

The Senate

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Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

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

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

Nature of the committee's scrutiny

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

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

Publications

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

Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Bill 2019

Purpose	<p>This bill seeks to amend various Acts relating to agricultural and veterinary chemicals to:</p> <ul style="list-style-type: none"> • provide the Australian Pesticides and Veterinary Medicines Authority (APVMA) and industry with flexibility to deal with certain types of new information provided when the APVMA is considering an application; • enable the use of new regulatory processes for chemicals of low regulatory concern; • provide for extensions to limitation periods and protection periods as an incentive for chemical companies to register certain new uses of chemical products; • simplify reporting requirements for annual returns; • support computerised decision-making by the APVMA; • provide for APVMA to manage errors in an application at the preliminary assessment stage; • enable APVMA to grant part of a variation application under section 27 of the Schedule to the <i>Agricultural and Veterinary Code Act 1994</i> (Agvet Code); • enable a person to apply to vary an approval or registration that is suspended; • establish civil pecuniary penalties for contraventions of provisions in the Agvet Code and the <i>Agricultural and Veterinary Chemicals (Administration) Act 1992</i> (Administration Act); • provide APVMA with more comprehensive grounds for suspending or cancelling approvals or registrations; • enable the use of new, simpler processes for assessments
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<p>Portfolio</p> <p>Introduced</p>	<p>based on risk;</p> <ul style="list-style-type: none"> • simplify the APVMA’s corporate reporting requirements; • amend the mechanism for dealing with minor variations in the constituents in a product; • clarify what information must be included on a label; • correct anomalies in the regulation-making powers for the labelling criteria; • amend the notification requirements in section 8E of the Agvet Code and amend section 7A of the Administration Act to clarify the authority to make an APVMA legislative instrument for residues of chemical products in protected commodities; • amend the definition of expiry date in the Agvet Code; and • establish a governance Board for the APVMA and cease the existing APVMA Advisory Board <p>Agriculture</p> <p>House of Representatives on 18 September 2019</p>
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Computerised decision-making¹

1.2 Item 36 seeks to insert new section 5F into Schedule 1 to the *Agricultural and Veterinary Chemicals Code Act 1994* (that is, the Agvet Code). The new section would allow the Australian Pesticides and Veterinary Medicines Authority (APVMA) to arrange for the use of computer programs for any purpose for which the APVMA may make a decision, exercise a power or comply with an obligation, or do anything related to those matters.

1.3 The committee notes that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

¹ Schedule 1, item 36, proposed section 5F. The committee draws senators’ attention to this provision pursuant to Senate Standing Orders 24(1)(a)(ii) and (iii).

1.4 With reference to these matters, the committee notes a number of decisions under the AgVet Code appear to involve complex or discretionary considerations. For example, when deciding whether to issue certain permits, the APVMA may be required to consider or take into account:

- any recommendations made by a co-ordinator;
- whether there are reasonable grounds for issuing the permit pending determination of the application; or
- whether there are exceptional circumstances that justify issuing the permit.²

1.5 In general, the committee considers that it may be appropriate for more complex decisions to be made by a person, rather than by a computer.

1.6 The explanatory memorandum explains that allowing computer programs to take administrative action on behalf of the APVMA will establish a flexible legislative regime that will support future developments in information technology and business processing. It further states that proposed section 5F does not require the APVMA to use computerised decision-making, but rather provides it as an option.³

1.7 The committee acknowledges the importance of ensuring flexibility and adaptability in the agricultural and veterinary chemicals regime, and notes that there are mechanisms in place to ensure that errors made by the operation of computer programs can be corrected.⁴ However, in light of the potential impacts on administrative decision-making outlined above, the committee would expect the explanatory materials to include a more comprehensive justification for allowing APVMA's administrative functions to be performed by computer programs. The committee considers also that it would be useful for the explanatory materials to explain how automated decision-making will comply with relevant administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).

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

- **why it is considered necessary and appropriate to permit the APVMA to arrange for the use of computer programs for any purpose for which the APVMA may or must take administrative action;**

2 Subsection 112(1) and paragraphs 112(2)(f) and (g) of the AgVet Code.

3 Explanatory memorandum p. 29.

4 For example, proposed subsection 5F(3) would permit the APVMA to substitute a decision for a decision made by a computer program, if satisfied that the computer's decision was incorrect. Further, all decisions made by a computer program would be taken to be decisions made by the APVMA, and would consequently be subject to the same review processes.

- **whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and**
- **whether consideration has been given to requiring that certain administrative actions (for example, complex or discretionary decisions) be taken by a person rather than by a computer.**

Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Purpose	This bill seeks to amend the <i>Australian Citizenship Act 2007</i> to provide that, at the discretion of the Minister for Home Affairs, a person who is a national or citizen of a country other than Australia ceases to be an Australian citizen if the person acts inconsistently with their allegiance to Australia by engaging in terrorist offences
Portfolio	Home Affairs
Introduced	House of Representatives on 19 September 2019

Trespass on personal rights and liberties

Broad discretionary powers⁵

1.9 The bill seeks to restructure the citizenship loss provisions currently contained in Division 3 of Part 2 of the *Australian Citizenship Act 2007* (Citizenship Act). Under the bill, the minister will be able to make a determination to cease a person's Australian citizenship in circumstances where:

- the minister is satisfied that the person has engaged in specified conduct and the conduct demonstrates that the person has repudiated their allegiance to Australia (proposed section 36B); or
- the person has been convicted of a terrorism related offence and has been sentenced (proposed section 36D).

1.10 Proposed section 36E requires the minister to have regard to a number of matters prior to making a determination, including the severity of the relevant conduct and the degree of threat posed by the person.

1.11 Proposed paragraph 36B(1)(b) requires that the minister, in making a determination to cease a person's citizenship on the basis of their conduct, be satisfied that the relevant conduct demonstrates that the person has repudiated their allegiance to Australia. This replaces the current requirement in subsection 33AA(3) that a person's citizenship would cease if the person engaged in conduct with the intent of advancing a political, religious or ideological cause and with the intention of coercing the government or intimidating the public. The explanatory memorandum states that:

⁵ Schedule 1, item 9, proposed sections 36B and 36D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

The omission of the intent element from new section 36B is supported by the requirement that a person has repudiated their allegiance to Australia, as it serves to narrow the class of people that may otherwise be subject to the provisions.⁶

1.12 The committee notes that what constitutes 'repudiation' of a person's citizenship is not precisely defined beyond the conduct itself and the test is subjective and based on the minister's satisfaction.

1.13 While the committee notes that a person will be entitled to seek judicial review of a determination made by the minister under proposed section 36B, this would involve the court considering whether the minister has exceeded their jurisdiction. However, it would be difficult to make out that the minister has exceeded their jurisdiction noting that the grounds on which the minister must be satisfied are narrow, given the power is framed in subjective terms. Although the exercise of such a power may be invalidated if infected with serious irrationality or illogicality, the courts are reluctant to accept this high standard of review has been established.⁷ Crucially, in a judicial review application, a court would not consider whether or not the alleged conduct had, as a matter of fact, occurred. The result is that this section confers on the minister a broad discretionary power as it is a matter for his or her judgement as to whether the relevant conduct has occurred and whether that conduct demonstrates that a person has repudiated their allegiance to Australia.

1.14 Proposed subsection 36B(5) lists the relevant conduct that the minister must be satisfied the person has engaged in before he or she can make a determination to cease a person's citizenship. The relevant conduct includes engaging in a terrorist act or engaging in foreign incursions and recruitment. Subsection 36B(6) provides that although the words used in paragraphs 36(5)(a)-(h) have the same meaning as in the *Criminal Code*, this does not include the relevant fault elements of the *Criminal Code* offences. The practical effect of this provision is to allow the minister to cease a person's citizenship for conduct that could constitute a criminal offence but without any of the protections associated with a criminal trial, such as the requirement to prove the requisite intention to commit an offence. The committee considers that this may unduly trespass on a person's rights or liberties. This is especially so given that the conduct which may lead to the serious consequence of loss of citizenship may have occurred long before the commencement of the provisions.

1.15 In relation to proposed paragraphs 36B(1)(a)-(c), the committee also notes that paragraph 40 of the explanatory memorandum states 'New paragraphs 36B(1)(a)-(c) set out the criteria that the minister may have regard to

6 Explanatory memorandum, p. 8.

7 See, for example, *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

when making such a determination'.⁸ However the committee notes that these criteria must be satisfied prior to the minister making a determination to cease a person's citizenship under proposed section 36B. The committee notes the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*). Noting the potential significant consequences of the provision, the committee considers that the explanatory memorandum should be amended to more accurately reflect the text of the provision.

1.16 In light of the comments above, the committee requests the minister's more detailed justification as to the necessity and appropriateness of providing the minister with a broad discretionary power to cease a person's citizenship under sections 36B and 36D by reference to the minister's subjective satisfaction that they have repudiated their allegiance to Australia.

1.17 The committee also requests the minister's more detailed justification as to the necessity and appropriateness of providing the minister with a power to cease a person's citizenship under section 36B conditioned merely on the minister's satisfaction of the key matters rather than the existence of those matters in fact.

1.18 The committee considers it may be appropriate that the minister amend paragraph 40 of the explanatory memorandum to more correctly describe the operation of paragraphs 36B(1)(a)–(c) and seeks the ministers advice in this regard.

Trespass on personal rights and liberties⁹

1.19 The bill seeks to remove the current requirements in the Citizenship Act that citizenship can only be removed if the person is a national or citizen of a country other than Australia. This would be replaced with a requirement that the minister must not make a determination under proposed section 36B or 36D if the minister is satisfied that the person 'would, if the Minister were to make the determination, become a person who is not a national or citizen of any country'.

1.20 The legal implications of this change for judicial oversight of the exercise of the powers are significant. Under the current provisions, the question of whether a person is a national or citizen of another country appears to be a jurisdictional fact that could be reviewed by the court for correctness, rather than merely on the basis of whether the minister's opinion on the question was lawfully formed (which provides considerably reduced scope for judicial supervision).

8 Explanatory memorandum, p. 7.

9 Schedule 1, item 9, proposed subsections 36B(2) and 36D(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.21 The committee notes that an error made by the minister in forming their state of satisfaction could have the consequence that a person could have their citizenship removed while possessing no other citizenship (and perhaps not ever being able to obtain such citizenship in practice), thereby rendering the person stateless. The committee notes that a non-citizen of Australia who does not possess a valid visa¹⁰ may be detained indefinitely in immigration detention if no other country is willing to accept that person. As such, these amendments have the potential to unduly trespass on personal rights and liberties.

1.22 The committee requests the minister's more detailed justification as to why it is considered necessary and appropriate to replace the existing requirement that citizenship can only be removed if the person is a national or citizen of another country, with a requirement that the minister must not make a citizenship cessation determination if the minister is satisfied that such a determination would result in the person becoming someone who is not a national or citizen of any country.

Merits review¹¹

1.23 The committee notes that while the minister's decision to remove a person's Australian citizenship under either proposed section 36B or 36D would be subject to judicial review under either section 75 of the Constitution or section 39B of the *Judiciary Act 1903*, neither decision is subject to independent merits review.¹² Determinations made under these provision involve (as explained above) broad discretionary powers and factual determinations which may be contested.

1.24 The committee notes that the explanatory materials do not address why merits review is not provided for in relation to the exercise of these powers.

1.25 The committee therefore requests the minister's advice as to why decisions under proposed sections 36B and 36D are not subject to independent merits review.

10 The committee notes that the statement of compatibility states that a person whose citizenship ceases under these provisions would hold an 'ex-citizen visa', but that this may be subject to cancellation under the *Migration Act 1958*.

11 Schedule 1, item 9, proposed sections 36B and 36D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

12 Neither the bill nor section 52 of the *Australian Citizenship Act 2007* in its current form include the relevant sections as being a decision that may be reviewed by the Administrative Appeals Tribunal.

Significant matters in delegated legislation¹³

1.26 Proposed paragraph 36B(5)(i) provides that the relevant conduct for making a determination to cease a person's Australian citizenship can include fighting for, or being in the service of, a declared terrorist organisation.¹⁴ Proposed section 36C allows the minister to declare that a terrorist organisation is a 'declared terrorist organisation' by legislative instrument. The committee's view is that significant matters, such as declaring terrorist organisations for the purpose of ceasing a person's citizenship, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory materials contain no justification as to why it is appropriate to leave this matter to delegated legislation.

1.27 The committee requests the minister's more detailed justification as to the necessity and appropriateness of leaving the declaration of terrorist organisations under section 36C to delegated legislation.

Trespass on personal rights and liberties

Broad discretionary powers¹⁵

1.28 Section 35A of the Citizenship Act currently provides that a person convicted of a terrorism-related offence must also be sentenced to at least six years imprisonment before the minister can remove the person's Australian citizenship. Proposed section 36D of the bill seeks to reduce this sentencing requirement to a sentence of at least three years.

1.29 The committee notes that the loss of citizenship is a severe consequence, which may ultimately lead to a person being physically excluded from the Australian community. Consequently, the committee would expect a strong justification for reducing the minimum sentence requirement from six years to three years. The explanatory memorandum states:

A sentence of imprisonment for a period of at least 3 years, or periods that total at least 3 years reflects the seriousness of a criminal conviction for one of the terrorism-related offences specified in new subsection 36D(5).¹⁶

1.30 The committee notes that when the Parliamentary Joint Committee on Intelligence and Security (PJCIS) reported on the bill that originally introduced

13 Schedule 1, item 9, proposed section 36C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

14 Paragraph 36B(5)(i).

15 Schedule 1, item 9, proposed section 36D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

16 Explanatory memorandum, p. 18.

section 35A (proposed section 36D in this bill), it recommended that citizenship may only be revoked following conviction for offences with a sentence of at least six years imprisonment (or multiple sentences totalling at least six years imprisonment). The PJCIS explained its reasoning on the following basis:

While limiting the provision to more serious offences is an appropriate measure to better define the scope of conduct leading to revocation, the Committee notes that even following a conviction there will still be degrees of seriousness of conduct and degrees to which conduct demonstrates a repudiation of allegiance to Australia. Therefore, the Committee recommends that loss of citizenship under this provision not be triggered unless the person has been given sentences of imprisonment that together total a minimum of six years for offences listed in the Bill.

