine terms and conditions attaching to them under section 96 of the Constitution.

1.41 Nevertheless, the committee notes that while these measures improve transparency to some degree, the committee remains concerned about the broad discretion provided to ministers to determine terms and conditions for grants to the states and territories. The committee also notes that the Parliament's ability to

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29 Explanatory memorandum to Appropriation Bill (No. 4) 2024-2025, p. 11.

30 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511–516; *Ninth Report of 2015*, pp. 611–614; *Fifth Report of 2016*, pp. 352–357; *Eighth Report of 2016*, pp. 457–460; *Scrutiny Digest 3 of 2017*, pp. 51–54; *Scrutiny Digest 6 of 2017*, pp. 7–10; *Scrutiny Digest 12 of 2017*, pp. 99–104; *Scrutiny Digest 2 of 2018*, pp. 8–11; *Scrutiny Digest 6 of 2018*, pp. 9–12; *Scrutiny Digest 4 of 2019*, pp. 9–12; *Scrutiny Digest 15 of 2020*, pp. 16–17; *Scrutiny Digest 8 of 2021*, pp. 13–14; *Scrutiny Digest 2 of 2022*, pp. 21–22; *Scrutiny Digest 7 of 2022*, pp. 20–21; *Scrutiny Digest 6 of 2023*, pp. 11–12; *Scrutiny Digest 7 of 2024*, pp. 12–14.

31 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp. 7–10; and *Eighth Report of 2016*, pp. 457–460.

32 Department of Finance, *Guide to preparing the 2024-25 Portfolio Additional Estimates Statements*, p. 29.

scrutinise the terms and conditions of these grants varies depending on the appropriation mechanism used for the payments.

1.42 The committee leaves to the Senate as a whole the appropriateness of clause 14 of Appropriation Bill (No. 4) 2024-2025, which allows ministers to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

Defence Service Homes Amendment (Insurance) Bill 2025[33]

Purpose	The bill seeks to amend the *Defence Service Homes Act 1918* to empower the Commonwealth to engage in insurance activities as an insurer and delegate this power to the secretary of the Department of Veterans' Affairs. In doing so, the bill also seeks to retrospectively validate that the Commonwealth and secretary possessed these powers since 1 January 1990, as well as to validate previous arrangements entered into by the Commonwealth as long as these arrangements were entered into or done by persons working in or for the Department of Veterans' Affairs at the time.
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 4 February 2025
Bill status	Passed both Houses of Parliament on 10 February 2025

Retrospective validation[34]

1.43 This bill seeks to provide that the Commonwealth may engage in activities with respect to insurance within the meaning of paragraph 51(xiv) of the Constitution and that the Secretary may, on behalf of the Commonwealth, do anything necessary or convenient for the purposes of carrying out such activities.[35] It also seeks to validate past insurance activities, providing that the Commonwealth and the Secretary of the Department of Veterans' Affairs are taken to have had at all times on and after 1 January 1990 the powers inserted by this bill. As such, the exercise of these powers over the past 35 years is retrospectively validated by the bill.

1.44 Underlying the basic rule of law principle that all government action must be legally authorised is the importance of protecting those affected by government decisions from arbitrary decision-making and enabling affected persons to rely on the law as it currently exists. Retrospective validation has the potential to undermine these values. The committee considers that where Parliament acts to retrospectively validate decisions which are put at risk it is necessary for Parliament to consider:

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33 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Defence Service Homes Amendment (Insurance) Bill 2025, *Scrutiny Digest 2 of 2025*; [2025] AUSStaCSBSD 21.

34 Schedule 1, item 3. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

35 Schedule 1, item 2, proposed section 39.

- whether affected persons will suffer any detriment by reason of the retrospective changes to the law and, if so, whether this would lead to unfairness; and
- that too frequent resort to retrospective legislation may work to sap confidence that the Parliament is respecting basic norms associated with the rule of law.

