

The Senate

Standing
Committee for the
Scrutiny of Bills

Scrutiny Digest 6 of 2019

18 September 2019

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ISSN 2207-2004 (print)

ISSN 2207-2012 (online)

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

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Introduction

Terms of reference

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

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

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

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

Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

Chapter 1

Commentary on Bills

1.1 The committee comments on the following bill and, in some instances, seeks a response or further information from the relevant minister.

Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019

Purpose

This bill seeks to amend the *Crimes Act 1914* and the *Criminal Code Act 1995* to:

- insert community safety as a factor that can be taken into account to revoke the parole of a federal offender without notice;
- remove the requirement to seek leave before a recorded interview of a vulnerable witness can be admitted as evidence in chief;
- prevent children and other vulnerable witnesses from being cross-examined at committal proceedings;
- insert notes in the Criminal Code to provide additional clarity regarding the scope of conduct captured by child sex offences;
- insert new aggravated offences for child sexual abuse that involves subjecting the child to cruel, inhuman or degrading treatment, or which causes the death of the child;
- insert new offences to criminalise the “grooming” of third parties, including through the use of a carriage service, with the intention of making it easier to procure a child for sexual activity in Australia or overseas;
- insert a new offence to criminalise the provision of an electronic service to facilitate dealings with child abuse material online;
- insert additional aggravating sentencing factors that apply when a court is sentencing for certain child sex offences, including considering the age and maturity of the victim and the number of people involved in the commission of the offence;
- increase the maximum penalties for certain Commonwealth child sex offences;

- introduce a mandatory minimum sentencing scheme to apply to the Commonwealth child sex offences that attract the highest maximum penalties, and all other Commonwealth child sex offences if the offender is a repeat child sex offender;
- insert a presumption against bail for Commonwealth child sex offences that attract the highest maximum penalties, and all other Commonwealth child sex offences if the offender is a repeat child sex offender;
- make it an aggravating factor in sentencing if a federal offender used their standing in the community to assist in the commission of an offence;
- ensure that when sentencing a Commonwealth child sex offender, the court must have regard to the objective of rehabilitating the person, including by considering whether to impose any conditions about rehabilitation and treatment and considering if the length of sentence is sufficient for the person to undertake a rehabilitation program while in custody;
- insert a presumption in favour of cumulative sentences for Commonwealth child sex offences;
- insert a presumption in favour of Commonwealth child sex offenders serving an actual term of imprisonment;
- require that if a court is releasing a Commonwealth child sex offender on a recognizance release order, the offender must be supervised in the community, and undertake such treatment and rehabilitation programs as their probation officer directs;
- add residential treatment orders as an additional sentencing alternative to allow intellectually disabled offenders to receive access to specialised treatment options;
- reduce the amount of 'clean street time' that can be credited by a court as time served against the outstanding sentence following commission of an offence by a person on parole and license; and
- require a period of time to be served in custody if a federal offender's parole order is revoked.

Portfolio

Attorney-General

Introduced

House of Representatives on 11 September 2019

1.2 The committee commented on a similar bill in the previous Parliament in [Scrutiny Digest 13 of 2017](#). The committee does not have any additional comments regarding the following matters it raised in relation to that bill:

- procedural fairness and broad discretionary power (Schedule 1, proposed paragraph 19AU(3)(ba)); and
- reversal of legal burden of proof (Schedule 4, items 20, 22, 40 and 42).

Mandatory minimum sentences¹

1.3 Schedule 6 to the bill proposes to introduce mandatory minimum sentences of imprisonment if a person is convicted of certain serious child sexual abuse offences under the Commonwealth Criminal Code.² Mandatory minimum sentences will also apply to any person convicted of any Commonwealth child sex offences more than once.³ The minimum sentences to be imposed range from two years to seven years.

1.4 The statement of compatibility states that the objective of the measure is to ensure the courts are handing down sentences 'that reflect the gravity of these offences and ensure that the community is protected from child sex offenders', stating that current sentences 'do not sufficiently recognise the harm suffered by victims of child sex offences' or 'that the market demand for, and commercialisation of, child abuse material often leads to further physical and sexual abuse of children'.⁴ The statement of compatibility further states that courts will retain discretion as to the term of actual imprisonment because the mandatory sentencing scheme relates only to the length of the head sentence and not the term of actual imprisonment served by an offender.⁵ This is because the courts set the non-parole period and could set that the non-parole period as lower than the mandatory minimum sentence.

1.5 However, the committee has consistently noted that mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. While a court retains a discretion as to the non-parole period, a mandatory minimum sentence still requires that a person be subject to a penalty for that period (either in prison or subject to parole conditions), and sentencing principles generally provide that a non-parole period is to be in proportion to the head sentence.