Some members of the Committee were of the view that a lower or higher threshold was preferable; however, on balance it was considered that a six year minimum sentence would clearly limit the application of proposed section 35A to more serious conduct. It was noted that three years is the minimum sentence for which a person is no longer entitled to vote in Australian elections.¹⁷ Loss of citizenship should be attached to more serious conduct and a greater severity of sentence, and it was considered that a six year sentence would appropriately reflect this.¹⁸

1.31 Noting the broad discretionary powers of the minister in proposed section 36D and the potential serious consequences flowing from loss of citizenship, the committee does not consider that the explanatory materials adequately explain why it is necessary or appropriate to reduce the relevant sentence from six years to three years.

1.32 In light of the above, the committee requests the minister's more detailed justification as to why, in relation to the powers under section 36D, it is necessary or appropriate to reduce the relevant sentence from six years to three years.

Procedural fairness¹⁹

1.33 Proposed subsections 36B(11) and 36D(9) provide that the rules of natural justice do not apply in relation to making a decision or exercising a power under these sections.

17 Subsection 93(8AA) of the *Commonwealth Electoral Act 1918*.

18 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, pp. 115-116.

19 Schedule 1, item 9, proposed subsections 36B(11) and 36D(9) and sections 36F, 36H, 36K. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

1.34 The committee notes that the natural justice rule, which requires that a person be given an opportunity to present their case, is a fundamental common law right and it expects that any limitation on this right to be comprehensively justified in the explanatory memorandum.

1.35 In relation to proposed subsection 36B(11), the explanatory memorandum states:

Natural justice has not been removed, it is to be afforded at a later point in time. The purpose behind this is to remove the potential for the Minister's decision to make a determination to cease a person's citizenship being frustrated by either the person and/or an affected country.²⁰

1.36 While noting this explanation, the committee does not consider that this adequately justifies excluding natural justice at this point in the decision making process. The committee notes that while judicial review will be available, judicial review is undertaken after a decision has already been made and focuses on whether a legal error has been made. This does not provide the person who may have their citizenship ceased with the opportunity to address whether the making of a citizenship cessation determination is appropriate or to correct any mistakes of fact. Combined with a lack of merits review (as discussed above at paragraphs [1.22]–[1.25]), the exclusion of procedural fairness severely limits a person's capacity to participate in decision-making under this bill that has significant effects on their rights and interests.

1.37 Proposed section 36H allows for a person who has had their citizenship ceased to apply to the minister to have the determination revoked. The application must be made no later than 90 days after the date the notice of the decision was given under proposed paragraph 36F(1)(a). The minister must observe the rules of natural justice in making the decision.

1.38 However, the committee does not consider that providing natural justice at this point in the process adequately compensates for the removal of natural justice at earlier stages as outlined above, noting the seriousness of the cessation of citizenship decision, which includes an immediate impact on the reputation of a person. In addition the committee considers that there may be limitations on the effectiveness of the provision of natural justice at this stage. Proposed subsection 36F(6) allows for the removal of information from a notice to a person regarding a cessation of citizenship determination if the information is operationally sensitive, could prejudice national security, could endanger a person's safety or is contrary to the public interest for any other reason. It is unclear whether the requirement to observe the rules of natural justice would extend to the minister providing an applicant with any information that had initially been excluded from a notice of decision on these grounds. As a result, it may be difficult in practice for a person to

20 Explanatory memorandum, p. 17.

successfully demonstrate or raise evidence responding to allegations they had engaged in certain conduct if the person is not provided with sufficient details as to why a cessation of citizenship determination has been made against them.

1.39 In addition, proposed subsection 36F(2) provides that this notice must be given to the affected person by sending it to the address of the place of residence of the person last known to the department. Proposed subsection 36F(3) provides that the minister may give the notice again electronically if the minister is satisfied the person did not receive the initial notice and the minister has become aware of the person's electronic address.

1.40 The explanatory memorandum states that the inclusion of this provision recognises the reality that the most effective way to contact a person may be electronically as the person's overseas location may not be known.²¹ However, there is no requirement that the minister must provide the person with a copy of their notice once the minister has become aware of their electronic address or it becomes clear that the original notice was not received. In addition, paragraph 36H(2)(b) provides only 30 days to make an application for revocation after receiving a notice electronically.

1.41 Finally the committee notes that the decision is legally effective at the time of making it and proposed subsection 36H(6) provides that there are no remedies available in relation to acts that may be taken in relation to a citizenship cessation decision which turns out to be incorrectly made.²² The explanatory memorandum states:

There are a range of circumstances that may result in citizenship being taken to never have ceased. However, there also needs to be administrative certainty for the Government to take action following cessation of a person's citizenship that should not be frustrated on the basis that the cessation determination may later be overturned or revoked.²³

1.42 The committee has not generally accepted the need for administrative certainty to be an appropriate justification for the limitation of rights and notes that the potential actions following the revocation of a person's citizenship could be serious, including the removal of the person from Australia.

1.43 In light of the above comments, the committee requests the minister's more detailed advice as to why it is necessary and appropriate to remove the obligation of the minister to observe the requirements of natural justice when making a determination to cease a person's citizenship under section 36B or 36D.

21 Explanatory memorandum, p. 28.

22 This also applies to automatic revocation under proposed section 36K.

23 Explanatory memorandum, p. 35.

1.44 The committee considers that it may be appropriate to (a) amend proposed subsection 36F(3) to require that the minister must give additional notice in circumstances where the original notice was not received and the minister is aware of the person's electronic address; and (b) amend paragraph 36H(2)(b) to allow for applications for revocation of the determination in these circumstances to be made within 90 days. The committee requests the minister's advice in relation to this.

Judicial review²⁴

1.45 Proposed section 36K provides that a determination to revoke a person's citizenship under section 36B or 36D will be automatically revoked if:

- for determinations under section 36B—in proceedings under section 75 of the Constitution, or under another Commonwealth Act, a court finds that the person did not engage in the conduct to which the determination relates; or
- for determinations under section 36D—a decision of a court has overturned or quashed the relevant conviction or convictions and the time for appealing has expired; or
- in proceedings under section 75 of the Constitution, or under another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time the determination was made.

1.46 The statement of compatibility states:

In any judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised lawfully. A person also has a right to seek declaratory relief as to whether the conditions giving rise to the cessation of citizenship have been met.²⁵

1.47 As the committee has noted above, judicial review of the decision of the minister to make a determination is limited by the nature of the powers granted to the minister. In particular, the committee notes that in a judicial review proceeding under section 75 of the Constitution, the court's only role is to test whether the minister exceeded their jurisdiction. In these circumstances, the court may determine that the minister was lawfully 'satisfied' of the relevant matters without being required to determine whether the considerations of the minister were factually correct. The result is that in a section 75 judicial review proceeding, the court would not be required to determine whether the person did not engage in the conduct to which a section 36B determination relates. Neither would a court, in a

24 Schedule 1, item 9, proposed section 36K. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

25 Statement of compatibility, p. 9.

judicial review of a section 36B or section 36D determination, necessarily, be required to make a factual finding as to whether a person is a national or citizen of a foreign country. Nor would such factual matters necessarily be resolved in proceedings for declaratory relief as to whether the conditions giving rise to the cessation of citizenship have been met.

1.48 In addition, even if these factual matters were directly at issue in a proceeding for declaratory relief, the applicant would bear the onus of proof. This would require the affected person to establish, on the balance of probabilities, that they did not engage in the relevant conduct or were not a national or citizen of another country. Practical difficulties may arise in discharging this burden, the fairness of which is not addressed in the explanatory materials. For example, requiring the applicant to prove a negative (for example that they did not engage in certain conduct) may not be reasonable or feasible in particular circumstances. In addition, evidence held by the government may be subject to a claim of public interest immunity if national security information is involved. These factors may limit the effectiveness of a person's ability to have a determination to cease their citizenship automatically revoked.

1.49 The committee notes that concerns over the adequacy of judicial oversight provided by section 36K are exacerbated by the breadth of the powers granted to the minister and the exclusion of procedural fairness for initial decisions (an exclusion which does not appear to be redressed through the procedures set out in section 36H).

1.50 In light of the comments above, the committee requests the minister's more detailed advice as to whether proposed section 36K provides adequate judicial oversight of the factual determinations upon which cessation of citizenship decisions (made under sections 36B, 36D and 36H) are, in substance, based.

Retrospective application²⁶

1.51 Item 18 of Schedule 1 seeks to ensure that proposed section 36B will apply to:

- conduct specified in paragraphs 36B(5)(a)-(h) that was engaged in on or after 29 May 2003;
- conduct specified in paragraph 36B(5)(i) that was engaged in on or after 12 December 2015; and
- conduct specified in paragraph 36B(5)(j) that was engaged in before or after commencement.

26 Schedule 1, items 18 and 19. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.52 Item 19 of Schedule 1 seeks to ensure that proposed section 36D will apply to any relevant terrorism convictions where the person was sentenced to a period of imprisonment of at least three years where the conviction occurred on or after 29 May 2003.

1.53 As a result, a person may be deprived of their citizenship based on actions which were not grounds for the cessation of citizenship at the time those actions were undertaken. In this way, the bill operates retrospectively.

1.54 The statement of compatibility states that it is appropriate to take past conduct or convictions into account 'in order to ensure the safety and security of Australia'.²⁷ The committee notes that this explanation focuses on the general threat of terrorism, without specifically explaining why applying the amendments to conduct or convictions occurring up to 16 years ago is necessary. The committee does not consider that this explanation, without more, to be sufficient to justify the retrospective application of the citizenship cessation provisions.

1.55 In this regard, the committee notes that it is a fundamental principle of the rule of law that the existence of an offence and penalty be established prospectively. The committee emphasises that it will consistently raise scrutiny concerns in circumstances where the law is applied retrospectively, particularly when the consequences for affected individuals are significant (as in this case). In general, individuals should be entitled to rely on the current law to determine their rights and obligations. Retrospective commencement or application, when too widely used or insufficiently justified, can work to diminish respect for the rule of law and its underlying values.

1.56 The committee requests the minister's more detailed advice as to the necessity and appropriateness of retrospectively applying the power to remove citizenship based on conduct engaged in or convictions made up to 16 years ago.

27 Statement of compatibility, p. 10.

Commonwealth Electoral Amendment (Real Time Disclosure of Political Donations) Bill 2019

Purpose	This bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> to require the agent or financial controller of the party, branch or campaigner to advise the Electoral Commission of any donation received by the party, branch or campaigner
Sponsor	Ms Rebekha Sharkie MP
Introduced	House of Representatives on 16 September 2019

Broad scope of civil penalty provisions²⁸

1.57 The bill seeks to amend the *Commonwealth Electoral Act 1918* (Electoral Act) to require the registration of gifts and donations in real time. Proposed section 305C provides that where a person makes a gift to a registered political party, state branch or political campaigner, the agent or financial controller of that party, branch or campaigner must notify the Electoral Commission. Notice would be required as soon as practicable, or in any case no later than five business days after receiving the gift. Contravention of these requirements may attract a civil penalty of up to 60 penalty units (\$12,600) or three times the value of the gift—whichever is higher.

1.58 The explanatory memorandum states that the bill seeks to require agents and financial controllers to notify the Commission of any donation 'that meets or exceeds the disclosure threshold' (currently \$13,800).²⁹ However, there appears to be no mention of the disclosure threshold on the face of the bill, nor any guidance as to the nature of the gifts that must be disclosed.³⁰

1.59 The committee is therefore concerned that proposed section 305C may require notification of *any* gift made to a registered political party, state branch or campaigner, irrespective of its value or significance. The committee is also concerned that the bill seeks to apply a relatively significant financial penalty to contraventions of this requirement in circumstances where the penalty imposed may not be

28 Schedule 1, item 4, proposed section 305C; item 5, proposed table item 3A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

29 Explanatory memorandum, p. 1. The disclosure threshold is prescribed by section 287 of the Electoral Act. It is subject to indexation under section 321A.

30 The committee notes in this regard that 'gift' is defined broadly in the Electoral Act as 'any disposition of property made by a person to another person...without consideration...or with inadequate consideration, and includes the provision of a service'.

commensurate with the actual or perceived impact of the gift on the integrity of the electoral process.

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

1.61 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of requiring that the Electoral Commissioner be notified of *any* gift made to a registered political party, state branch or political campaigner, in circumstances where failure to notify Commissioner may expose a person to a financial penalty.

1.62 The committee also notes that, as presently drafted, proposed section 305C may not reflect the intention of the bill as set out in the explanatory memorandum.

Currency (Restrictions on the Use of Cash) Bill 2019

Purpose	This bill seeks to introduce offences for entities that make or accept cash payments of \$10,000 or more
Portfolio	Treasury
Introduced	House of Representatives on 19 September 2019

Significant matters in delegated legislation³¹

1.63 Clauses 12 and 13 of the bill create new criminal offences for entities³² that make or accept a payment in cash where the value of the cash equals or exceeds \$10,000. Subclauses 12(5) and 13(3) provide that the offences will not apply to:

- the making or acceptance of a payment of a kind specified by the rules; or
- the making or acceptance of payment in circumstances specified by the rules.