1.45 Insufficiently defined administrative powers may be exercised arbitrarily or inconsistently and may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. Where a bill seeks to retrospectively validate prior actions the committee expects that the explanatory materials will set out the reasons for this, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. If an individual's interests will, or may, be affected by the retrospective validation, the explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity. In this instance, the explanatory memorandum states:

> The Bill will commence on the day after it receives the Royal Assent. Part 2 of Schedule 1 to the Bill operates to confirm the validity of past activities carried out by the Commonwealth as an agent for an insurer. An effect of that Part is to confirm that all insurance policies that the Department of Veterans' Affairs (the Department) has sold before the commencement of this Bill are valid and effective. This practically reassures existing and past policyholders that their policies are effective so claims may be lodged for their coverage period. No persons are likely to be detrimentally affected by Part 2 of Schedule 1 to the Bill.[36]

1.46 The committee welcomes the advice that persons are unlikely to be detrimentally affected by the retrospective validation of the Commonwealth and Secretary's actions in this instance.

1.47 However, the committee draws attention to the fact that these actions have occurred since 1 January 1990 without proper legislative basis and no information has been provided in the explanatory memorandum as to what circumstances necessitated the retrospective validation of these actions.

1.48 However, in light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment.

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[36] Explanatory memorandum, p. 1.

Social Security Legislation Amendment (Technical Changes) Bill 2025[37]

Purpose	The bill seeks to amend the *Social Security Act 1991* to make provision for the payment of differing rates for disability support pension recipients aged under 21, depending on their circumstances.
Portfolio	Social Services
Introduced	House of Representatives on 5 February 2025
Bill status	Before the House of Representatives

Retrospective validation[38]

1.49 The bill seeks to ensure provision for different rates of payment of the disability support pension (DSP) for recipients under 21 based on their circumstances (for example, whether living at home or independently). The bill also seeks to retrospectively validate past rate decisions, to ensure higher rates of payments are targeted to those living independently or away from home. It also seeks to apply some of these amendments retrospectively. The explanatory memorandum provides that the bill is giving effect to the original policy position, following a 2024 decision of the Administrative Appeals Tribunal which highlighted unintended consequences arising from the *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005*.[39]

1.50 While the committee understands it was not intended that the 2005 amendments were meant to affect the rate of payment a DSP recipient receives, the committee notes that underlying the basic rule of law principle that all government action must be legally authorised, is the importance of enabling affected persons to rely on the law as it currently exists. Retrospective validation has the potential to undermine these values. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.51 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. If an individual's interests

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37 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Social Security Legislation Amendment (Technical Changes) Bill 2025, *Scrutiny Digest 2 of 2025*; [2025] AUSStaCSBSD 22.

38 Schedule 1, items 2 and 3. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

39 Explanatory memorandum, p. 4-5.

will, or may, be affected by the retrospective application of a provision, the explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity. In this instance, the explanatory memorandum states that:

> Item 2 is intended to have retrospective effect, however, it does not operate retrospectively to change anything that occurred in the past, including previous working out undertaken by Services Australia staff in respect of disability support pension recipients under 21. The validation provision cannot result in any debts arising for past periods.
>
> The validation provision does not remove people's rights of review or appeal in cases where decisions may have been invalid for other reasons.[40]

1.52 Further, the explanatory memorandum provides:

> Subitems 3(1) and 3(3) are intended to have retrospective effect, however, they do not operate to create any different outcomes for disability support pension recipients under 21 in the same circumstances where a relevant thing was done or purportedly done before commencement and that has been validated by item 2. The application provision cannot result in any debts arising for past periods.[41]

1.53 While the committee notes that in some instances, the retrospective validation of actions may be justified, the committee remains concerned that the explanatory memorandum does not provide an adequate explanation as to the effect of the retrospective validation and application. The committee acknowledges the advice in the explanatory memorandum that these provisions will not result in a debt arising for past periods. The committee also notes that, given the policy intent, the recipient is unlikely to have formed a reasonable expectation of a certain rate of payment as a result of the 2005 amendments and relied on that to their detriment. However, it remains unclear if these amendments mean that some DSP recipients will no longer be entitled to a higher rate of payment which they were previously legally entitled to. The committee considers that in this case, the explanatory memorandum should have directly engaged with the question of detriment and better explained the context of the 2024 Administrative Appeals Tribunal decision.