1 Schedule 6. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(i) of the committee's terms of reference.

2 See, Schedule 6, item 2, proposed section 16AAA.

3 See Schedule 6, items 2, 8 and 9, proposed section 16AAB.

4 Statement of compatibility, p. 9.

5 Statement of compatibility, p. 9.

1.6 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of setting mandatory minimum sentences, which limits judicial discretion, for Commonwealth child sex offences.

Right to liberty—presumption against bail⁶

1.7 Schedule 7 to the bill would introduce a presumption against bail for persons charged with, or convicted of, certain Commonwealth child sex offences. Proposed section 15AAA provides that a bail authority must not grant bail unless satisfied by the person that circumstances exist to grant bail.

1.8 The presumption against bail applies to persons charged with, or convicted of, serious child sex offences to which mandatory minimum penalties apply. It also applies to all offences where the alleged perpetrator has a previous conviction for a child sex offence.

1.9 The presumption against bail applies to those convicted of, and also those charged with, certain offences. The committee notes that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption. As such, the committee expects that a clear justification be given in the explanatory materials for imposing a presumption against bail and any evidence that courts are currently failing to consider the serious nature of an offence in determining whether to grant bail.

1.10 In this instance, the statement of compatibility provides that the presumption against bail aims to achieve the objective of community protection from Commonwealth child sex offenders while they are awaiting trial or sentencing, and where conditions of bail 'cannot mitigate the risk to the community, witnesses, and victims.'⁷ The statement of compatibility further states that the presumption is rebuttable and provides judicial discretion in determining whether a person's risk on bail can be mitigated by appropriate conditions.⁸

1.11 However, no information is provided to demonstrate that the courts are currently not appropriately considering the risks posed by those accused of Commonwealth child sex offences.

6 Schedule 7, Part 2. The committee draws Senators' attention to this Part pursuant to principle 1(a)(i) of the committee's terms of reference.

7 Statement of compatibility, p. 10.

8 Statement of compatibility, p. 10.

1.12 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing a presumption against bail.

Right to liberty—conditional release⁹

1.13 Section 20(1)(b) of the *Crimes Act 1914* currently provides that, following conviction for an offence, the court may sentence a person to imprisonment but direct that the person be released after having given certain forms of security, such as being of good behaviour, paying compensation or paying the Commonwealth a pecuniary penalty or other conditions (known as a recognizance order or suspended sentence). Schedule 11 to the bill proposes removing this sentencing option for Commonwealth child sex offenders except in exceptional circumstances. As a result, those convicted of Commonwealth child sex offences will be required to serve a period of imprisonment that cannot be suspended, except in limited circumstances.

1.14 The explanatory memorandum states that this:

Still provides the courts with enough discretion in setting the pre-release period under a recognizance release order to enable individual circumstances to be taken into account while ensuring that child sex offenders receive sentences that reflect the exceptionally serious nature of their crimes.¹⁰

1.15 As with mandatory minimum sentences, the committee has consistently noted that severely limiting the court's discretion to make a recognizance order (or suspend a sentence) undermines the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. The statement of compatibility states that the court retains a discretion as to how long the term of imprisonment will be.¹¹ However, the committee notes that the proposed amendments in Schedule 6 would impose mandatory minimum sentences and as such the court's discretion as to the term of imprisonment is already limited. In addition, while the court would retain a discretion to suspend a sentence in 'exceptional circumstances', the committee notes that this will require offenders to demonstrate that exceptional circumstances exist.

1.16 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of limiting judicial discretion in sentencing Commonwealth child sex offenders.

9 Schedule 11. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(i) of the committee's terms of reference.

10 Explanatory memorandum, p 62.

11 Statement of compatibility, p 10.

Emergency Response Fund Bill 2019

Purpose	This bill seeks to establish the Emergency Response Fund to fund emergency response and recovery following natural disasters in Australia that have a significant or catastrophic impact
Portfolio	Finance
Introduced	House of Representatives on 11 September 2019

Broad discretionary powers¹²

1.17 Clause 20 of the bill seeks to allow the Emergency Management Minister,¹³ on behalf of the Commonwealth, to make arrangements with, and grants of financial assistance to, a person or body for a number of specified purposes related to disaster relief and post-disaster resilience.¹⁴

1.18 The committee's view is that, where it is proposed to allow the expenditure of a potentially substantial amount of Commonwealth money,¹⁵ the expenditure should be subject to at least some level of parliamentary scrutiny. In this regard, the committee is concerned that the bill contains only very limited guidance on its face as to the terms and conditions that would attach to financial assistance granted in accordance with clause 20.¹⁶ The explanatory memorandum also provides no explanation as to why it is considered necessary and appropriate to confer on the minister a broad power to make grants and enter into arrangements, without specifying conditions to which the provision of financial assistance would be subject.