1.64 The committee's view is that significant matters, such as the kinds of transactions that will be exempt from offences, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

Allowing kinds of transactions to be made exempt from the cash payment limit by legislative instrument ensures that there is flexibility in the regulatory regime to accommodate new kinds of transactions. Given the serious nature of the proposed offences and the breadth of activities to which they can apply, it is important to ensure that swift changes can be made to accommodate new kinds of transactions in which the use of cash is necessary or appropriate.³³

1.65 The committee's consistent scrutiny view is that the need for flexibility does not, of itself, provide an adequate justification for leaving significant matters to delegated legislation. In this instance, it is unclear why a non-exhaustive list of the currently known kinds of transactions that will be exempt cannot be included on the face of the bill, with further kinds of transactions able to be specified by the rules. The committee notes that the explanatory memorandum provides examples of the types of payments that are expected to be exempted by the rules,³⁴ and that

31 Clauses 12 and 13. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

32 The term 'entity' is defined in the bill to include individuals.

33 Explanatory memorandum, p. 13.

34 Explanatory memorandum, p. 13.

inclusion of at least some kinds of transaction on the face of the bill will assist in clarifying the scope of the offences.

1.66 The committee's consistent scrutiny view is that significant matters, such as the kinds of transactions that will be exempt from offences, should be included in primary legislation unless a sound justification is provided. The committee therefore requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to leave all of the exceptions to these offences to delegated legislation; and**
- **whether it would be appropriate for the bill to be amended to include a non-exhaustive list of the currently known kinds of transactions that will be exempt, with further kinds of exempt transactions able to be specified by the rules.**

Significant penalties³⁵

1.67 As noted above, clause 13 of the bill creates new criminal offences for entities who make or accept a payment in cash where the value of the cash equals or exceeds \$10,000. The penalty for both offences is imprisonment for 2 years or 120 penalty units or both.

1.68 The committee's expectation is that a detailed justification for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in other Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. This should include a consideration of...other comparable offences in Commonwealth legislation'.³⁶

1.69 In this instance, the committee notes that the explanatory memorandum does not provide any specific justification for the proposed imposition of significant penalties, merely stating that 'the use of an effective deterrent is required to change existing practices that have facilitated participation in the black economy'.³⁷

35 Clauses 12 and 13. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

36 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 39.

37 Explanatory memorandum, p. 7.

1.70 Noting the lack of detail in the explanatory memorandum, it is not apparent to the committee that the penalties in clause 13 of the bill are appropriate by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.

1.71 The committee therefore requests the minister's more detailed advice as to the justification for the significant custodial penalty proposed in clause 13. In particular, the committee requests the minister's advice as to specific examples of applicable penalties for comparable Commonwealth offence provisions.

Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019

Purpose	This bill seeks to amend the <i>VET Student Loans Act 2016</i> and the <i>Higher Education Support Act 2003</i> to implement a new tuition protection model for students participating in the VET Student Loans program or accessing FEE-HELP or HECS-HELP assistance
Portfolio	Employment, Skills, Small and Family Business
Introduced	House of Representatives on 18 September 2019

Significant matters in delegated legislation³⁸

1.72 The bill seeks to amend the *VET Student Loans Act 2016* (VET Act) and the *Higher Education Support Act 2003* (HES Act) to establish a tuition protection scheme for domestic students. Among other matters, the scheme requires higher education providers to pay annual tuition protection levies, and establishes mechanisms to protect and support students in the event that their provider 'defaults'.³⁹

1.73 Proposed subsection 49A(2) of the VET Act would provide that rules made under that Act may make provision for or in relation to a number of matters relating to the tuition protection scheme—in relation to vocational education and training. Similarly, proposed subsection 19-66A(3) of the HES Act would provide that the Higher Education Provider Guidelines (guidelines) may make provision for or in relation to a number of matters relating to the tuition protection scheme—in relation to the Higher Education Loan Program (HELP).⁴⁰ The matters that may be included in the rules and guidelines include: when tuition protection levies are due and payable; penalties for late payment of levy; and any other matter relating to the collection and recovery of tuition protection levy.

1.74 Additionally, proposed paragraph 66A(1)(b) of the VET Act and proposed paragraph 166-5(1)(b) of the HES Act seek to allow the rules and guidelines to

38 Schedule 1, proposed subsection 49A(2) and paragraph 66A(1)(b); Schedule 2, proposed subsection 19-66A(3) and paragraph 166-5(1)(b). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

39 Generally, a provider will default if they fail to start to provide a course (or part thereof) to a student on the day on which the course was due to start; or the provider ceases to provide a course to the student on a day after the course starts but before it is completed.

40 The rules would be made under section 116 of the VET Act. The guidelines would be made under section 238-10 of the HES Act. Both the rules and the guidelines would be legislative instruments, subject to disallowance and sunseting under the *Legislation Act 2003*.

exempt classes of education providers from the tuition protection scheme (that is, from proposed Part 5A of the VET Act and proposed Part 5-1A of the HES Act).

1.75 The committee's longstanding view is that significant matters, such as core elements of a tuition protection scheme and the entities to which the scheme is to apply, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.76 In relation to the matters that may be included in rules and guidelines under proposed subsections 49A(2) and 19-66A(3), the explanatory memorandum explains that the use of delegated legislation is appropriate because the relevant matters 'are primarily matters of administration and process regarding the collection and recovery of levy amounts, and do not impact on the setting of the levy amounts payable by the providers'.⁴¹ In relation to the power in proposed paragraphs 66A(1)(b) and 166-5(1)(b) to exempt providers from the tuition protection scheme, the explanatory memorandum explains that the use of delegated legislation:

[provides] for flexibility should it become apparent that the risk of another class of providers defaulting is...low and [the providers] have adequate processes and procedures in place to provide tuition protection to students. This approach allows the tuition protection arrangements to evolve responsively based on evidence and experience.⁴²

1.77 The committee acknowledges that certain matters proposed to be included in rules and guidelines may be administrative or procedural in nature.⁴³ However, it remains unclear that *all* matters in proposed subsections 49A(2) and 19-66A(3) would be appropriate for inclusion in delegated legislation. For example, it appears that the refund, remission or waiver of tuition protection levies,⁴⁴ and the notional liability of the Commonwealth to pay VSL tuition protection levy,⁴⁵ are substantive matters that may be more appropriate for enactment via primary legislation.

1.78 In relation to proposed paragraphs 66A(1)(b) and 166-5(1)(b), the committee acknowledges the need for flexibility—to ensure that the tuition protection arrangements can develop responsively. However, the committee notes that it does not generally consider flexibility, on its own, to be sufficient justification for including significant matters (including broad exemptions) in delegated legislation. Further,

41 Explanatory memorandum, pp. 16 and 39-40.

42 Explanatory memorandum, p. 17, in relation to proposed paragraph 66A(1)(b). A similar explanation is provided on p. 42, in relation to proposed paragraph 166-5(1)(b).

43 For example, the issue of notices setting out the amount of tuition protection levy payable by a provider, noting that the amount of levy would be set by primary legislation.

44 See proposed paragraph 49A(2)(f) of the VET Act, and proposed paragraph 19-66A(3)(f) of the HES Act.

45 See proposed paragraph 49A(2)(g) of the VET Act.

while noting the information in the explanatory memorandum as to when providers may be exempted from the tuition protection scheme, the committee remains concerned that there appears to be no guidance on the face of the bill as to the circumstances in which exemptions may be appropriate.

1.79 In relation to the power in proposed paragraphs 66A(1)(b) and 166-5(1)(b), the committee requests the minister's advice as to the appropriateness of amending the bill to provide at least high-level guidance as to the circumstances in which rules and guidelines may exempt higher education providers from the operation of the tuition protection scheme.

1.80 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of including potentially significant matters in delegated legislation.

Broad discretionary power⁴⁶

1.81 Proposed Part 5-1A of the HES Act would establish a scheme designed to protect students in the event of default by a higher education provider. The scheme imposes a number of obligations on providers in this regard.⁴⁷

1.82 Proposed subsection 166-5(1) of the HES Act provides that Part 5-1A applies to higher education providers other than Table A providers, and providers of a kind prescribed by the guidelines. Proposed subsection 166-5(2) provides that, despite subsection 166-5(1), the minister may determine that Part 5-1A applies, or does not apply, to a specified higher education provider. Under proposed subsection 166-5(3), a determination may apply unconditionally or subject to conditions, and may be expressed to apply indefinitely or for a specified period of time. Proposed subsection 166-5(4) provides that the determination would not be a legislative instrument.

1.83 The explanatory memorandum explains that allowing the minister to specify individual higher education providers to which Part 5-1A applies or does not apply provides additional flexibility in circumstances where the risk of a particular provider defaulting is low, and in circumstances where the provider has demonstrated that it has adequate tuition protection procedures in place. It also notes that the minister's ability to exempt individual providers from the operation of Part 5-1A reflects current arrangements elsewhere in the HES Act.⁴⁸

46 Schedule 2, proposed subsections 166-5(2) and (4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

47 These include, for example, payment of tuition protection levies, and requirements to notify the relevant Tuition Protector Director and students of the default in a timely manner, and to cooperate with the relevant Tuition Protection Director.

48 Explanatory memorandum, p. 42.

1.84 However, the committee remains concerned that proposed subsection 166-5(2) would permit the minister to determine whether and how the tuition protection requirements in Part 5-1A of the HES Act apply to specific providers, with little or no guidance on the face of the bill as to how this power is to be exercised. The committee is also concerned that the relevant determinations would not be legislative instruments, and would not be 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.

1.85 The committee requests the minister's detailed advice as to why it considered necessary and appropriate to permit the minister to determine, by non-legislative instrument, individual providers to which the tuition protection scheme in proposed Part 5-1A of the *Higher Education Support Act 2003* applies.

1.86 The committee also requests the minister's advice as to the appropriateness of amending the bill to:

- **provide that determinations made under proposed subsection 166-5(2) are legislative instruments; and**
- **provide at least high-level guidance as to how the minister's power to make such determinations is to be exercised.**

Broad delegation of administrative powers⁴⁹

1.87 Proposed section 66N of the VET Act sets out the functions and powers of the VSL Tuition Protection Director. These include relatively significant functions relating to the tuition protection model set out in the bill and the management of the VSL Tuition Protection Fund.⁵⁰ Proposed subsection 114(3) would permit the VSL Tuition Protection Director to delegate the majority of these powers or functions to a person who holds or performs the functions of an Australian Public Service (APS) Level 6, or an equivalent or higher position.⁵¹

49 Schedule 1, item 41, proposed subsection 114(3); Schedule 2, item 27, proposed section 238-6. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

50 For example: facilitating and monitoring the placement of students in relation to whom an approved course provider has defaulted; managing the VSL Tuition Protection Fund; and any other function conferred by the VET Act or any other law of the Commonwealth.

51 The Director would be permitted to delegate any or all of his or her functions or powers, except the power in proposed paragraph 66N(1)(e) to make a legislative instrument for the purposes of the *VET Student Loans (VSL Tuition Protection Levy) Act 2019*.

1.88 Proposed section 167-20 of the HES Act seeks to confer similar powers and functions on the HELP Tuition Protection Director.⁵² Proposed section 238-6 would permit the HELP Tuition Protection Director to delegate the majority of these powers or functions to a person holding or performing the functions of an APS Level 6, or an equivalent or higher position.⁵³

1.89 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class to persons, with little specification as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of the powers that may be delegated, or on the categories of people to whom delegations are permitted. The committee's preference is that delegates be confined to holders of nominated officers, and/or to members of the Senior Executive Service (SES). Where broad delegations are provided for, the committee considers that an explanation as to why these broad delegations are necessary should be included in the explanatory materials.

1.90 In relation to the delegation of the powers and functions of the VSL Tuition Protection Director, the explanatory memorandum states that:

It is anticipated that the VSL Tuition Protection Director's powers and functions would only be delegated to officers, who have been allocated as resources dedicated to assisting the...Director. It is anticipated delegated powers would primarily be exercised by officers at EL1 and EL2 levels. The power to delegate to an employee at the APS 6 level has been included as:

- the current disposition of staff that will be assigned to assist the...Director in the exercise of his or her functions has not yet been fully determined; and
- the...Director's work load may unexpectedly increase significantly, for example in the event of multiple provider defaults. Officers at the APS 6 level may need to exercise delegated powers to ensure that affected students...receive assistance as soon as practicable.⁵⁴

1.91 A similar explanation is provided in relation to the delegation of the powers and functions of the HELP Tuition Protection Director.⁵⁵

1.92 The committee appreciates the importance of ensuring students affected by default on the part of higher education providers are able to receive assistance as

52 For example: facilitating and monitoring the placement of students in relation to whom an approved course provider has defaulted; managing the HELP Tuition Protection Fund; and any other function conferred by the HES Act or any other law of the Commonwealth.

53 The Director would be permitted to delegate any or all of his or her functions or powers, except the power in proposed paragraph 66N(1)(e) to make a legislative instrument for the purposes of the *Higher Education Support (HELP Tuition Protection Levy) Act 2019*.

54 Explanatory memorandum, p. 34.

55 See explanatory memorandum, p. 55.

soon as practicable, and acknowledges that the staffing requirements for the Directors are not yet known. However, the committee remains concerned that the bill would permit the delegation of significant powers to APS 6 officers, with nothing on the face of the bill as to delegates' qualifications, attributes or expertise. The committee is also concerned that, in practice, the relevant powers and functions may be exercised by Executive Level 1 (EL1) and EL2 officers. As noted above, the committee generally prefers that delegates be members of the SES—particularly where more significant powers and functions are delegated.

1.93 The committee further notes that it has not generally accepted operational or administrative flexibility as sufficient justification for permitting broad delegations of power. In this respect, it is unclear to the committee why officers at the APS 6 level could not undertake the relevant work, with final authorisation provided either by a Tuition Protection Director or a delegate at the SES level.