1.54 The committee draws its long-standing scrutiny concerns regarding legislation that seeks to have a retrospective effect to the attention of senators and leaves to the Senate as a whole the appropriateness of the retrospective validation and application of the bill's provisions.

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40 Explanatory memorandum, p. 8.

41 Explanatory memorandum, p. 9.

Universities Accord (National Higher Education Code to Prevent and Respond to Gender-based Violence) Bill 2025[42]

Purpose	The bill seeks to establish a new standalone regulatory framework to reduce incidences of gender-based violence in universities. The bill will provide the minister with the power to create a 'National Higher Education Code to Prevent and Respond to Gender-based Violence' (the Code) as a legislative instrument, which will set out standards and requirements which higher education providers must meet.
Portfolio	Education
Introduced	House of Representatives on 6 February 2025
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Incorporation of external materials as existing from time to time[43]

1.55 The bill provides that the minister may make a National Higher Education Code to Prevent and Respond to Gender-based Violence (the code), by legislative instrument.[44] This code is intended to provide national standards for higher education providers in connection with preventing and responding to gender-based violence. The bill sets out the purpose of the code and a non-exhaustive list of matters that may be included in the code. This may include requiring higher education providers to do certain things, such as that the code may require providers to collect or provide certain information, including personal information, and other matters the minister considers are necessary or convenient.[45] The bill also provides that a number of obligations flow from the code. A provider that fails to comply with a requirement in the code would be subject to a civil penalty of up to 200 penalty units (currently $66,000)[46]. In addition, the bill provides that the monitoring powers under the *Regulatory Powers (Standard Provisions) Act 2014* are triggered in order to monitor whether a provision of a legislative instrument, such as the code, has been complied with, and investigation

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42 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Universities Accord (National Higher Education Code to Prevent and Respond to Gender-based Violence) Bill 2025, *Scrutiny Digest 2 of 2025*; [2025] AUSStaCSBSD 23.

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

44 Clause 15.

45 Clause 17.

46 See *Crimes Act 1914*, section 4AA.

powers can be triggered to investigate whether a civil penalty provision has been complied with.[47]

1.56 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.

1.57 In this instance, the explanatory memorandum states:

> Using a legislation-making power to impose the substantive regulatory requirements on higher education providers is appropriate as the legislative instrument will contain detailed requirements under numerous standards to ensure higher education providers are appropriately preventing and responding to gender--based violence in their communities, which will help to protect and promote the safety of students and staff.
>
> This legislative-making power ensures there is sufficient flexibility for the Government to respond quickly to trends or new evidence about effective practices to prevent and respond to gender-based violence, noting this is an evolving area of policy. A legislative instrument can be made quickly to include any additional requirements to uplift higher education providers' gender-based violence prevention and response practices.[48]

1.58 While the committee acknowledges this explanation and the need for flexibility, the committee notes that breach of the code could lead to a civil penalty and trigger monitoring and investigation powers. The committee notes that in such circumstances the committee would generally expect greater detail in the bill itself as to what the code must contain and/or a more detailed explanation in the explanatory memorandum as to the need to set the code entirely out in delegated legislation.

1.59 Further, the bill provides that the code may apply, adopt or incorporate any matter contained in any other instrument or writing as in force or existing from time to time. While the explanatory memorandum states that international conventions and treaties or any existing Australian guidance may be incorporated by the national code, it provides no explanation as to whether these materials will be freely available for any member of the public, or if other material may be incorporated that is not freely available.[49]

1.60 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. The committee reiterates its consistent

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47 Clause 35 and 36.

48 Explanatory memorandum, p. 22.

49 Explanatory memorandum, p. 25.

scrutiny view that where material is incorporated by reference into the law, it should be freely and readily available to all those who may be interested in the law.