12 Clauses 20 and 21. The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(iv) and (v).

13 Clause 4 of the bill clarifies that 'Emergency Management Minister' means a minister whose title includes 'Emergency Management', or otherwise the minister declared by the Prime Minister, by notifiable instrument, to be the Emergency Management Minister.

14 The purposes for which grants may be made, and arrangements may be entered into, are specified in proposed paragraphs 20(1)(c)-(f).

15 The explanatory memorandum (p. 4) states that \$4 billion in uncommitted funds would be transferred from the Education Investment Fund to the Emergency Response Fund on its establishment.

16 In this respect, the committee notes that subclause 20(6) defines 'post-disaster resilience' for the purposes of the grants scheme. Clause 21 provides that any terms and conditions to which a grant is subject are to be set out in a written agreement between the grant recipient and the Commonwealth, and that the terms and conditions must provide for the circumstances in which the grant recipient must repay amounts to the Commonwealth.

It only notes that the bill does not limit the terms and conditions that may be included in a grant agreement.¹⁷

1.19 The committee also notes that clause 24 (which seeks to set constitutional limits on the provision of financial assistance) provides that the minister may grant financial assistance to a state or territory.¹⁸ The explanatory memorandum indicates that this assistance may be used to fund community recovery packages and disaster resilience projects (for example, the development of a flood levee to reduce the impact of future flooding events).¹⁹ In this respect, the committee notes that section 96 of the Constitution confers on the *Parliament* the power to make grants to the states and to determine the terms and conditions attaching to them.²⁰ Where the Parliament delegates this power, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny. However, as noted above, the bill appears to contain only limited guidance as to the terms and conditions on which financial assistance may be granted.

1.20 The committee requests the minister's advice as to why it is considered necessary and appropriate to confer on the Emergency Management Minister a broad power to make grants of financial assistance, in the absence of clear guidance on the face of the bill as to how this power is to be exercised.

1.21 The committee also requests the minister's advice as to the appropriateness of amending the bill to include (at least high-level) guidance as to the terms and conditions on which financial assistance may be granted.

Merits review²¹

1.22 As outlined above, clause 20 of the bill seeks to allow the Emergency Management Minister to make an arrangement with, or make a grant of financial assistance to, a person or body for purposes relating disaster recovery and post-disaster resilience. The explanatory memorandum states that, under clause 20:

arrangements could...be made with, and grants provided to, individuals, incorporated or unincorporated bodies, not-for-profit organisations, education institutions (such as a university), State and Territory

17 Explanatory memorandum, p. 14.

18 In particular, proposed paragraph 24(b).

19 Explanatory memorandum, p. 16.

20 Section 96 of the Constitution provides that: '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

21 Clause 20. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

governments, and local government bodies. This list should not be considered exhaustive.²²

1.23 It appears to the committee that the provision of grants and the making of arrangements pursuant to clause 20 may involve discretionary decisions on the part of the minister or his or her delegate. Moreover, such decisions have the potential to affect the interests of the persons and entities to which grants may be provided and arrangements made. It therefore appears that decisions under clause 20 may be suitable for independent merits review. However, the committee notes that neither the bill nor the explanatory memorandum indicates whether merits review would be available.

1.24 Additionally, it is unclear to the committee how the relevant grants and arrangements would be made. The committee notes that neither the bill nor the explanatory memorandum set out any particular processes to be followed by persons seeking to obtain a grant or enter into an arrangement. Information regarding how grants are to be awarded and how arrangements are to be entered into would assist the committee in determining whether relevant decisions would be suitable for independent merits review.

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

- **the processes by which grants would be provided, and arrangements would be entered into, in accordance with clause 20 of the bill;**
- **whether decisions in relation to the provision of grants and entering into arrangements would be subject to independent merits review; and**
- **if not, the characteristics of those decisions that would justify excluding merits review (the committee's consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*).**

Significant matters in non-disallowable legislative instruments²³

1.26 Clause 39 of the bill would permit the responsible ministers to give the Future Fund Board (FFB) written directions about the performance of its Emergency Response Fund investment functions.²⁴ Directions given by the responsible ministers

22 Explanatory memorandum, pp. 12-13.

23 Clause 39. The committee draws senators' attention to this provision pursuant to Senate Standing Orders 24(1)(a)(iv) and (v).