1.94 Finally, the committee notes that proposed subsection 215-40(1A) would permit the HELP Tuition Protection Director to delegate powers and functions under the *Regulatory Powers Act 2014* to an SES employee, or acting SES employee, within the department. This suggests that powers and functions under that Act are of such significance that they should only be delegated to SES employees. However, it appears that there is some ambiguity as to whether the bill would also permit delegation of those functions to officers at the APS 6 level.⁵⁶

1.95 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to permit the VSL Tuition Protection Director and the HELP Tuition Protection Director to delegate their powers and functions to officers at the APS 6 level. The committee's consideration of these matters would be assisted if the minister's response addressed the following matters:

- **the anticipated nature and volume of matters to be determined by the VSL Tuition Protection Director and HELP Tuition Protection Director; and**
- **whether the relevant work could be performed by officers below the Senior Executive Service (SES) level, with an SES officer giving final authorisation.**

56 In this respect, proposed paragraph 167-20(1)(g) provides that the powers and functions of the HELP Tuition Protection Director include 'any other function conferred by...any other law of the Commonwealth'. This would appear to include functions conferred under the Regulatory Powers Act. Proposed section 238-6 appears to permit the delegation of functions under paragraph 167-20(1)(g). A similar issue arises in relation to the powers and functions of the VSL Tuition Protection Director—see proposed paragraph 66N(1)(g) and subsections 89(1A) and 114(3) of the *VET Student Loans Act 2016*.

1.96 The committee also requests the minister's advice as to the appropriateness of amending the bill to restrict delegations to members of the SES or, at a minimum, to require that delegates possess expertise appropriate to the delegated power or function.

Family Assistance Legislation Amendment (Building on Child Care Package) Bill 2019

<p>Purpose</p>	<p>This bill seeks to amend Acts relating to family assistance to:</p> <ul style="list-style-type: none"> • amend the requirements on child care providers for the issuing of Additional Child Care Subsidy; • allow the Minister for Education (the Minister) to prescribe circumstances in which a third party may contribute to meeting the cost of an individual's child care fees without affecting that individual's Commonwealth child care subsidies; • allow the Minister to prescribe specific circumstances in which Commonwealth child care subsidies can be paid where the child is absent at the start or end of an enrolment; • provide for the Minister to specify eligibility criteria and care requirements to access Commonwealth-subsidised In Home Care places; • increase the number of weeks at which enrolments automatically cease due to non-attendance from 8 to 14 weeks; • clarify that decisions made under section 105 of the <i>A New Tax System (Family Assistance)(Administration) Act 1999</i> must first be subject to internal review before an application is made to the Administrative Appeals Tribunal; • simplify the Child Care Subsidy claims process; • ensure that where an approved provider or child care service is suspended or cancelled that access to Commonwealth child care subsidies automatically cease
<p>Portfolio</p>	<p>Education</p>
<p>Introduced</p>	<p>House of Representatives on 18 September 2019</p>

Significant matters in delegated legislation⁵⁷

1.97 Schedule 1 to the bill seeks to make a number of changes in relation to the provision of Child Care Subsidy and Additional Child Care Subsidy, including

⁵⁷ Schedule 1, proposed paragraph 85BA(1)(e) and proposed section 85ECA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

amendments to the *A New Tax System (Family Assistance) Act 1999* in relation to when these subsidies will be available for child care provided by in home care.

1.98 Proposed paragraph 85BA(1)(e) will allow targeted eligibility criteria for Child Care Subsidy for in home care to be prescribed in the Minister's rules (that is, in delegated legislation). The explanatory memorandum states that the eligibility criteria to be set out in the rules

...will broadly encompass the availability and suitability of access to other forms of appropriate care, geographic location, non-standard or variable working hours of parents, and whether families seeking to access In Home Care have complex and or extensive additional needs.⁵⁸

1.99 Proposed section 85ECA will enable the Minister's rules to prescribe requirements that must be met with respect to the provision of care by in home services in order for such care to attract Child Care Subsidy. The explanatory memorandum states that this 'amendment ensures that the Minister's rules are able to clearly prescribe care requirements for In Home Care services' such as 'requirements relating to ratios of in home educators and number of children'.⁵⁹

1.100 The committee's view is that significant matters, such as the eligibility requirements for Commonwealth-subsidised in home care places, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, it is unclear to the committee why at least high level guidance regarding the circumstances in which child care subsidies will be available for in home care cannot be included in the primary legislation. For example, it is unclear why the relevant circumstances outlined in the explanatory memorandum could not be included on the face of the bill. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.101 The committee's view is that significant matters, such as the eligibility requirements for Commonwealth-subsidised in home care services, should be included in primary legislation unless a sound justification is provided. The committee therefore requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to leave significant elements of the provision of subsidies for in home care to delegated legislation; and**

58 Explanatory memorandum, p. 24.

59 Explanatory memorandum, p 24–5.

- **whether it would be appropriate for the bill to be amended to set out at least high level guidance of the relevant eligibility requirements on the face of the primary legislation.**
-

Merits review⁶⁰

1.102 Items 9 and 10 of Schedule 2 to the bill seek to exclude decisions made under either section 197H or 197J of the *A New Tax System (Family Assistance) (Administration) Act 1999* from review by the Administrative Appeals Tribunal. Section 197H provides that the Secretary must cancel the approval of an approved provider if the provider ceases to operate all of the approved child care services of the provider. Section 197J provides that the Secretary must vary the approval of a provider if the provider ceases to operate some of its services.

1.103 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. In this instance, the explanatory memorandum states:

It was not intended for these kinds of decisions to be reviewable by the AAT, noting also that these decisions are not discretionary, and therefore these amendments correct this oversight.⁶¹

1.104 The committee notes that the decisions in sections 197H and 197J are not discretionary and the Secretary *must* make the decision to cancel or vary the approval of an approved provider in certain circumstances. However, it remains unclear to the committee why merits review should not be available in circumstances where there has been a mistake of fact as to whether the relevant conditions in sections 197H and 197J have occurred.

1.105 The committee requests the minister's more detailed advice as to why merits review will no longer be available in relation to decisions made under sections 197H and 197J of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

60 Schedule 2, items 9 and 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

61 Explanatory memorandum, p. 34.

Higher Education Support (HELP Tuition Protection Levy) Bill 2019

VET Student Loans (VSL Tuition Protection Levy) Bill 2019

Purpose	<p>The Higher Education Support (HELP Tuition Protection Levy) Bill 2019 seeks to impose the HELP tuition protection levy, specify the amounts that are payable by providers and prescribe the levy components and the manner in which, and by whom, they will be determined each year</p> <p>The VET Student Loans (VSL Tuition Protection Levy) Bill 2019 seeks to impose the VSL tuition protection levy, specify the amounts that are payable by various classes of providers and prescribe the levy components and the manner in which, and by whom, they will be determined each year</p>
Portfolio	Employment, Skills, Small and Family Business
Introduced	House of Representatives on 18 September 2019

Charges in delegated legislation⁶²

1.106 The bills seek to impose (as taxes) the HELP Tuition Protection Levy and VSL Tuition Protection Levy. The levies will be credited to the HELP Tuition Protection Fund and VSL Tuition Protection Fund (the Funds),⁶³ which will be used to support students in the event of default by a higher education provider.⁶⁴ Clause 7 of each bill provides that the levy is the sum of the relevant provider's 'administrative fee component', 'risk rated premium component', and 'special tuition protection component'. Methods for calculating each component are also set out in the bill.⁶⁵

1.107 Clause 13 of each bill would require the HELP Tuition Protection Director and VSL Tuition Protection Director (the Directors) to make legislative instruments for the

62 Clause 13. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

63 The HELP Tuition Protection Fund and VSL Tuition Protection Fund would be established by the Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019.

64 A higher education provider may 'default', in relation to a student, where they fail to provide a course (or part thereof) to a student on the day on which the course was due to start, or cease to provide a course to the student on the day after the course starts or before it is completed.

65 See clauses 8, 11 and 12.

purposes of calculating the special tuition protection and risk rated premium components of the levy.⁶⁶ The bill would therefore allow the Directors to determine significant elements of the proposed levy scheme by delegated legislation.

1.108 One of the most fundamental functions of the Parliament is to impose taxation. Consequently, the committee's consistent scrutiny view is that it is for the Parliament, rather than the makers of delegated legislation, to set rates of tax. Where it is proposed to include rates of tax in delegated legislation, the committee considers that, at a minimum, some guidance in relation to the amount of tax that may be imposed should be included in the enabling Act.

1.109 With regard to these matters, the committee notes that the bill provides that a percentage determined by legislative instrument under clause 13 may be zero, and that a risk factor value must be a number between one and 10.⁶⁷ The committee also notes that, in making an instrument under clause 13, the Directors must have regard to the advice of the relevant advisory board,⁶⁸ and must consider the sustainability of the Funds. Before an instrument under clause 13 is made, the Treasurer would also be required to approve the instrument in writing.⁶⁹ The explanatory memorandum asserts that this 'provides an additional measure of scrutiny'.⁷⁰

1.110 However, the committee is concerned that, despite these requirements, there appears to be nothing on the face of the bill that would expressly limit the amount of the risk rated premium and special tuition protection components of the levy. By contrast, the committee notes that subclause 9(2) would expressly limit the dollar amount of the administrative fee component.

1.111 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the HELP Tuition Protection Director and the VSL Tuition Protection Director to determine core elements of the tuition protection levy by delegated legislation, with only limited guidance as to the amounts of levy that may be imposed.

66 Clause 11 of each bill provides that calculating the risk rated premium component involves multiplying the total number of students for the relevant provider by the amount determined in an instrument under clause 13. Clause 12 provides that the special tuition protection component is the amount of loans or assistance paid to the relevant provider, multiplied by the percentage determined in an instrument made under clause 13.

67 Subclauses 13(2) and (3).

68 Subclause 13(4). The VSL Tuition Protection Fund Advisory Board and HELP Tuition Protection Fund Advisory Board would be established under the Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019

69 Subclause 13(6).

70 Explanatory memorandum (each bill), p. 11.

Medical and Midwife Indemnity Legislation Amendment Bill 2019

Purpose	<p>This bill seeks to amend various Acts in relation to medical and midwife indemnity to:</p> <ul style="list-style-type: none"> • simplify the current legislative structure underpinning the Government's support for medical indemnity insurance; • repeal redundant legislation; • remove the existing contract requirements for the Premium Support Scheme (PSS) and incorporate the necessary requirements in legislation; • require all medical indemnity insurers to provide universal cover to medical practitioners; • maintain support for high cost claims and exceptional claims made against allied health professionals and enable exceptional cost claims to be made, which is provided for in a separate scheme to medical practitioners; • support high cost claims and exceptional cost claims made against private sector employee midwives not covered under the MPIS; • clarify eligibility for the Run-off Cover Schemes (ROCS) and permit access for medical practitioners and eligible midwives retiring before the age of 65; • cause an actuarial assessment to report on the stability and affordability of Australia's medical indemnity market, with the report to be laid before each House of Parliament; and • amend reporting obligations and improve the capacity for monitoring and information sharing
Portfolio	Health
Introduced	House of Representatives on 18 September 2019

Computerised decision-making⁷¹

1.112 Items 15 and 26 of Schedule 3 to the bill seek, respectively, to insert sections 76A into the *Medical Indemnity Act 2002* (Indemnity Act) and section 87A into the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (MPI

71 Schedule 3, item 15, proposed section 76A; item 26, proposed section 87A. The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(ii) and (iii).

Scheme Act). The new sections would allow the Chief Executive Medicare (CEM) to arrange for the use of computer programs for any purpose for which the CEM may or must take administrative action. 'Administrative action' means making a decision, exercising any power or complying with any obligation, or doing a related thing.⁷²

1.113 The committee notes that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.114 With reference to these matters, the committee notes that certain decisions made by the CEM appear to involve complex or discretionary considerations. For example, in deciding whether to issue an apportionment certificate in relation to a claim (under the MPI Scheme Act), the CEM must consider whether there is a third party against whom a claim has been or is reasonable likely to be made, in relation to the incident to which the claim relates. The CEM must also consider whether there is a live judgment or court order that applies to the claim, which has not been stayed and is not subject to appeal.⁷³ In general, the committee considers that it may be appropriate for these more complex decisions to be made by a person, rather than by a computer.

1.115 The explanatory memorandum explains that allowing computer programs to take administrative action on behalf of the CEM will enable the processing of medical indemnity claims and payments to be streamlined, and that the CEM will remain accountable for any administrative action taken by the operation of a computer program. It further states that there will be quality assurance processes in place to ensure that computer systems are operating correctly, and that where a decision is made in error, it will be quickly identified and substituted.⁷⁴

1.116 The committee acknowledges that there may be merit in streamlining claims processes, and notes that there are mechanisms in place to ensure that errors made by the operation of a computer program can be quickly corrected. However, in light of the potential impacts on administrative decision-making outlined above, the

72 See proposed subsections 76A(4) of the Indemnity Act and 87A(4) of the MPI Scheme Act.

73 Sections 51 and 52 of the MPI Scheme Act.

74 Explanatory memorandum, pp. 29-30, 33.

committee would expect the explanatory materials to include a more comprehensive justification for allowing *all* of the CEM's administrative functions to be performed by computer program. The committee also considers that it would be useful for the explanatory materials to explain how automated decision-making will comply with relevant administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).

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

- **why it is considered necessary and appropriate to permit the Chief Executive Medicare (CEM) to arrange for the use of computer programs for *any* purpose for which the CEM may or must take administrative action;**
- **whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and**
- **whether consideration has been given to requiring that certain administrative actions (for example, complex or discretionary decisions) be taken by a person rather than by a computer.**

Reversal of evidential burden of proof⁷⁵

1.118 Subsection 77(2) of the Indemnity Act and subsection 88(2) of the MPI Scheme Act provide that a person commits an offence if they copy, record, disclose or produce protected information or a protected document to another person, where the first person is not performing or exercising duties, powers or functions under specified legislation. The offence is punishable by two years' imprisonment.