1.61 The committee requests that an addendum to the explanatory memorandum, containing information as to whether documents applied, adopted or incorporated by reference under subclause 17(3) will be made freely available to all persons interested in the law, 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.[50]

1.62 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the national code being entirely set out in delegated legislation.

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

Privacy[51]

1.64 The bill provides that the secretary may disclose protected information[52] to a wide range of persons or bodies if satisfied that the information will be appropriately protected after disclosure. A person or body who has obtained protected information can use or further disclose the information for the purpose for which it was disclosed.[53]

1.65 Bills which enable the collection, use or disclosure of personal information may trespass on an individual's right to privacy. Where a bill contains provisions for the collection, use or disclose of personal information, the committee expects the explanatory memorandum to the bill to address why it is appropriate for the bill to provide for the collection of personal information; what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* applies).

1.66 In this instance, the explanatory memorandum provides:

> It is not anticipated that personal information will need to be disclosed often, and the department will seek to minimise any disclosures of personal information. An example of when it may be necessary to disclose personal information is if a complaint or issue is raised with the department and it would be most appropriately handed by an alternative body, for example, the National Student Ombudsman. This provision will ensure that the

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50 See section 15AB of the *Acts Interpretation Act 1901*.

51 Clause 42. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

52 Which is taken to have the same meaning as under the *Privacy Act 1988*, or any information relating to a higher education provider.

53 Subclause 42(3).

department can share the complaint with the National Student Ombudsman for action.[54]

1.67 The statement of compatibility also provides:

> The Secretary's powers to collect, use and further disclose information are appropriate and necessary to ensure the Secretary can effectively regulate the Bill and the National Code. Given the serious nature of gender-based violence and the impact that it has on people who experience it, it is critical that the Secretary is able to access relevant information and documents to carry out their functions and powers under the Bill. Any information collected through these processes will be handled in accordance with the Department of Education's privacy policy (which can be found here: https://www.education.gov.au/using-site/privacy) and the department will also continue to comply with its privacy obligations under the Australian Privacy Principles in Schedule 1 to the Privacy Act.
>
> Further, no personal information will be made publicly available by the Department of Education or any other government agency. Such information will only be used internally by the department and other Commonwealth agencies for the purposes of performing their functions and undertaking their activities.[55]

1.68 The committee acknowledges the application of these intended safeguards and that disclosure of protected information will be minimised and is required to only occur where the secretary is satisfied of appropriate protections. However, the committee notes that it is somewhat unclear how the secretary will be satisfied of the requirement that they may only disclose personal information if it will be protected after disclosure, particularly as the information can be further used or disclosed. The committee also considers that an additional safeguard may be to limit disclosure to de-identified information, where possible, to minimise the risk of overly broad disclosure.

1.69 The committee recommends that consideration be given to amending clause 42 of the bill to provide that the relevant protected information used or disclosed must be de-identified if appropriate in the circumstances and if it does not prevent the person from fulfilling the purpose for which the information was disclosed.[56]

1.70 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the disclosure power under clause 42 of the bill, which may include the disclosure of personal information.

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54 Explanatory memorandum, p. 51.

55 Statement of compatibility, p. 12.

56 See for example, *Aged Care Act 2024*, subsection 537(9A).

Bills with no committee comment[57]

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

- Appropriation (Parliamentary Departments) Bill (No. 2) 2024-2025
- Early Childhood Education and Care (Three Day Guarantee) Bill 2025
- Electricity Infrastructure Legislation Amendment Bill 2025
- Remuneration Tribunal Amendment (There For Public Service, Not Profit) Bill 2025
- Superannuation Guarantee (Administration) Amendment (Frontline Emergency Service Workers) Bill 2025
- Tertiary Education Legislation Amendment (There For Education, Not Profit) Bill 2025
- Universities Accord (National Higher Education Code to Prevent and Respond to Gender-based Violence) (Consequential Amendments) Bill 2025

[57] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 2 of 2025*; [2025] AUSStaCSBSD 24.