24 Clause 4 of the bills clarifies that the responsible Ministers are the Treasurer and the Finance Minister. The Future Fund Board is responsible for deciding how to invest the Emergency Response Fund.

make up the Fund's Emergency Response Fund Investment Mandate. Given that the directions making up the investment mandate are given by a minister to a Commonwealth entity, they will not be subject to disallowance or sunseting.²⁵

1.27 The committee's consistent view is that significant matters relating to a legislative scheme (for example, the investment of Commonwealth funds) should be included in primary legislation, or at least in legislative instruments subject to disallowance and sunseting. Where significant matters are to be included in legislative instruments that are not subject to disallowance or sunseting, the committee would expect a comprehensive justification for this approach to be included in the explanatory materials. In this instance, the explanatory memorandum states that:

The Government considers it is appropriate that a direction under subclause 39(1) of the Bill is not subject to disallowance. The Bill would provide adequate scrutiny of [such] directions...through mandated consultation with the Future Fund Board (clause 32). Exemption from disallowance together with consultation would give the Future Fund Board necessary certainty when investing through the Emergency Response Fund. While it would be possible to provide that a direction under subsection 39(1) does not come into effect until disallowance periods have expired, this approach would significantly impede the ability of Government to make urgent changes to the Emergency Response Fund Investment Mandate in the national interest.

The Government also considers it is appropriate that a direction under subclause 39(1) of the Bill is not subject to sunseting. The process for setting the Emergency Response Fund Investment Mandate has been designed to ensure the mandate remains relevant over the long term, subject to appropriate revisions to take into account changing circumstances. This process means the [mandate] may comprise of multiple directions issued at different times. Not being subject to sunseting would ensure that directions comprising the [mandate] remain coherent, regardless of when specific directions are issued.

This approach enables the public and the Parliament to hold the Government accountable for the directions it issues to the Future Fund Board without impeding the Government's ability to manage its finances. The approach is consistent with other investment mandates in respect of the other investment funds managed by the Future Fund Board.

1.28 While noting this explanation, the committee does not consider operational certainty alone to be sufficient justification for leaving significant elements of the emergency response fund scheme to legislative instruments that are not subject to

25 See section 9, item 2, and section 11, item 3 of the Legislation (Exemptions and Other Matters) Regulation 2015. That the directions will not be subject to disallowance or to sunseting is confirmed by the explanatory memorandum (pp. 23-24).

disallowance or sunseting. In this respect, the committee notes that disallowance is the primary tool by which Parliament exercises control of delegated legislation. Further, it is not clear that consultation with the FFB, on its own, would be an adequate substitute for parliamentary disallowance, particularly noting that the FFB is the entity to which the directions would be issued.

1.29 The committee also acknowledges the importance of ensuring certainty and coherence for the FFB in relation to the performance of its functions. However, the committee considers that there may be methods available that would deliver this certainty while maintaining an appropriate level of parliamentary oversight. For example, the committee considers that it would be possible to provide that instruments making up the investment mandate are generally disallowable, with an exception provided for emergency circumstances.

1.30 The committee requests the minister's more detailed advice as to:

- **why it is considered appropriate to leave significant elements of the disaster relief and post-disaster resilience scheme proposed by the bill to delegated legislation; and**
- **why directions making up the Emergency Response Fund Investment Mandate would not be subject to disallowance or to sunseting.**

1.31 The committee also requests the minister's advice as to the appropriateness of amending the bill to provide that the directions making up the Emergency Response Fund Investment Mandate are subject to disallowance but only come into force once the disallowance period has expired, unless the minister certifies that there is an urgent need to make changes and it is in the national interest that a specified direction not be subject to disallowance.

Broad delegation of administrative powers²⁶

1.32 Proposed paragraph 61(1)(c) provides that the minister may, in writing, delegate any or all of the their powers under Division 2 of Part 3 of the bill to an official of a Commonwealth entity. These include the powers to make grants and arrangements involving the expenditure of Commonwealth money. The official to whom powers may be delegated must not be covered by proposed paragraph 61(1)(a) or (b),²⁷ and must possess expertise appropriate to the delegated power.²⁸

26 Proposed paragraph 61(1)(c). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

27 Proposed sub-paragraph 61(1)(c)(ii). Proposed paragraphs 61(1)(a) and (b) would permit delegation, respectively, to the Secretary of the Department of Home Affairs and to an SES employee or acting SES employee within that department. The SES employee must have the expertise appropriate to the delegated power.

28 Proposed paragraph 61(1)(c)(iii).

Subject to the requirement that a delegate possess appropriate expertise, it appears that the power of delegation in proposed paragraph 61(1)(c) would extend to any employee of the Australian Public Service (APS).