1.119 Items 18 and 29 of Schedule 3 to the bill seek, respectively, to insert subsections 77(2A) and (2B) into the Indemnity Act, and subsections 88(2A) and (2B) into the MPI Scheme Act. The new provisions would provide that, despite subsections 77(2) and 88(2), certain listed persons may copy, record, or disclose protected information or a protected document, for the purposes of monitoring, assessing or reviewing the operation of the medical indemnity legislation. In this respect, they would create offence-specific defences to the offences in subsections 77(2) and 88(2). The defences reverse the evidential burden of proof.

1.120 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed

75 Schedule 3, item 18, proposed subsections 77(2A) and (2B); item 29, proposed subsections 88(2A) and (2B). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.121 While in this instance a defendant would bear an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee still expects the reversal of the burden of proof to be justified. The committee notes that no such justification is provided in the explanatory materials.

1.122 The committee further notes that the *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁷⁶

1.123 In this instance, it is not clear that the matters in proposed subsections 77(2) of the Indemnity Act and 88(2) of the MPI Scheme Act would be peculiarly within the knowledge of the defendant. Rather, the role a person occupies (for example, the secretary or the Chief Executive Medicare), and whether the person is monitoring, assessing or reviewing the operation of the medical indemnity legislation, appear to be largely factual matters which may be established through reasonable inquiries.

1.124 The committee requests the minister's advice as to why it is considered necessary and appropriate to reverse the evidential burden of proof in proposed subsections 77(2A) and (2B) of the *Medical Indemnity Act 2002*, and proposed subsections 88(2A) and (2B) of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010*. The committee's consideration of this matter would be assisted if the minister's response explicitly addressed relevant principles set out in the *Guide to Framing Commonwealth Offences*.⁷⁷

76 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

77 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

Broad delegation of legislative power⁷⁸

1.125 Item 26 of Schedule 6 to the bill seeks to insert new Divisions 2C and 2D into the Indemnity Act, to provide for the operation of the allied health high cost claim indemnity scheme and the allied health exceptional claims indemnity scheme.

1.126 Proposed paragraphs 34ZZG(2)(b) and 34ZZD(2)(b) seek to allow regulations to provide, respectively, that Divisions 2C and 2D apply, with specified modifications, to certain liabilities associated with costs which have been paid.

1.127 Additionally, proposed subsection 34ZZF(1) seeks to allow the regulations to provide that Division 2D applies, with specified modifications, in relation to a specified class of claims, a specified class of contracts of insurance, or a specified class of situations in which a liability is wholly or partly covered by more than one contract of insurance. Proposed subsection 34ZZF(2) further seeks to allow the regulations to provide that Division 2D does not apply, or applies with specified modifications, in relation to a specified class of liabilities or payments.

1.128 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the parent Act). The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact parliamentary oversight and may subvert the appropriate division of powers between the Parliament and the executive. The committee will also have concerns about provisions that enable delegated legislation to create exemptions from primary legislation, as these provisions may have the effect of limiting, or in some cases removing, parliamentary scrutiny.

1.129 In light of these matters, the committee expects a sound justification in the explanatory materials for any provision that allows delegated legislation to modify, or to exempt matters from, the operation of primary legislation. The committee notes that, in this instance, no such justification is provided in the explanatory memorandum.

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

- **why it is proposed to allow regulations to modify and exempt matters from the operation of the primary legislation; and**
- **whether it would be appropriate to amend the bill to insert at least high-level guidance concerning the making of such regulations.**

78 Schedule 6, item 3, proposed paragraphs 34ZZG(2)(b) and 34ZZD(2)(b); proposed subsections 34ZZF(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019

Purpose	This bill seeks to amend the <i>National Consumer Credit Protection Act 2009</i> and the National Credit Code in relation to small amount credit contracts and consumer leases
Sponsor	Ms Rebekha Sharkie MP
Introduced	House of Representatives on 16 September 2019

1.131 This bill is identical to bills that were introduced in the House of Representatives on 26 February 2018⁷⁹, 22 October 2018⁸⁰ and 18 February 2019.⁸¹ The committee raised a number of scrutiny concerns in relation to the earlier bills in [Scrutiny Digest 3 of 2018](#),⁸² and reiterates those comments in relation to this bill.

79 The bill was introduced by the former Member for Perth, Mr Tim Hammond MP, and was removed from the House of Representatives *Notice Paper* in accordance with standing order 42. See explanatory memorandum, p. 2.

80 The bill was then introduced by the former Member for Indi, Ms Cathy McGowan MP, and lapsed on 11 April 2019 at the dissolution of the 45th Parliament.

81 The bill was also introduced by the Member for Brand, Ms Madeleine King MP, and lapsed on 11 April 2019 at the dissolution of the 45th Parliament.

82 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2018*, at pp. 24-27.

Protection of the Sea (Prevention of Pollution from Ships) Amendment (Air Pollution) Bill 2019

Purpose	This bill seeks to amend the <i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> to implement Australia's international obligations in relation to sulphur emissions from ships under Annex VI of the <i>International Convention for the Prevention of Pollution from Ships, 1973</i> .
Portfolio	Infrastructure, Transport, Cities and Regional Development
Introduced	House of Representatives on 18 September 2019

Reversal of evidential burden of proof⁸³

1.132 Proposed section 26FEGA seeks to provide a number of exceptions (offence specific defences) in relation to the offences in section 26FEG of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Protection of the Sea Act). Section 26FEG provides that it is an offence to use fuel oil with sulphur content more than the prescribed limit on board a ship in certain areas.

1.133 The explanatory memorandum states that:

It is reasonable that the defendant should have to present, or point to, evidence that suggests a reasonable possibility that any of the matters set out in section 26FEGA occurred.⁸⁴

1.134 Proposed section 26FEHA seeks to provide a number of exceptions (offence specific defences) in relation to the offences in section 26FEH of the Protection of the Sea Act. Section 26FEH provides that it is an offence to take an Australian flagged ship into an emission control area if the ship does not meet the SO_x emission control conditions. The explanatory memorandum provides no information in relation to why the reversal of evidential proof is appropriate for this proposed section.

1.135 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require

83 Schedule 1, items 7 and 11, proposed sections 26FEGA and 26FEHA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

84 Explanatory memorandum p. 7.

a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.⁸⁵

1.136 The committee notes that the *Guide to Framing Commonwealth Offences*⁸⁶ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

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

1.137 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed sections 26FEGA and 26FEHA have not been adequately addressed in the explanatory materials.

1.138 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of provisions which reverse the evidential burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.⁸⁷

Reversal of legal burden of proof⁸⁸

1.139 Item 20 of Schedule 1 to the bill seeks to insert a number of presumptions in relation to the offences in section 26FEG of the Protection of the Sea Act.⁸⁹ Item 27 of Schedule 1 to the bill seeks to insert subsection 26FEH(6) which provides that, for the purpose of section 26FEH, fuel oil on board a ship is presumed to be carried for

85 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

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

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

88 Schedule 1, items 20 and 27, proposed subsections 25FEG(4)–(6) and 26FEH(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

89 Section 26FEG provides that it is an offence to use fuel oil with sulphur content more than the prescribed limit on board a ship in certain areas.

use as fuel unless the contrary is proved. By requiring the defendant to prove the matters in items 20 and 27 of the bill, the provisions reverse the legal burden of proof.⁹⁰

1.140 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. The inclusion of presumptions in relation to offences interferes with this common law right by placing a legal burden on the defendant to rebut the presumption. The committee expects any provision that places a legal burden of proof on the defendant to be fully justified in the explanatory materials. Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion of presumptions in relation to offences should be kept to a minimum.⁹¹

1.141 In relation to proposed subsections 26FEG(4) and 25FEH(6), the explanatory memorandum states that a legal burden is appropriate because 'a defendant would be able to uniquely demonstrate that the fuel is used for combustion or operation on board the ship'.⁹² Similarly, for proposed subsection 26FEG(5), the explanatory memorandum states that a defendant 'would be able to validate the location of the offence was within an Australian maritime zone for all ships and for Australian ships beyond this jurisdiction'.⁹³ The committee notes these explanations, however it does not consider that they adequately address why it is appropriate to place a legal burden of proof on the defendant.

1.142 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to place a legal burden of proof on the defendant by including presumptions in relation to these offences. The committee also requests the minister's advice as to why it is not sufficient to reverse the evidential, rather than legal, burden of proof in this instance.

1.143 The committee's consideration of the appropriateness of provisions which include presumptions in relation to offences is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.⁹⁴

90 Paragraph 13.4(b) of the *Criminal Code Act 1995* provides that a burden of proof imposed on the defendant is a legal burden if the law expressly requires the defendant to prove the matter.

91 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 53.

92 Explanatory memorandum, pp 10 and 11.

93 Explanatory memorandum, p 10.

94 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 53.

Bills with no committee comment

1.144 The committee has no comment in relation to the following bills which were introduced into the Parliament between 16 – 19 September 2019:

- Australian Bill of Rights Bill 2019;
- Australian Research Council Amendment Bill 2019;
- Defence Service Homes Amendment Bill 2019;
- Fair Work Amendment (Stop Work to Stop Warming) Bill 2019;
- Treasury Laws Amendment (2019 Measures No. 2) Bill 2019;
- Treasury Laws Amendment (International Tax Agreements) Bill 2019;
- Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019; and
- Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019.

Commentary on amendments and explanatory materials

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

- Treasury Laws Amendment (Putting Members' Interests First) Bill 2019.⁹⁵

95 On 19 September 2019 the Senate agreed to 16 Government amendments (four as amended by Pauline Hanson's One Nation), the Assistant Minister for Superannuation, Financial Services and Financial Technology (Senator Hume) 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.

Chapter 2

Commentary on ministerial responses

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

Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

Purpose	This bill seeks to amend the <i>Crimes Act 1914</i> and the <i>Criminal Code Act 1995</i> to: <ul style="list-style-type: none"> • introduce new restrictions on the existing arrangements for bail and parole; and • amend the operation of the continuing detention order scheme
Portfolio	Attorney-General
Introduced	Senate on 1 August 2019
Bill status	Before the Senate

Right to liberty—presumptions against bail and parole¹

2.2 In [Scrutiny Digest 5 of 2019](#) the committee requested the Attorney-General's advice as to the necessity and appropriateness of expanding the presumption against bail and parole, noting that it may apply in circumstances where a person has not been charged with, or ever previously convicted of, a terrorism offence.²

Attorney-General's response³

2.3 The Attorney-General advised:

In June 2017, the Council of Australian Governments (COAG) agreed to ensure there will be a presumption that neither bail nor parole will be granted to those persons who have demonstrated support for, or have

1 Schedule 1. The committee draws senators' attention to this Schedule pursuant to Senate Standing Order 24(1)(a)(i).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2019*, pp. 1-5.

3 The minister responded to the committee's comments in a letter dated 1 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

links to, terrorist activity. In line with the COAG agreement, this Bill expands the existing presumption against bail to include those offenders who are the subject of a control order, or have links with, or have shown support for, terrorist activities. The new presumption against parole similarly covers all of these terrorism-related offenders.

As noted at the special meeting of the COAG on Counter Terrorism on 5 October 2017:

A nationally consistent approach to preventing and responding to terrorist threats underpins Australia's national security in a complex and evolving threat environment. Close cooperation and interoperability between Commonwealth and state agencies is critical to Australia's ability to counter terrorism. It is the bedrock of our national counter-terrorism effort. And by strengthening legal frameworks, implementing new practices and programs and improving information sharing, we are better equipping our security and law enforcement agencies, strengthening protections for public places, and preventing radicalisation and violent extremism.

The presumptions against bail and parole mirror those arrangements now in place in most Australian states and territories. The presumptions are necessary legislative tools in support of the prevention and disruption of terrorism, a core element of Australia's national security strategy. It is essential that our laws continue to enable intervention and disruption at the early stages of preparations for a terrorist act. Decision makers at the key steps in the criminal justice process of bail and parole must be able to take into account a person's prior actions, where those actions indicate a terrorism-related risk to the community. The terrorism-related risk posed by these offenders needs to be taken into account regardless of the federal offence for which they are currently being prosecuted or imprisoned.

The presumptions against bail and parole are intended to operate broadly to ensure the community is protected from terrorism and terrorist threats. The presumptions against bail and parole are critical mechanisms to mitigate risks posed by terrorist offenders and other people who have expressed support for terrorism, or those individuals who have been identified by law enforcement as posing a risk to the community who are the subject of a control order. These strong measures will ensure that public safety is paramount when applications for bail and parole are being considered.

A person who is convicted of a terrorism offence has been proven, to the satisfaction of the law, to be a danger to the Australian community. A person who is subject to a control order has been identified by law enforcement and the courts as posing a risk to society. In relation to such persons, as well as those who have shown support or advocated support for terrorist acts, restricting their freedom of movement through the

rebuttable presumptions against bail and parole is a legitimate response to the need to protect the community and Australia's national security from the evolving nature of the threat posed by terrorism.

The Government is of the view that it is also appropriate that the presumption also apply to persons accused of offences against section 102.8 of the *Criminal Code Act 1995* (associating with terrorist organisations). This measure reflects the serious threat posed to the Australian community by those individuals who adhere to extremist ideology, and ensures that these individuals can be appropriately managed and controlled within the criminal justice system. This measure, along with the other measures in the Bill, is necessary to fully implement the COAG Agreement of 9 June 2017.

The presumptions provide safeguards and facilitate the exercise of judicial discretion as bail may still be granted where there are 'exceptional circumstances'. The presumptions against bail and parole are not blanket bans on bail and parole for persons who have demonstrated support for, or have links to, terrorism. The presumptions preserve an appropriate degree of discretion as decision makers may grant bail or parole where there are exceptional circumstances to justify release.