Commentary on amendments[58]

Criminal Code Amendment (Hate Crimes) Bill 2024

1.71 On 6 February 2025, the House of Representatives agreed to 20 Government and four Opposition amendments, and the bill passed, as amended, both Houses of Parliament on the same day.

Undue trespass on rights and liberties
Parliamentary scrutiny[59]

1.72 One Government amendment and one Opposition amendment introduced mandatory minimum terms of imprisonment for a number of offences.[60] The relevant offences and terms of mandatory imprisonment are:

- public display of prohibited Nazi symbol or giving Nazi salute[61] – 12 months;
- public display of prohibited terrorist organisation symbols[62] – 12 months;
- commission of specified terrorist acts[63] – 6 years;
- associating with a terrorist organisation[64] – 12 months;
- financing terrorism or a terrorist[65] – 3 years; and
- advocating force or violence through causing damage to property[66] – 12 months.[67]

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58 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments, *Scrutiny Digest 2 of 2025*; [2025] AUSStaCSBSD 25.

59 Government amendment (1) [sheet AA101] and Opposition amendment (1) [Sheet 3]. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (v).

60 Government amendment (1) [sheet AA101] and Opposition amendment (1) [Sheet 3].

61 *Criminal Code*, section 80.2H.

62 *Criminal Code*, section 80.2HA.

63 *Criminal Code*: engaging in a terrorist act (section 101.1); providing or receiving training connected with terrorist acts (section 101.2); possessing things connected with terrorist acts (section 101.4); collecting or making documents likely to facilitate terrorist acts (section 101.5); other acts done in preparation for, or planning, terrorist acts (section 101.6); directing the activities of a terrorist organisation (section 102.2); membership of a terrorist organisation (section 102.3); recruiting for a terrorist organisation (section 102.4); training involving a terrorist organisation (section 102.5); getting funds to, from or for a terrorist organisation (section 102.6); providing support to a terrorist organisation (section 102.7).

64 *Criminal Code*, section 102.8.

65 *Criminal Code*, sections 103.1 and 103.2.

66 *Criminal Code*, section 80.2BE.

67 See amendments to section 16AAA of the *Crimes Act 1914*, table A1A–1F.

1.73 The committee notes that mandatory minimum terms of imprisonment remove judicial discretion and may result in the imposition of sentences of imprisonment that are disproportionate to the offence in the circumstances. Typically, the Parliament determines, based on the severity of the conduct to be criminalised, the maximum penalty that may be imposed following conviction. This gives courts the discretion to impose a sentence up to, and including, the maximum penalty based on a range of factors. It enables the court to consider matters such as the impact of the offence on the victim and the circumstances of the offending and the accused. In sentencing an offender, the court must consider whether a particular case meets the threshold for imposing a term of incarceration, taking into account and balancing the purposes and principles of sentencing.

1.74 Mandatory minimum sentences constrain the exercise of judicial discretion and deprive a court of the ability to adequately consider the culpability of a particular defendant. At common law, it is understood that the purpose of a criminal sentence is that it reflects the objective seriousness of the offence committed and that there must be a reasonable proportionality to the circumstances of the offending.[68] As mandatory sentences fail to account for individual circumstances, this could lead to detention that is disproportionate and arbitrary.

1.75 It has been the committee's long standing and consistent approach to draw scrutiny concerns regarding mandatory sentencing to the attention of the Senate. See, for example, the committee's comments in relation to the Border Protection (Validation and Enforcement Powers) Bill 2001; Anti-People Smuggling and Other Measures Bill 2010; Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014; Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015; Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019; Criminal Code Amendment (Firearms Trafficking) Bill 2022; and Migration Amendment (Bridging Visa Conditions) Bill 2023 and Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023.[69]

1.76 From a scrutiny perspective, the committee also notes with concern the speed at which the bill and its amendments were considered by the Senate. The bill, as amended, was introduced into the Senate on 6 February 2025, and agreed to by the Senate under a limitation of debate the same day, which allowed only one hour for the second reading of the bill and around 15 minutes to discuss committee-of-the-whole amendments.