1.33 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a large class of persons, with little or no specificity as to their qualifications or attributes. The committee will have particular concerns where delegated powers are significant. Generally, the committee prefers that delegates be confined to the holders of nominated offices, or to members of the Senior Executive Service (SES). Where broader delegations are provided for, the committee considers that an explanation as to why such delegations are necessary should be included in the explanatory materials. In this instance, the explanatory memorandum states that the power of delegation in proposed paragraph 61(1)(c):

is required to enable grants made under section 20 to be administered by Commonwealth officials employed in an Australian Government grants hub (for example, the Community Grants Hub, managed by the Commonwealth Department of Social Services).

1.34 While noting this explanation, the committee emphasises that it does not consider administrative flexibility or convenience (in this case, ensuring that grants can be administered by particular Commonwealth officials) to be sufficient justification for enabling the delegation of the minister's powers to any official of a Commonwealth entity.

1.35 The committee acknowledges that the Emergency Management Minister may only delegate powers to officers who possess appropriate expertise. Nevertheless, the committee remains concerned that the bill would enable the delegation of significant administrative powers to APS officials at any level. In this respect, it is unclear to the committee why powers could not be delegated to an SES official, who could provide final authorisation in relation to the work performed by other officers. The committee also notes that the powers of delegation in clauses 59 and 60 of the bill, relating to the powers of the Finance Minister and the Treasurer, are restricted to members of the SES.

1.36 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to permit the Emergency Management Minister to delegate their powers to any official of a Commonwealth entity.

1.37 The committee also requests the minister's advice as to the appropriateness of amending the bill to restrict the delegation of the Emergency Management Minister's powers to members of the Senior Executive Service, consistent with other powers of delegation in the bill.

Family Law (Self-Assessment) Bill 2019

Purpose	This bill seeks to provide a process for separating couples to self-assess relevant matters regarding their separation via an online portal
Sponsor	Senator Pauline Hanson
Introduced	Senate on 12 September 2019

Broad scope of offence provisions

Procedural fairness²⁹

1.38 The bill seeks to create a process for separating couples to self-manage the details of their separation via an online portal. Clause 16 sets out the requirements for shared parenting obligations. Subclause 16(3) provides a number of obligations for each parent upon separation, including that parents:

- optimise their child's short-term and medium-term welfare;
- co-operate with each other; and
- give effect to the shared parenting objectives of the *Family Law Act 1975* (the principal Act), in a manner in which that person makes best efforts to minimise the scarce public resources of our courts.

1.39 Subclause 16(9) provides that a person who does not comply with this section commits an offence punishable, on conviction, by a fine not exceeding 100 penalty units.

1.40 There is no guidance in the bill or the explanatory memorandum as to what conduct might constitute a failure to comply with the obligations under subclause 16(3) and many of the terms used, such as 'co-operate', are broad and subjective. The committee considers that it is therefore unclear how a person would be able to determine whether or not their conduct would constitute an offence. The committee has similar concerns regarding the offence in subclause 14(9), relating to compliance obligations for financial disputes.

1.41 The committee also considers that the self-assessment process for resolving family law disputes may limit a person's right to procedural fairness. Part 2 of the bill sets out the process for separating couples to manage financial disputes. This process is conducted very quickly, for example real estate may be required to be sold within 60 days of a self-assessment being made. The committee considers that, as a result

29 Clause 16 and Part 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iii).

of the speed of the self-assessment process, a person's right to raise matters or seek to litigate disputes under the principal Act may be limited. The statement of compatibility states that the bill 'enables a hearing to be made following payments of sums not rationally in dispute.'³⁰ However the explanatory materials do not provide further information as to whether a person's right to a fair hearing prior to the payment of sums will be impacted.

1.42 In the event that the bill progresses further through the Parliament, the committee may request further information from the legislation proponent.

1.43 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of creating offences with an uncertain scope and establishing a self-assessment process for resolving family law disputes that may limit a person's right to procedural fairness.

30 Statement of compatibility, p 42.

National Housing Finance and Investment Corporation Amendment Bill 2019

Purpose	This bill seeks to amend the <i>National Housing Finance and Investment Corporation Act 2018</i> to establish the framework for the First Home Loan Deposit Scheme to assist eligible first home buyers to access the housing market
Portfolio	Treasury
Introduced	House of Representatives on 12 September 2019

Significant matters in non-disallowable delegated legislation³¹

1.44 This bill seeks to amend the *National Housing Finance and Investment Corporation Act 2018* (the NHFIC Act) to establish the framework for a new First Home Loan Deposit Scheme. It does this by expanding the NHFIC's functions to enable it to 'issue guarantees to improve housing outcomes'.³² Under the proposed Scheme the NHFIC would provide guarantees to lenders for eligible first home buyers.