Exceptional circumstances are not defined in the *Crimes Act 1914* (Cth) (Crimes Act). This means that the courts (in relation to bail) and the Attorney-General (in relation to parole) have discretion to take into account all relevant information when determining whether exceptional circumstances exist to justify a terrorism-related offender's release into the community.

The defendant (and the Commonwealth Director of Public Prosecutions) also has the option to appeal the decision of the bail authority. This already exists under the current legislation and will continue to be available to the expanded class of offenders under the amended legislation.

In relation to parole, release on parole is already at the discretion of the Attorney-General for all federal offenders serving a non-parole period - the amendments merely set a higher threshold for these offenders who present the highest risk to the community. Further, the existing procedural fairness arrangements under Part IB of the Crimes Act will apply to this expanded class of offenders.

The presumptions are not insurmountable, but they do set an appropriately high threshold in order to protect the community from the threat posed by terrorism-related offenders.

Committee comment

2.4 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the presumption against bail and parole are intended to operate broadly to ensure that the community is

protected from terrorism and terrorist threats. The committee also notes the advice that the presumptions against bail and parole are critical mechanisms to mitigate risks posed by terrorist offenders and other people who have expressed support for terrorism, or those individuals who have been identified by law enforcement as posing a risk to the community who are the subject of a control order.

2.5 The committee reiterates that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumption against bail (which denies a person their liberty before they have been convicted) tests this presumption. The committee expects any limitation of this fundamental right to be soundly justified.

2.6 The committee also notes the Attorney-General's advice that the terrorism-related risk posed by these offenders needs to be taken into account regardless of the federal offence for which they are currently being prosecuted or imprisoned. However it remains unclear to the committee that this is something that is currently not being taken into account by courts when exercising their discretion to grant bail.

2.7 The committee further notes the Attorney-General's advice that a person who is convicted of a terrorism offence has been proven, to the satisfaction of the law, to be a danger to the Australian community. However, the Attorney-General's response does not address why or how a person who has been previously charged with a terrorism offence, but not necessarily convicted of that offence, is a risk to the community. The committee reiterates that, under this bill, a person may have been previously *charged* with a terrorism offence but the charges were later dropped or they may have been acquitted of that offence, yet a presumption against bail would exist in relation to them if they are later charged with *any* Commonwealth offence. The committee notes that this places the onus of proof onto the accused to prove that exceptional circumstances exist. It remains unclear to the committee that providing evidence that a past charge for terrorism was dropped will be sufficient in all circumstances to satisfy the high bar of proving exceptional circumstances exist to override the presumption.

2.8 The committee notes the Attorney-General's advice that a person who is subject to a control order has been identified by law enforcement and the courts as posing a risk to society. The committee further notes the advice that, in relation to such persons, as well as those who have shown support or advocated support for terrorist acts, restricting their freedom of movement through the rebuttable presumptions against bail and parole is a legitimate response to the need to protect the community and Australia's national security from the evolving nature of the threat posed by terrorism.

2.9 While the committee acknowledges this advice, the committee notes that control orders may be issued by a court without any criminal conviction or even a charge being laid. The committee also reiterates its concerns that what could constitute someone 'who supports or advocates support for terrorist acts' may be very broad and may, for example, include statements on social media made a

number of years ago. From a scrutiny perspective, the committee does not consider that the advice provided by the Attorney-General sufficiently justifies expanding the presumption against bail to these categories of persons.

2.10 In relation to presumption against parole, the committee notes the Attorney-General's advice that release on parole is already at the discretion of the Attorney-General for all federal offenders serving a non-parole period and that the amendments merely set a higher threshold for those offenders who present the highest risk to the community. While noting this advice, the committee notes that the presumption against parole will apply to persons who have not been convicted of a terrorism offence. From a scrutiny perspective, the committee does not consider that the Attorney-General's advice has adequately justified a need for expanding the presumption against parole.

2.11 In addition, the committee reiterates that while the presumption against parole will not technically have retrospective effect, in practice there may be people who have been convicted of offences prior to the commencement of this bill who will now be subject to a presumption against parole that did not exist when they were initially sentenced.

2.12 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of broadly expanding the presumptions against bail and parole, noting that it may apply in circumstances where a person has not been charged with, or ever previously convicted of, a terrorism offence.

Trespass on rights and liberties—continuing detention orders⁴

2.13 In [Scrutiny Digest 5 of 2019](#) the committee requested the Attorney-General's advice as to why it is considered appropriate to expand the continuing detention scheme for high risk terrorist offenders after their sentences for imprisonment have been served.⁵

Attorney-General's response

2.14 The Attorney-General advised:

Concurrent and cumulative sentences

The proposed amendments in Part 1 of Schedule 2 are appropriate to ensure that the community can be protected from dangerous terrorist offenders who continue to pose an unacceptable risk of committing a serious terrorism offence upon release.

4 Schedule 2. The committee draws senators' attention to this Schedule pursuant to Senate Standing Order 24(1)(a)(i).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2019*, pp. 5-6.

Currently, the HRTO scheme does not apply to terrorist offenders who are in prison for multiple offences where their sentence for the terrorism offence ends before that of any other offence. In such circumstances, the Minister for Home Affairs (Minister) cannot consider whether a continuing detention order (CDO) is appropriate, even if the sentence for any other offence expires only a short period after the sentence for the eligible terrorism offence. This undermines the policy intention of the original HRTO scheme, which is to continue the detention of high-risk terrorist offenders serving a custodial sentence who pose an unacceptable risk to the community. The fact that a terrorist offender has also been imprisoned for other offences, in addition to an eligible terrorism offence, does not mean that the offender is any less likely to pose a threat to the community of committing a serious Part 5.3 offence.

This gap in the current legislation could also lead to perverse outcomes which have the potential to diminish the effectiveness of the HRTO scheme. For example, offenders currently serving a sentence for a terrorism offence may be rendered ineligible for consideration under the HRTO scheme if they commit a further offence whilst in prison (e.g. assaulting another inmate or corrections staff), and subsequently serve a sentence for that offence which ends after the sentence for their terrorism offence.

The proposed amendments are a minor adjustment to the eligibility criteria of the HRTO scheme. They address this gap by ensuring that terrorist offenders are not rendered ineligible simply because they are serving a sentence of imprisonment for an additional offence that ends after their sentence of imprisonment for an eligible terrorism offence. Under the proposed amendments, the Minister will be able to seek a CDO irrespective of whether the terrorist offender's final day in prison is for the eligible terrorism offence or another offence, provided that they have been detained continuously since being convicted of the eligible terrorism offence.

There will be no impact on the safeguards already guaranteed under Division 105A, which include:

- the court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence if released into the community;
- the court must be satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk before making a CDO;
- a CDO is appealable as of right within 28 days of the decision, and by leave, within such further time as the court of appeal allows;
- the making of a CDO is a judicial process subject to civil rules of evidence and procedure; and

- a CDO is subject to annual review, and the terrorist offender can seek review of a CDO sooner where new facts or circumstances justify reviewing the order, or where it is in the interests of justice to review the order.

In assessing whether an offender continues to pose an unacceptable risk to the community of committing a further terrorism offence, the court may also consider any matter it considers relevant, including the time between the completion of the offender's terrorism sentence and their potential release from prison.

Committee comment

2.15 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that currently the minister cannot consider whether a continuing detention order is appropriate, even if the sentence for any other offence expires only a short period after the sentence for the eligible terrorism offence. The committee also notes the Attorney-General's advice that this gap in the current legislation could also lead to perverse outcomes which have the potential to diminish the effectiveness of the HRTO scheme, including in circumstances where a person commits a further offence while imprisoned.

2.16 However, the committee reiterates its significant scrutiny concerns in relation to the high risk terrorist offenders scheme. The committee reiterates that while proceedings for a continuing detention order are characterised by the usual procedures and rules for civil proceedings, the scheme nevertheless fundamentally inverts basic assumptions of the criminal justice system. The committee notes that 'offenders' in our system of law may only be punished on the basis of offences which have been proven beyond a reasonable doubt, whereas the scheme detains persons, who have committed offences and have completed their sentences for those offences, on the basis that there is a high degree of probability they will commit similar offences in the future.

2.17 The committee acknowledges that in some circumstances detention may be justified on the basis of protecting the public from unacceptable risks without undermining the presumption of innocence, or the principle that persons should not be imprisoned for crimes they may commit. For example, detention on the basis of risks associated with the spread of communicable disease does not threaten these basic assumptions of our criminal law. However, where the trigger for the assessment of whether or not a person poses an unacceptable risk to the community is prior conviction for an offence, the protective purpose cannot be clearly separated from the functioning of the criminal justice system. If the continuing detention is triggered by past offending, then it can plausibly be characterised as retrospectively imposing additional punishment for that offence.

2.18 Noting these significant scrutiny concerns regarding the operation of the scheme, the committee considers that any expansion of the scheme needs to be soundly justified. While the committee notes the Attorney-General's advice, from a

scrutiny perspective, the committee continues to have concerns regarding the potential for the underlying scheme to trespass on personal rights and liberties.

2.19 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.20 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of expanding the continuing detention scheme for high risk terrorist offenders after their sentences for imprisonment have been served.

Procedural fairness⁶

2.21 In [Scrutiny Digest 5 of 2019](#) the committee requested the Attorney-General's advice as to why it is considered necessary and appropriate to remove an offender's right to receive a complete copy of any continuing detention order (CDO) application made against them.⁷

Attorney-General's response

2.22 The Attorney-General advised:

Information protections

When making a CDO application under the existing legislation, the 'complete copy' requirement requires the Minister to include all inculpatory information that the Minister seeks to rely upon to support the application, as well as all exculpatory information that the Minister is aware of which would support a finding that the CDO should not be made, regardless of the sensitivity or probative value of that exculpatory information.

The current requirement to provide all exculpatory material to the terrorist offender, without the ability to protect that material where it contains sensitive national security information, is problematic, as it may prejudice national security or ongoing law enforcement or intelligence operations. For example, it may require the Minister to provide the terrorist offender with material in the CDO application that discloses sensitive sources and capabilities, with severe consequences for the safety of human sources, the integrity of law enforcement and security

6 Schedule 2. The committee draws senators' attention to this Schedule pursuant to Senate Standing Order 24(1)(a)(iii).

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2019*, pp. 6-7.

operations, and ultimately, public safety. In deciding whether to make a CDO application, this could also put the Minister in a difficult position where the consequences of revealing sensitive national security information are significant and the terrorist offender poses an unacceptable risk of committing a serious terrorism offence when released into the community. In some circumstances, the consequences of compromising sensitive national security information may be so great that this risk outweighs the Minister making a CDO application. This ultimately undermines the preventative purpose of the CDO scheme.

The proposed amendments will overcome this problem by bringing the options for protecting sensitive national security information contained in an application for a CDO into line with the protections available in other proceedings, whether criminal or civil. The Bill will achieve this by providing that the information that must be given to a terrorist offender in a CDO application is subject to any protective orders made by a court. Under the proposed amendments, the Commonwealth can seek protective orders over sensitive inculpatory and exculpatory material to allow it not to be provided to the terrorist offender, or provided in a redacted or summarised form. This will enhance the ability of the Minister to properly consider offenders for CDO applications in circumstances where sensitive national security information is involved.

Further, the amendments in the Bill will provide a mechanism through which public interest immunity (PII) may operate to prevent the disclosure of highly sensitive information to the terrorist offender. In so doing, the amendments do not purport to modify or qualify the ordinary application of the doctrine of PII. Rather, they provide a mechanism whereby that doctrine may be engaged to enable a court to consider whether to make protective orders in relation to the disclosure of information to a terrorist offender. Where the Commonwealth withholds sensitive exculpatory material on the basis of PII, the terrorist offender must be notified and may choose to contest the claim. If contested, it will be a matter for a court to determine a PII claim taking into account the right to a fair hearing and ensuring appropriate protections for highly sensitive national security information.

The Bill qualifies the 'complete copy' requirement where the Minister is likely to seek an order of the court preventing or limiting disclosure of the information (either through protective orders or PII). It will ultimately be a matter for the court to determine any protective orders, balancing the competing interests of providing the terrorist offender with material relevant to the proceedings, with the prejudice to national security that may result from the disclosure of that material.

The proposed amendments will not affect the existing requirement that all information that the Minister relies on for the making of a CDO must be provided to the terrorist offender to ensure their right to a fair hearing. Neither the Minister nor the court may rely on information that is not

provided to the terrorist offender. If the court orders that information be withheld from a terrorist offender in its entirety, it will not form part of the proceedings. If the court orders that a summary or statement of facts will stand in place of the source document, the court will only be able to consider the summary or statement of facts for the purposes of the CDO proceeding.

Further, the terrorist offender will always be able to contest the withholding of sensitive exculpatory information. Where the Minister withholds any exculpatory material from an application on the basis of a planned PII claim, the Minister would be required to notify the terrorist offender of that fact in writing. The terrorist offender would then be able to seek disclosure of that information. The Minister, or a relevant operational agency, would then be required to formally resist disclosure of the sensitive material by making a PII claim to the court. There would be no onus on the terrorist offender to disprove the PII claim. The Commonwealth would have to demonstrate to the court the public interest arguments in favour of withholding the sensitive material outweigh the public interest in disclosure to the terrorist offender. It will be up to the court to determine whether the balance of the public interest lies in favour of protecting that information (in full or in part), or in ensuring the terrorist has complete access to the material. This is consistent with the operation of information protections in other contexts, whether criminal or civil.

The court always retains ultimate discretion as to whether to grant a PII claim, or grant any orders sought under the *National Security Information (Criminal and Civil Proceedings) Act 2004*, balancing competing public interests to determine the appropriate orders. Importantly, the proposed amendments in the Bill do not preclude the court from exercising its inherent powers to stay proceedings if it considers that the terrorist offender cannot receive a fair hearing. For example, the court may uphold a PII claim to withhold sensitive exculpatory material on the basis that the public interest in not prejudicing national security outweighs the public interest in disclosing that material to the terrorist offender for the purposes of ensuring a fair hearing. However, the court may decide to stay the CDO proceeding on the basis that it would not be in the interests of justice to proceed with a hearing in which the terrorist offender had been denied relevant and important exculpatory material.