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68 *Veen v The Queen* (No 2) (1988) 164 CLR 465 at p. 477.

69 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 13 of 2001* (20 September 2001), p 8; *Alert Digest 3 of 2010* (10 March 2010), p. 2; *Alert Digest 10 of 2014* (27 August 2014) p. 10; *Alert Digest 4 of 2015* (25 March 2015) p. 11; *Scrutiny Digest 13 of 2017* (15 November 2017), pp. 76-79; *Scrutiny Digest 6 of 2019* (18 September 2019), pp. 3-4; *Scrutiny Digest 2 of 2022* (18 March 2022) p. 33; and *Scrutiny Digest 15 of 2023* (29 November 2023), p. 14.

1.77 The committee considers that such a rapid process limits parliamentary scrutiny and debate, and that this may have limited an appropriate consideration of all matters within the amendments, particularly in relation to serious impacts on personal rights and liberties.

1.78 As previously stated, the committee considers mandatory minimum sentences unduly trespass on personal rights and liberties as they remove judicial discretion and may result in the imposition of sentences of imprisonment that are disproportionate to the offence in the circumstances.

1.79 The committee reiterates its consistent scrutiny view that legislation, particularly legislation that may unduly trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny.

1.80 However, in light of the fact that this bill, as amended, has passed both Houses of Parliament, the committee makes no further comment.

Broad scope of offence
Freedom of expression
Significant penalties[70]

1.81 The Government and Opposition amendments also made a number of significant changes to existing offences and introduced additional offences to the Criminal Code, including:

- amendments to sections 80.2A and 80.2B so that it is an offence to 'advocate' the use of force or violence against particular groups, members of groups or their close associates, instead of needing to 'intentionally urge' the use of force or violence. Advocate is defined to mean 'counsel, promote, encourage or urge';[71]
- introducing new sections 80.2BC and 80.2BD, making it an offence to advocate or threaten the causing of damage or destruction to real property or motor vehicles, because it is a place of worship or owned or occupied by groups with particular attributes;[72]
- introducing new section 80.2BE, making it an offence to advocate the use of force or violence against a group, distinguished by race, religion or ethnic origin, by causing damage to property. Damage is defined to include minor damage and would capture an offensive slogan painted on a building. This

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70 Government amendments [sheet EZ100] and [sheet AA101] and Opposition amendments [Sheet 3]. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

71 Government amendments (1)–(11) [sheet EZ100].

72 Government amendment (16) [sheet EZ100].

offence is subject to imprisonment for between 5–7 years and a mandatory minimum period of 12 months;[73] and

- amending existing sections 80.2H and 80.2HA to add to the prohibition of display of Nazi salutes or symbols and terrorist organisation symbols to also prohibit these if it would offend, insult or humiliate or intimidate a person distinguished by disability, and to increase the penalty from 12 months imprisonment to up to five years imprisonment.[74]

1.82 The committee notes that when it considered the bill as originally introduced, it had scrutiny concerns regarding the removal of an existing defence.[75] The committee had noted that by removing this defence, an existing safeguard was removed that aimed to ensure the offences are not overly broad, noting the potential impact of these offences on freedom of expression. The committee had noted that previous drafting of the offences meant it was unlikely there were many circumstances where a person could urge or threaten the use of force or violence against a particular group in ways that would be considered legitimate. However, the committee noted 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 was concerned that completely removing existing defence provisions may result in unintended consequences, particularly in circumstances where the threshold for intending that the force or violence will occur has been lowered to recklessness. For example, under the bill, it would appear 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.