1.45 The explanatory memorandum states that the government 'will provide further direction to the NHFIC about the operation of the First Home Loan Deposit Scheme in amendments to the Investment Mandate'.³³ The government would be empowered to make the further direction as a result of the amendments to section 13 of the NHFIC Act proposed by items 7 to 9 of Schedule 1 to the bill. These items expand the existing matters that may be covered by the Investment Mandate to include 'decision-making criteria for issuing guarantees'. The committee notes that directions constituting the Investment Mandate are not subject to disallowance, and that there is no further detail on the face of the bill as to how the new First Home Loan Deposit Scheme is to operate.

1.46 The explanatory memorandum and the minister's second reading speech set out details of the proposed Scheme that will be provided for in the Investment Mandate. These details include:

31 Schedule 1, items 7–9, proposed subparagraph 13(b)(iia), proposed paragraphs 13(c) and (d). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

32 Schedule 1, item 4, proposed paragraph 8(1)(ca).

33 Explanatory memorandum, p. 8.

- that the guarantees provided by the NHFIC on eligible loans will be equal to the difference between the deposit (of at least 5 per cent) and 20 per cent of the property purchase price;
- an annual cap of 10,000 guarantees issued;
- eligibility requirements for applicants, including that the applicant must:
 - be a first home buyer,
 - be an Australian citizen purchasing property in Australia, and
 - satisfy an income test (taxable incomes up to \$125,000 per annum for singles and up to \$200,000 per annum for couples in the previous year); and
- eligibility requirements for loans, where a loan is eligible if:
 - the residential property will be owner-occupied; and
 - the purchase price of the property is less than the price cap that applies in the area where the property is located (these regional price caps will be set with a view to ensuring equitable access to the Scheme across Australia).³⁴

1.47 The committee's view is that significant matters, such as the core details of a proposed home loan guarantee scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee is particularly concerned that all of these details of the proposed First Home Loan Deposit Scheme are being left to *non-disallowable* delegated legislation and will therefore not be subject to effective parliamentary oversight.

1.48 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum states that the approach taken in the bill 'is consistent with that which applies to the NHFIC's existing functions and provides flexibility to adjust the First Home Loan Deposit Scheme as market conditions change'.³⁵ The committee's consistent view is that the need for flexibility alone, and the fact that a certain approach continues current arrangements, does not, of itself, provide an adequate justification for delegated legislation not being subject to the usual parliamentary disallowance process.

1.49 The committee's view is that significant matters, such as the core elements of the proposed First Home Loan Deposit Scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is

34 Explanatory memorandum, pp 8–9; The Hon. Michael Sukkar MP, Assistant Treasurer and Minister for Housing, *House of Representatives Hansard*, 12 September 2019, pp 6–7.

35 Explanatory memorandum, p. 8.

provided. In this instance, the committee's scrutiny concerns are heightened by the fact the delegated legislation setting out the core elements of the proposed Scheme will not be subject to the usual parliamentary disallowance process. The committee therefore requests the Assistant Treasurer's detailed advice as to:

- why it is considered necessary and appropriate to leave nearly all of the elements of the proposed First Home Loan Deposit Scheme to non-disallowable delegated legislation; and
- whether it would be appropriate for the bill to be amended to set out at least the core elements of the proposed new First Home Loan Deposit Scheme on the face of the primary legislation, or to at least to provide that directions given to the NHFIC relying on the new matters inserted by items 7 to 9 of Schedule 1 to the bill be subject to the usual parliamentary disallowance process.

National Integrity Commission Bill 2019

Purpose	These bills seek to establish the Australian National Integrity Commission as an independent, broad-based public sector anti-corruption commission for the Commonwealth
Sponsors	Mr Adam Bandt MP
Introduced	House of Representatives on 9 September 2019

1.50 The committee commented on a similar bill, introduced by Senator Larissa Waters in the Senate, in [Scrutiny Digest 5 of 2019](#). The committee reiterates those comments in relation to the current bill concerning the following issues:

- fair hearing;
- coercive powers;
- arrest and search warrants;
- privilege against self-incrimination;
- legal professional privilege;
- evidentiary certificate constitutes prima facie evidence;
- reversal of evidential burden of proof;
- strict liability offence; and
- investigations and inquiries by Whistleblower Protection Commissioner.

Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019

Purpose	This bill seeks to amend <i>Social Security (Administration) Act 1999</i> to set out the transition of income management participants in the Northern Territory and Cape York region in Queensland onto the Cashless Debit Card and extends the end for existing Cashless Debit Card trial areas from 30 June 2020 to 30 June 2021 with the exception of Cape York, which has an end date of 31 December 2021
Portfolio	Social Services
Introduced	House of Representatives on 11 September 2019

Broad discretionary power³⁶

1.51 Item 36 of the bill seeks to amend section 124PJ of the *Social Security (Administration) Act 1999* (Administration Act). The amendments would specify the portion of restrictable payments that are designated 'restricted' and 'unrestricted', for participants in the Northern Territory Trial of the Cashless Debit Card (CDC).³⁷

1.52 Item 39 of the bill seeks to amend subsection 124PJ of the Administration Act to insert new subsections 124PJ(2A) and (2B). These provisions would permit the minister to determine, by notifiable instrument, the percentage of income that is designated as 'restricted' for certain classes of trial participants.