Committee comment

2.23 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the current requirement to provide all exculpatory material to the terrorist offender, without the ability to protect that material where it contains sensitive national security information, is problematic, as it may prejudice national security or ongoing law enforcement or intelligence operations.

2.24 The committee also notes the Attorney-General's advice that the proposed amendments will not affect the existing requirement that all information that the minister relies on for the making of a CDO must be provided to the terrorist offender to ensure their right to a fair hearing. The committee also notes that if the court orders that a summary or statement of facts will stand in place of the source document, the court will only be able to consider the summary or statement of facts for the purposes of the CDO proceeding.

2.25 However, from a scrutiny perspective, the committee remains concerned that the proposed amendments may limit an offender's right to a fair hearing as the offender may not have access to all of the relevant information on which the application for a continuing detention order is made. The committee's concerns in this regard are heightened given the serious consequences for the right to liberty that may flow from the making of a continuing detention order.

2.26 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.27 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of limiting the right of an offender to receive a complete copy of any application for a continuing detention order made against them.

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
Bill status	Before the Senate

Broad discretionary powers⁸

2.28 In [Scrutiny Digest 6 of 2019](#) the committee requested 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.

2.29 The committee also requested 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.⁹

Minister's response¹⁰

2.30 The minister advised:

The Emergency Response Fund Bill 2019 (Bill) ensures that any financial assistance provided under the Emergency Response Fund (ERF) will be subject to appropriately transparent decision-making processes.

Spending from the ERF will only be accessed as an additional source of funding for emergency response and recovery from natural disasters that have a significant or catastrophic impact on Australian communities and where the Government determines that existing programs are insufficient to meet the scale of the response required. The Bill does not provide for regular disbursements from the ERF which is consistent with the arrangements for other natural disaster recovery programs. This is due to the uncertainty of when funding will be required. Funding will only be

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

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2019*, pp. 6-7.

10 The minister responded to the committee's comments in a letter dated 1 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

accessed following a decision of the Government after a large scale natural disaster of national significance.

Funding from the ERF will complement existing sources of funding for emergency response and natural disaster recovery, such as the Disaster Recovery Funding Arrangements, the Australian Government Disaster Recovery Payment and the Disaster Recovery Allowance¹¹. The ERF will also complement strategic work being undertaken to reduce disaster risk, in line with the National Disaster Risk Reduction Framework.

In developing a proposal to access the ERF, the Emergency Management Minister will be informed by advice from the Director General of Emergency Management Australia. The Director General is highly qualified for this role, as the senior official responsible for coordinating Australia's responses to crises, including providing both physical and financial support to those impacted by natural disasters. The Director General will provide advice to the Emergency Management Minister on when the ERF should be accessed and the design of funding arrangements for recovery from natural disasters.

In preparing advice for the Emergency Management Minister, the Director General will rely on the Australian Government's well-established crisis management arrangements, which include whole-of-government recovery consultative committees that bring together relevant government agencies at the Commonwealth and State and Territory levels. The Director General will also consult with local governments and communities affected by the disaster or any other expert, to determine the needs of the community and identify any additional recovery assistance that would be beneficial.

All decisions of the Government to access the ERF will be published as a Budget or Mid-Year Economic and Fiscal Outlook (MYEFO) measure that outlines the purpose and amount of funding to be provided. Following a Government decision of this nature, the Emergency Management Minister may make grants or arrangements as permitted by the legislation.

The Bill provides that the Emergency Management Minister can only make arrangements or grants for specified purposes - the carrying out of a project, the provision of a service, the adoption of technology or for a matter incidental or ancillary to one of those purposes. Any grants or arrangements made must be directed towards achieving the goal of recovery from a natural disaster and/or post-disaster resilience. These requirements in the Bill ensure that the Minister can only provide funding for purposes that are directed towards achieving the intent of the legislation.

11 <https://www.disasterassist.gov.au/Pages/disaster-arrangements.aspx>

Where appropriate, ERF funding programs will have guidelines published on the Department of Home Affairs' website to ensure that applicants are treated equitably, and that funding recipients are selected based on merit addressing the program's objectives. Grant programs under the ERF will be developed in accordance with the Commonwealth Grant Rules and Guidelines 2017 (CGRG) and the requirements of the Public Governance, Performance and Accountability Act 2013 (PGPA Act). Grant guidelines will be developed for all new grant opportunities and approved grants will be reported on the GrantConnect website no later than 21 days after the grant agreement takes effect. ERF grant administration will be conducted in a manner consistent with the CGRG's principles of:

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

Procurements under the ERF will be undertaken in accordance with the Commonwealth Procurement Rules 2019 and the procurement policy framework. ERF procurements will be accountable and transparent, while meeting the core procurement principle of achieving value for money.

The terms and conditions of grants or arrangements will be set out in a written agreement between the Commonwealth and the relevant funding recipient. This approach is consistent with the CGRGs, which state that grant agreements should provide for:

- a clear understanding between the parties on required outcomes, prior to commencing payment of the grant;
- appropriate accountability for relevant money, which is informed by risk analysis;
- agreed terms and conditions in regards to the use of the grant, including any access requirements; and
- the performance information and other data that the grantee may be required to collect as well as the criteria that will be used to evaluate the grant, the grantee's compliance and performance.

The Bill also requires the Emergency Management Minister to publish detailed and up-to-date information about grants and arrangements made under the ERF on the Department of Home Affairs' website. This information, which may include amounts paid and payable to recipients as well as the names of recipients, is in addition to the reporting obligations under the CGRGs and Commonwealth Procurement Rules 2019. This

information will not need to be reported for recipients that are individuals, to protect personal privacy.

I do not consider an amendment is necessary or that it would add to the effective administration of the ERF. The design of the funding arrangements will be informed by the Commonwealth's expert on natural disaster management, who will consult with appropriate stakeholders to determine the needs of the community and identify any additional recovery assistance that would be beneficial. Due to the unpredictability of the timing and scale of natural disasters, the ERF has been designed to be accessed only when the Government determines that that existing recovery programs are insufficient to meet the scale of the response required. There are sufficient reporting obligations in the Bill that, when combined with the existing requirements in existing Commonwealth legislation and frameworks, ensure that detailed information on grants and arrangements is transparently available to the general public.

I consider the Bill includes sufficient high-level guidance on the terms and conditions for financial assistance to be granted. As outlined above, financial assistance will be granted through a well-informed decision-making process. The process includes expert advice from the Director General of Emergency Management Australia, consideration through the Government's Budget process and a consistent approach for making arrangements or grants for emergency response and recovery from natural disasters.

Where appropriate, terms and conditions will be included in grant guidelines and funding agreements with recipients, rather than placing it within the primary legislation...

Scope also exists to provide grants to state and territory governments to support recovery from natural disasters and post-disaster resilience. In these scenarios, grants would be channelled through the COAG Reform Fund. Financial assistance will be paid in accordance with the terms and conditions set out in Schedule D of the Intergovernmental Agreement on Federal Financial Relations and through a written agreement between the Commonwealth and the State or Territory, which will be made publicly available on the Federal Financial Relations website.

The details of financial assistance provided from the ERF will be published on the Department of Home Affairs' website and provided in the department's annual report, providing transparency of the outcomes.

Committee comment

2.31 The committee thanks the minister for this response, and notes the minister's advice that the bill ensures that any financial assistance provided under the Emergency Response Fund (ERF) will be subject to appropriately transparent decision-making processes, and that all funding must be directed toward purposes that achieve the intent of the legislation (that is, disaster recovery and/or post-disaster resilience).

2.32 In this respect, the committee notes the minister's advice that, in developing proposals to access the ERF, the Emergency Management Minister will be informed by expert advice from the Director-General of Emergency Australia and that, in preparing this advice, the Director will rely on the Australian Government's well-established crisis management arrangements. The committee also notes the advice that the Director will consult with local governments and communities affected by the disaster, to determine needs and to identify any additional recovery assistance that would be beneficial.

2.33 The committee also notes the minister's advice that all decisions to access the ERF will be published as a Budget or Mid-Year Economic and Fiscal Outlook measure, which outlines the purpose and amount of the funding to be provided.

2.34 The committee also notes the minister's advice that the bill provides that the Emergency Management Minister may only make arrangements or grants for specified purposes: carrying out a project, providing a service, adopting a technology, or a matter incidental or ancillary to one of those purposes. This suggests that there is at least high-level guidance on the face of the bill as to the purposes for which funding may be provided.

2.35 The committee further notes the minister's advice that ERF funding programs will have published guidelines to ensure that grant applicants are treated equitably, and funding recipients will be selected on merit according to a program's objectives. The committee also notes the advice that guidelines will be developed in accordance with the Commonwealth's Grant Rules and Guidelines 2017 and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and that all procurements under the ERF will be undertaken in accordance with the Commonwealth Procurement Rules 2019 and the procurement policy framework.

2.36 Finally, the committee notes the minister's advice that the terms and conditions applicable to grants and funding arrangements would be set out in a written agreement between the Commonwealth and the relevant funding recipient.

2.37 The committee acknowledges that funding provided in accordance with the bill would be subject to a number of controls designed to prevent arbitrary decision-making and promote transparency. However, from a scrutiny perspective, the committee remains concerned that the bill would permit the expenditure of a substantial amount of Commonwealth money, with limited guidance on the face of the bill as to the terms and conditions on which funds may be granted. In relation to the grants of funds to a state or territory, the committee also reiterates that the Constitution confers on the *Parliament* the power to make such grants and to determine associated terms and conditions. Where the Parliament delegates this power, the committee considers that its exercise should be subject to at least some level of parliamentary scrutiny.

2.38 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and if necessary, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.39 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of conferring on the Emergency Response Minister a broad power to make grants of financial assistance, including to the States and Territories, with only limited guidance on the face of the bill as to how the power is to be exercised.

Merits review¹²

2.40 In [Scrutiny Digest 6 of 2019](#) the committee requested 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.¹³

Minister's response

2.41 The minister advised:

As outlined above, financial assistance will be granted through well-informed decision-making processes. The process includes:

- the requirement that the Emergency Management Minister can only make grants or arrangements that are directed towards recovery from a natural disaster and/or post-disaster resilience;
- the provision of advice on the design of ERF funding programs from the Commonwealth's expert on natural disaster management in consultation with appropriate stakeholders;
- the publication of program guidelines that outline the administration of the ERF and set out high-level principles to assist the Emergency Management Minister in considering when to bring forward proposals to access the Fund;

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

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2019*, pp. 7-8.

- the publication of all decisions of the Government to access the ERF, as a Budget or MYEFO measure that outlines the purpose and amount of funding to be provided; and
- a requirement that grants or arrangements made by the Emergency Management Minister be consistent with the program of grants or arrangements agreed by the Government.

This provides a transparent and merit-based decision-making process for providing financial assistance from the ERF, to assist with emergency response and recovery from natural disasters.

Priorities may be delivered by activities supported by, but not exclusive to, a competitive merit-based grants program, discretionary grants or a procurement process, consistent with the rules relating to the Commonwealth in the PGPA Act.

Guidelines will be developed for ERF granting activities and will include detailed criteria and merit review processes where appropriate...

The general exclusion of an independent merits review process in the legislation can be justified on the basis of decisions relating to the allocation of a finite resource where not all claims can be met. Allocating resources to a merits process would be disproportionate to the significance of the decisions under review – for example, small grants programs. However, where appropriate, merits review processes will be included in grant guidelines. If funding is provided to a State or Territory to distribute, any independent merits review would be subject to the conditions and processes they impose on recipients.

I do not consider that an amendment is necessary or would contribute to the effective administration of the ERF.

Committee comment

2.42 The committee thanks the minister for this response, and notes the minister's advice regarding the process through which financial assistance from the ERF will be granted. The committee also notes the minister's advice that guidelines will be developed for ERF granting activities, and the advice that the guidelines will include merits review processes where appropriate.

2.43 In relation to the general exclusion of independent merits review in relation to ERF grant decisions, the committee notes the minister's advice that the exclusion can be justified on the basis that the decisions involve the allocation of finite resources in circumstances when not all claims can be met. The committee also notes the advice that allocating resources to a review process in these circumstances would be disproportionate to the significance of the decisions under review. The

committee notes that these matters appear to reflect established grounds for excluding merits review.¹⁴

2.44 The committee requests that the information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and, if necessary, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Significant matters in non-disallowable legislative instruments¹⁵

2.46 In [Scrutiny Digest 6 of 2019](#) the committee requested 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.

2.47 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.¹⁶

Minister's response

2.48 The minister advised:

The Bill provides for certain functions to be carried out through delegated legislation, including:

- declarations made by the Prime Minister nominating the Emergency Management Minister for the purposes of the Act (clause 4 of the Bill);

14 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.11]-[4.19]; [4.56]-[4.57].

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

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2019*, pp. 8-10.

- crediting determinations by the responsible Ministers regarding amounts to be credited into the Emergency Response Fund Special Account (clause 13 of the Bill);
- transfers by the Emergency Management Minister of excess amounts in the Home Affairs Emergency Response Fund Special Account back to the Emergency Response Fund Special Account (clause 31 of the Bill); and
- any rules made by the Finance Minister as permitted under the Bill (clause 64 of the Bill).

These functions are administrative in nature and do not represent significant elements of the legislative framework for the ERF. Consistent with the arrangements for other Commonwealth Investment Funds, providing for these functions to be carried out through delegated legislation allows for a simpler, more practical and more efficient administration of the ERF.

Investment Mandate

The investment mandate is a direction by the Treasurer and the Minister for Finance, as the responsible Ministers under the Bill, to the Future Fund Board of Guardians (Future Fund Board).