1.83 The committee's concerns in this regard are heightened by these amendments, which broaden the scope of the offence to 'advocating' the use of force, which includes encouraging or promoting. This is a lower threshold than urging the use of force, and the committee notes there is now no defence for acts done for a genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest or in the dissemination of news or current affairs.[76] The committee is concerned that the amendments, applying also to damage to property (rather than only urging or threatening violence against individuals) also broaden the offence. This also raises issues regarding freedom of expression. The committee is particularly concerned by the new offence in section 80.2BE, the effect of which is that a person could be subject to up to five years imprisonment, and a minimum of one year's

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73 Opposition amendments (1)–(2) [sheet 3]

74 Government amendment (17) [sheet EZ100] and (5) and (6) [sheet AA101].

75 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024* (18 September 2024) pp. 11–15 and *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 109–113.

76 See *Criminal Code Act 1995*, section 80.3 (as it existed prior to the amendments made by this bill).

imprisonment, for certain forms of graffiti. The committee considers it has not been established that this significant penalty is appropriate in all the circumstances and is of comparable severity to other like offences.[77]

1.84 The committee also notes that it had concerns with the breadth of the scope of the offences involving displays of Nazi or terrorist symbols, and the potential impact on the right to freedom of expression.[78] The committee notes that the substantial increase in the maximum term of imprisonment (to five years) and the introduction of the mandatory minimum term of 12 months imprisonment, heighten these concerns.

1.85 The committee considers the expansion of the scope of these offences and the increase in the penalties of imprisonment, taken together with the removal of existing defences and a lowering of the fault element from intention to recklessness, unduly trespasses on personal rights and liberties.

1.86 However, in light of the fact that this bill, as amended, has passed both Houses of Parliament, the committee makes no further comment.

Health Legislation Amendment (Improved Medicare Integrity and Other Measures) Bill 2024

1.87 On 5 February 2025, the House of Representatives agreed to two Government amendments.

Abrogation of privilege against self-incrimination[79]

1.88 Section 106ZPQ of the *Health Insurance Act 1973* (the Health Insurance Act) currently abrogates the privilege against self-incrimination by providing that persons are not entitled to refuse to produce documents on the grounds that production of documents might tend to incriminate them. A person may be required under that Act to produce such information or documents as part of a review into the provision of services involving a Medicare or dental benefit. However, use and derivative use immunity is applicable in relation to documents and information obtained except for proceedings for an offence of providing false or misleading documents. A use immunity provides that information or documents produced are not admissible in

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77 In this regard, the committee notes that it is not clear if a constitutional head of power would support the breadth of such an offence, noting it appears to rely on the external affairs power. However, it is not clear if such an offence is supported by the International Covenant on Civil and Political Rights or the International Convention on the Elimination of All Forms of Racial Discrimination.

78 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2023* (9 August 2023) pp. 1–19; *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 57–73; and *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 35–43.

79 Amendment (2) items 19 and 20, government sheet [FL102]. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

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.

1.89 Item 19 of amendment (2) seeks to amend this provision to limit when the existing use and derivative use immunities are applicable. This would mean that any information, document or other material obtained under this provision is applicable in the following proceedings:

- for offences for failing to produce documents or give information or for producing false or misleading documents;
- before a Committee or the Determining Authority;
- to recover an amount that is recoverable as a debt to the Commonwealth or otherwise required to be repaid to the Commonwealth; and
- any other proceedings in relation to compliance with a requirement under Part VAA of the Health Insurance Act.[80]

1.90 In addition, item 20 of amendment (2) seeks to provide circumstances when information and certain derivative materials are admissible as evidence in these proceedings. These circumstances include where information, documents or other material is obtained by an appropriate person or body (who are prescribed by the regulations) under sections 106XA or 106XB of the Health Insurance Act for proceedings that are for the purposes of the National Law.[81] Derivative materials may also be admissible in proceedings even if they are not obtained by compulsion under the relevant sections of the Health Insurance Act but were the result of the production of documents under those sections and are obtained by an appropriate person or body.[82]

1.91 The committee notes that the exceptions to when use and derivative use immunity is not applicable is being expanded to include proceedings to recover a debt to the Commonwealth and any other proceedings in relation to compliance with a requirement under Part VAA of the Health Insurance Act. This would provide that use and derivative use immunity could potentially not be applicable in a wide range of proceedings under this scheme, potentially even criminal proceedings. In relation to this, the supplementary explanatory memorandum provides:

> The amendments will ensure that information and documents produced under subsection 89B(2) or 105A(2) of the Health Insurance Act could be used in certain proceedings related to the Professional Services Review process. This presents a limited exception to the use immunity that otherwise applies to the compulsorily acquired material. Noting that material obtained under subsection 89B(2) or 105A(2) will have been sought

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80 Amendment (2), item 19, proposed subsection 106ZPQ(2).