1.53 The explanatory memorandum explains that the proposed powers would enable the minister to adjust the restricted portion of trial participants' benefits to reflect community requests, as well as requests from state and territory authorities and child protection officers. It also states that it is appropriate for variations to be made by determination, as the secretary's power under subsection 124PJ(3) (to vary

36 Schedule 1, item 39, proposed subsections 134PJ(2A) and (2B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

37 See proposed subsections 124PJ(1B), (1C) and (1D). A 'restrictable payment', in relation to a trial participant, refers to a variety of tax and social security benefits (set out in section 124PD of the Administration Act). The 'restricted portion' is the portion that may not be used to obtain alcoholic beverages, for gambling, or to obtain certain 'cash-like' products. The 'unrestricted portion' may be used at the recipient's discretion.

restricted portions for individuals) will prevail over ministerial determinations made under proposed subsections 124PJ(2A) and (2B).³⁸

1.54 However, the committee remains concerned that proposed subsections 124PJ(2A) and (2B) would confer on the minister a broad power to determine, in relation to classes of trial participants, the portion of restrictable payments that are restricted, with little or no guidance on the face of the bill as to how this power is to be exercised. It is also unclear how the secretary's power under subsection 124PJ(3) would be effective to ensure that the minister's powers are exercised appropriately, noting that the minister's powers apply to *classes* of participants while the secretary's powers apply to *individuals*.

1.55 The committee is also concerned that ministerial determinations would be made by notifiable instrument. In this respect, the committee notes that notifiable instruments are not subject to the tabling, disallowance, and sunseting requirements that apply to legislative instruments under the *Legislation Act 2003*. Parliamentary scrutiny of the determinations would therefore be limited.

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

- **why it is considered necessary and appropriate to allow the minister to determine, by notifiable instrument, the percentage of income that is designated as 'restricted' for classes of trial participants;**
- **how the secretary's powers in subsection 124PJ(3) would be effective to ensure the minister's powers are exercised appropriately; and**
- **whether (at least high-level) rules or guidance in relation to the exercise of powers under proposed subsections 124PJ(2A) and (2B) could be included in the bill.**

Privacy³⁹

1.57 Item 43 of the bill seeks to insert sections 124POB, 124POC and 124POD into the Administration Act. Each of those provisions would allow the secretary, and specified state and territory government officials, to share information relating to current or prospective trial participants. The information must be relevant to the operation of Part 3D of the Administration Act (which relates to the trial of cashless welfare arrangements).⁴⁰

38 Explanatory memorandum, pp. 13-14. See proposed subsection 124PJ(2C).

39 Schedule 1, item 43, proposed sections 124POB, 124POC and 124POD; Schedule 1, item 46. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

40 Proposed paragraphs 124POB(1)(b), 124POC(1)(b) and 124POD(1)(b).

1.58 Item 46 of the bill seeks to amend paragraph 192(db) of the Administration Act, to extend the Secretary's power in section 192 of that Act to Part 3D. In effect, this would permit the secretary to require a person to give information or produce a document to the department where the secretary considers that the information or document may be relevant to the operation of Part 3D.

1.59 In relation to item 43 (proposed sections 124POB, 124POC and 124POD), the explanatory memorandum states that the provisions are 'essential to ensure that the CDC trial operates effectively and that people can, or are only required to, enter and exit the CDC trial as is appropriate to their circumstances'.⁴¹ The statement of compatibility includes a similar explanation, and asserts that any trespass on privacy is justified by reference to the objectives of the bill and the broader CDC scheme.⁴² In relation to item 46, the explanatory memorandum explains that the amendment to paragraph 192(db) 'is essential to allow the Secretary to determine whether a person should not participate in the CDC trial on the basis of their mental, physical or emotional wellbeing or where they can demonstrate reasonable or responsible management of their affairs'.⁴³

1.60 The committee acknowledges the importance of ensuring that the CDC trial is properly administered—including by ensuring that the trial only extends to appropriate persons. However, the committee is concerned that allowing the sharing of information about trial participants, and extending the secretary's power to require information and documents, may trespass unduly on individuals' privacy. In this respect, the committee notes that neither the explanatory memorandum nor the statement of compatibility provide detail as to the type of information that may be shared under proposed sections 124POB, 124POC and 124POD, or the type of information or documents that may be required under paragraph 192(db).