81 Amendment (2), item 20, proposed subsection 106ZPQ(3).

82 Amendment (2), item 20, proposed subsection 106ZPQ(4).

> for the purposes of a Director's review or a Committee's inquiry, it is appropriate for the material to also be admissible in proceedings that support, or are related to that process, including the recovery of amounts due as debts or required to be repaid.[83]

1.92 It is not clear to the committee if this exception is limited in nature as it is applicable to any proceeding for the purpose of compliance with a requirement under a certain Part of the Act. Further, the committee notes that this explanation is only applicable to civil proceedings and fails to address instances where information or documents are admissible in criminal proceedings commenced in relation with a failure to comply with the Health Insurance Act. The committee's concerns are focused on when persons may be forced to incriminate themselves – in such circumstances the committee expects that safeguards, such as a use or derivative use immunity, should apply. It is also unclear from this justification why the amendments are necessary and more concerningly, why such a broad exception to the application of use and derivative use immunity is required.

1.93 The committee's concerns are heightened in this instance as material which is referred to regulatory bodies or other appropriate persons under sections 106XA and 106XB of the Health Insurance Act can also be used in proceeding against those individuals as a result of investigations commenced by said bodies. The committee understands that these investigations would have been commenced on the basis of compulsorily provided information that should be, and previously would have been, subject to use and derivative use immunity. In relation to this matter, the supplementary explanatory memorandum states:

> Under the current subsection 106ZPQ(2), there are broad restrictions against the use of material acquired under subsection 89B(2) or 105A(2) of the Health Insurance Act in civil and criminal proceedings. The current restrictions may prevent Ahpra or another regulatory body from taking appropriate regulatory or compliance action in relation to the referred material. In turn, this may have the result that potential threats to life or health, or non-compliance with professional standards remain unaddressed and patient safety is compromised.
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> […]
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> These amendments would ensure that the requirements to refer information under sections 106XA and 106XB are not ultimately frustrated by restrictions on the use of referred information. Such exceptions to the use and derivative use immunities are appropriate in circumstances where the legislation intends that this information would be used by appropriate regulatory bodies to take action to address significant threats to life or health and non-compliance with professional standards.[84]

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83 Supplementary explanatory memorandum, pp. 15-16.

84 Supplementary explanatory memorandum, pp. 16-17.

1.94 While the committee acknowledges the necessity of being able to address significant threats to life or health and non-compliance with professional standards, it is still unclear whether such threats could be addressed by taking immediate regulatory action (outside the criminal law context).

1.95 The committee reiterates that the privilege against self-incrimination is a fundamental right under the common law and any abrogation of that right represents a significant loss to personal liberty and the presumption of innocence. The committee notes in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 Murphy J noted that the privilege is:

> part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of the human personality.[85]

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

- **why it is necessary and appropriate that the exceptions to when use and derivative use immunity apply be expanded to include any proceedings in relation to compliance with a requirement under Part VAA of the *Health Insurance Act 1973* (noting this can include criminal proceedings);**
- **why it is necessary and appropriate derivative use immunity not apply to documents that are obtained by regulatory bodies or other appropriate persons under sections 106XA and 106XB of the *Health Insurance Act 1973*, allowing these documents or information to be admissible as evidence in certain proceedings; and**
- **whether the Criminal Justice Division of the Attorney-General's Department has been consulted in relation to this matter.**

1.97 The committee's consideration of this information would be assisted if the response made reference to the principles in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

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85 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.