1.61 The committee also notes that the explanatory materials do not identify any relevant safeguards in relation to the collection of information under paragraph 192(db). In relation to proposed sections 124POB, 124POC and 124POD, the statement of compatibility states that there are 'effective community safeguards' in place. However, it does not provide any further detail (for example, expressly identifying the safeguards or explaining how they will operate in practice). The statement of compatibility states that 'there are still safeguards in place to protect individual privacy', and that some information collected, used and disclosed for the

41 Explanatory memorandum, p. 14.

42 Statement of compatibility, p. 23. The objectives are set out on p. 18, and include: reducing spending on alcohol, gambling and illegal drugs; determining whether such a reduction decreases violence or harm; determining whether the CDC arrangements are more effective when community bodies are involved; and encouraging socially responsible behaviour.

43 Explanatory memorandum, p. 15.

purposes of the CDC will be protected under the *Privacy Act 1988*.⁴⁴ However, it is unclear whether, and if so, how, these safeguards would apply to the disclosure of information under proposed sections 124POB, 124POC and 124POD, or to the collection of information under paragraph 192(db).

1.62 As the explanatory materials do not adequately address this matter, the committee requests the minister's detailed advice as to:

- **the type of information that would be collected under paragraph 192(db) of the *Social Security (Administration) Act 1999*, as amended by the bill;**
- **the type of information that would be shared under proposed sections 124POB, 124POC and 124POD; and**
- **any relevant safeguards in place to protect individuals' privacy.**

44 Statement of compatibility, p. 22.

Previous comments on reintroduced bills

1.63 The committee has previously commented and reiterates those comments on the following bills which have been reintroduced into the Parliament between 9 – 12 September 2019:

- Social Services Legislation Amendment (Drug Testing Trial) Bill 2019
[Scrutiny Digest 3/18](#)
- Social Services Legislation Amendment (Payment Integrity) Bill 2019
[Scrutiny Digest 8/17](#) and [Scrutiny Digest 10/17](#)

Bills with no committee comment

1.64 The committee has no comment in relation to the following bills which were introduced or reintroduced into the Parliament between 9 – 12 September 2019:

- ANL Legislation Repeal Bill 2019;
- Customs Amendment (Safer Cladding) Bill 2019;
- Customs Amendment (Product Specific Rule Modernisation) Bill 2019;
- Emergency Response Fund (Consequential Amendments) Bill 2019;
- National Health Amendment (Safety Net Thresholds) Bill 2019;
- Paid Parental Leave Amendment (Work Test) Bill 2019;
- Product Stewardship Amendment (Packaging and Plastics) Bill 2019; and
- Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2019.

Commentary on amendments and explanatory materials

Criminal Code Amendment (Agricultural Protection) Bill 2019

[Digest 3 & 5/19]

1.65 On 12 September 2019 the Senate agreed to five Government amendments, the Minister for Agriculture (Senator McKenzie) tabled a supplementary explanatory memorandum and the bill was read a third time. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

1.66 In *Scrutiny Digest 3 of 2019* and *Scrutiny Digest 5 of 2019* the committee raised concerns about a number of offences that reverse the evidential burden of proof in the bill. The amendments provide that a defendant will not bear an evidential burden in relation to whether the material relates to a news report made in the public interest by a person working in a professional capacity as a journalist.

1.67 The committee welcomes the amendments which appear to address the committee's scrutiny concerns.

1.68 The committee has no comments on amendments made or explanatory material relating to the following bills:

- Inspector-General of Live Animal Exports Bill 2019;⁴⁵
- Royal Commissions Amendment (Private Sessions) Bill 2019;⁴⁶ and
- Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Bill 2019.⁴⁷

45 On 10 September 2019 the Senate agreed to two Government amendments, the Minister for Resources and Northern Australia (Senator Canavan) tabled a supplementary explanatory memorandum and the bill was read a third time.

46 On 10 September 2019 the Senate agreed to eight Government amendments, the Assistant Minister for Finance, Charities and Electoral Matters (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time. On the same day the House of Representatives agreed with the Senate amendments and the bill was passed.

47 On 9 September 2019 the House of Representatives agreed to one Government amendment, the Minister for Regional Services Decentralisation and Local Government (Mr Coulton) presented a supplementary explanatory memorandum and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

2.1 No responses received.

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.¹ It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.²

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

- Emergency Response Fund Bill 2019 — Part 2, Division 2, clauses 12 and 27 (SPECIAL ACCOUNTS: CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*); and
- National Housing Finance and Investment Corporation Amendment Bill 2019 — Schedule 1, item 13, section 48A.

Senator Helen Polley
Chair

- 1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.
- 2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