The ERF is intended to be a long-term investment that will provide an additional source of sustainable funding for recovery and post-disaster resilience following a natural disaster that has a significant or catastrophic impact in Australia. Similar to the other long-term Commonwealth Investment Funds (including the Future Fund, the Medical Research Future Fund and the Future Drought Fund), it is expected that the investment mandate will set a long-term target rate of return. In these cases it is envisaged that investment mandates would only be reissued if there was a significant change in Government policy or a structural change in the investment landscape.

In setting the investment mandates for the different investment funds, responsible Ministers need to ensure that:

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

Exemption from disallowance

As a direction from the Treasurer and the Minister for Finance to a body (the Future Fund Board), investment mandates are exempt from

disallowance under item 2 of the table at section 9 of the 5 Legislation (Exemption and other Matters) Regulation 2015, which provides that a class of instruments not subject to disallowance is 'an instrument that is a direction by a Minister to any person or body'.

This is consistent with the long-standing and established operational arrangements for other funds currently managed by the Future Fund Board, and is appropriate in the case of the investment mandate. The investment mandate provides direction to the Future Fund Board in relation to the performance of its investment functions, and will include the setting of a benchmark rate of return and an acceptable level of risk that is aligned with the purpose of the ERF.

This process for setting investment mandates provides the Board with an appropriate level of operational certainty in managing their investments on behalf of the Government over the long term. It also allows the Government to issue updated directions to the Future Fund Board through new investment mandates when appropriate.

Although investment mandates are exempt from disallowance, the Bill provides for appropriate parliamentary and public scrutiny. The Bill requires that, prior to issuing the investment mandate, the responsible Ministers must consult the Future Fund Board (section 42(1) refers). If the Future Fund Board chooses to make a submission regarding the draft investment mandate, this submission must be tabled in both houses of Parliament (s 42(2) refers). This requirement ensures that Parliament is informed of any matters raised by the Future Fund Board with respect to proposed investment mandates.

Additionally, the Future Fund Management Agency provides annual and quarterly performance reports, including comparisons against the benchmark rates specified in the Fund investment mandates.

Exemption from sunseting

It is not appropriate that the ERF investment mandate be subject to sunseting due to the long-term nature of the fund's investments (refer to above comments). The investment mandates for Commonwealth Investment Funds are rarely reissued. For example, previous investment mandates for the Building Australia Fund and the Future Fund were in place for around 10 years. The investment mandate for the Education Investment Fund has been in place since 2009 and the investment mandates for the Disability Care Australia Fund and the Medical Research Future Fund have been in place since inception (2013 and 2015 respectively).

On this basis, and consistent with all of the Commonwealth Investment Fund investment mandates, I do not believe that it would be appropriate to make the ERF investment mandate subject to disallowance or sunseting.

Committee comment

2.49 The committee thanks the minister for this response, and notes the minister's view that it would not be appropriate to make the Investment Mandate subject to disallowance or sunseting. In this respect, the committee notes the minister's advice that this approach is consistent with longstanding and established operational arrangements for other funds currently managed by the Future Fund Board (FFB). The committee also notes the advice that the process for setting the Investment Mandate provides the FFB with an appropriate level of operational certainty in managing its investments, and allows the government to issue updated directions to the FFB as appropriate.

2.50 The committee further notes the minister's advice that the bill provides for appropriate parliamentary and public scrutiny of the Investment Mandate. In this respect, the committee notes the advice that the bill would require the responsible ministers to consult the FFB before issuing the Investment Mandate, and that any submission by the FFB on the draft Mandate must be tabled in both Houses of Parliament. The committee also notes the advice that the Future Fund Management Agency provides annual and quarterly performance reports, including comparisons against benchmark rates specified in the Mandate.

2.51 Finally, the committee notes the minister's advice that it is not appropriate for the Investment Mandate to be subject to sunseting, due to the long-term nature of the fund's investments. The committee also notes the advice that this approach is consistent with mandates for other Commonwealth investment funds.

2.52 The committee acknowledges the importance of ensuring certainty in long-term investment activities. However, as outlined in its initial comments, the committee does not generally consider operational certainty, or consistency with arrangements for other Commonwealth investment funds, as sufficient justification for leaving significant elements of schemes, such as the emergency response fund scheme, to non-disallowable legislative instruments. Indeed, the committee has stated on a number of occasions that such matters should be included in primary legislation, or at least in delegated legislation that is subject to disallowance.¹⁷

2.53 From a scrutiny perspective, the committee also considers that the proposed level of parliamentary oversight may not be sufficient. In this respect, the committee reiterates that disallowance and sunseting are the primary means by which the Parliament exercises control over delegated legislation. As set out in its initial

17 The committee has also made such statements in relation to the mandates for other Commonwealth investment funds. See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, pp. 37-38; *Scrutiny Digest 8 of 2017*, pp. 142-147, in relation to the Regional Investment Corporation Bill 2017. See also *Scrutiny Digest 15 of 2018*, pp. 14-16; *Scrutiny Digest 1 of 2019*, pp. 42-45, in relation to the Future Drought Fund Bill 2018.

comments, the committee does not consider consultation with the Board, on its own, to be an adequate substitute for parliamentary disallowance, particularly noting that the Board is the entity to which the Investment Mandate would be issued.

2.54 Finally, it remains unclear to the committee how providing that the Investment Mandate would be subject to disallowance would undermine operational certainty. In this respect, the committee reiterates that there may be methods available to deliver transparency and certainty in relation to investment decisions, and maintain the independence of the FRB, while still delivering an appropriate level of parliamentary oversight. For example, the committee considers that certainty may be delivered by providing that the relevant instruments do not come into force until after the applicable disallowance period has expired. Moreover, and as outlined in the committee's initial comments, it may be possible to provide that the instruments are generally disallowable, with an exception provided for emergency circumstances.

2.55 The committee considers that it may be appropriate for the bill to be amended to provide that directions forming part of the Investment Mandate for the Emergency Response Fund (ERF) be subject to disallowance and sunseting.

2.56 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness leaving significant elements of the ERF scheme to legislative instruments that are not subject to disallowance or to sunseting.

2.57 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Broad delegation of administrative powers¹⁸

2.58 In [Scrutiny Digest 6 of 2019](#) the committee requested the minister's 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.

2.59 The committee also requested 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.¹⁹

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

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2019*, pp. 10-11.

Minister's response

2.60 The minister advised:

The Bill needs to be read in conjunction with the primary legislation governing the operation of all Commonwealth entities: the PGPA Act.

The PGPA Act imposes general duties on all accountable authorities of Commonwealth entities (at sections 15 to 19) including, inter alia, a duty to govern their entity in a way that promotes the proper use (efficient, effective, economical and ethical use) of public resources. Integral to that is the duty to establish and maintain systems relating to risk and control (section 16), including measures directed at ensuring that the officials of the entity comply with the finance law.

To give effect to their duties, accountable authorities are generally expected to implement:

- delegation and decision-making processes for the proper use of public resources, including robust decision-making and control processes for the expenditure of relevant money. For example,
 - decision-making processes could be supported by requirements on the type of information that officials need to consider before making a spending decision; and
 - delegation processes could be limited to particular persons or positions with particular skills and roles (financial transaction limits could be part of those system of delegation).
- appropriate oversight and reporting arrangements for activities and projects, and to address the inappropriate use of resources by officials, or the failure by officials to comply with applicable laws or Commonwealth policies.

These processes are designed to provide an appropriate level of assurance in accordance with the accountable authorities' duty to establish and maintain systems in relation to risk and control in section 16 of the PGPA Act.

The PGPA Act provides an express power of delegation to accountable authorities for reasons of practical necessity, administrative efficiency and operational efficacy. The PGPA Act requirement that the delegation is in writing ensures clarity and accountability for decision-making. Management of delegated power by delegators is crucial to the legitimacy and appropriateness of the exercise of delegated power. The accountable authority of an entity may also, by written instrument, give instructions to officials of other entities where these officials are approving the commitment of relevant money or dealing with public resources for which the accountable authority is responsible (section 22 of the PGPA Act).

When delegating PGPA Act powers accountable authorities must bear in mind their duties under the PGPA Act at sections 15 to 19, including their

duty to govern their entity in a way that promotes the proper use of public resources. To give effect to this, an accountable authority may accompany their delegations of power with directions to delegates. Directions enable the accountable authority to instruct the delegate to exercise the delegated power within specified parameters. This not only allows the accountable authority to control how the delegated power is exercised consistent with the statutory requirement to promote the proper use of resources, but also allows the accountable authority to set limits on the power the delegate may exercise.

Delegates, who are officials under the PGPA Act, should understand the nature and scope of the power they have been delegated. This is reinforced through the application of the duties of officials at sections 25 to 29 of the PGPA Act, which, inter alia, requires them to exercise powers with care and diligence, honestly, in good faith and for a proper purpose.

Emergency Management Australia within the Department of Home Affairs may utilise a Commonwealth Grants Hub, through a contract arrangement, to make payments to grant recipients. Grants Hub staff will also be officials under the PGPA Act and subject to the responsibilities outlined above.

The provisions of the PGPA Act endure and there is no need or intention to introduce duplicative statutory requirements. The governance outcomes sought by the Committee are already factors implemented under the PGPA Act – see response above.

Committee comment

2.61 The committee thanks the minister for this response. The committee notes the minister's advice that Emergency Management Australia within the Department of Home Affairs may use the Community Grants Hub to make payments to grant recipients. This indicates that the Emergency Management Minister may delegate powers and functions to staff administering the Grants Hub. In this regard, the committee notes the minister's advice that Grants Hub staff would be 'officials' under the PGPA Act, and subject to the duties set out therein. The committee also notes the advice that the PGPA Act requires delegates to exercise their powers with care, diligence, honesty, in good faith and for a proper purpose.

2.62 The committee further notes the minister's advice that accountable authorities under the PGPA Act are expected to implement appropriate decision-making, delegation and oversight processes, including ensuring that delegates possess expertise appropriate to the delegated functions and powers.

2.63 However, while the committee acknowledges that delegates, as 'officials' under the PGPA Act, would be subject to a number of relevant duties, it remains concerned that the bill does not appear to limit the delegation of the Emergency Management Minister's powers to staff at a particular level, or require the minister to be satisfied that delegates possess expertise appropriate to the relevant delegation.

2.64 It is also unclear to the committee that such requirements would be duplicative of the PGPA Act, or inconsistent with the other powers of delegation set out in the bill. In this respect, the committee notes that the Emergency Management Minister does not appear to be captured by the definition of 'accountable authority' in the PGPA Act²⁰ (and may therefore not be subject to the corresponding duties under the PGPA Act). Further, the bill would restrict any delegations made by the Treasurer and the Finance Minister to heads of departments and members of the Senior Executive Service.

2.65 The committee considers that it may be appropriate for the bill to be amended to, at a minimum, require that persons exercising delegated powers possess the expertise appropriate to the relevant delegation.

2.66 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the Emergency Management Minister to delegate functions and powers to *any* official of a Commonwealth entity.

20 Section 12 of the PGPA Act provides that 'accountable authority' refers to the secretary of a government department, a person prescribed as an accountable authority by Commonwealth legislation, or the governing body of a Commonwealth corporate entity.

Inspector-General of Live Animal Exports Bill 2019

Purpose	This bill seeks to establish the role of an independent Inspector-General of Live Animal Exports to oversee the regulator of livestock exports: the Department of Agriculture
Portfolio	Agriculture
Introduced	Senate on 31 July 2019
Bill status	Received Royal Assent on 2 October 2019

Significant matters in delegated legislation²¹

2.67 In [Scrutiny Digest 5 of 2019](#) the committee requested the minister's advice as to why it is considered necessary and appropriate to leave significant elements of the review process and the content of reports to delegated legislation.²²

Minister's response²³

2.68 The minister advised:

Section 10(4) provides that the rules may make provision for the conduct of reviews and the content of reports. The rule making power is set out in clause 41 of the Bill. This enables the Minister to prescribe any additional requirements relating to the conduct of reviews and the content of reports.

It is intended that the rules will include requirements regarding the Inspector-General's review program; when reviews are to be conducted; the process for inviting submissions and their publication; requesting of assistance from the department; the handling of documents; the consideration of all evidence provided; the reporting on reviews; the exclusion of certain material from reports and the inclusion of criticism in reports.

Matters relating to these issues have been dealt with under delegated legislation for many years in similar circumstances. The rules will mirror the delegated legislation for the Inspector-General of Biosecurity under the Biosecurity Regulation 2016.

21 Clause 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2019*, pp. 8-9.

23 The minister responded to the committee's comments in a letter dated 26 September 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

In this case delegated legislation is necessary and justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently and its adaptability for other matters such as those of technical detail. Delegated legislation is the appropriate method through which to work out the application of the law in greater detail.

Committee comment

2.69 The committee thanks the minister for this response, and notes the minister's advice regarding the matters that may be included in rules. The committee also notes the minister's advice that similar matters have been included in delegated legislation for a number of years, and the advice that the use of delegated legislation is justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for matters of technical detail.

2.70 While noting this advice, the committee emphasises that it does not generally consider flexibility, or consistency with other regulatory regimes, to be sufficient justification for including significant matters in delegated legislation. Rather, the committee considers that delegated legislation should generally include only technical, procedural or administrative matters.

2.71 It is unclear to the committee that the matters proposed to be included in rules would be only technical or administrative in nature. For example, when reviews are to be conducted, how reviews are to be reported, and the inclusion of criticism in review reports all appear to be substantive matters that may be more appropriate for parliamentary enactment. The committee is also concerned that there appears to be only limited guidance on the face of the bill as to the matters that may be included in rules. In this respect, even if it were accepted that the matters currently proposed for inclusion in the rules are administrative or technical in nature, there would be nothing to prevent the minister from including more significant matters in delegated legislation if they see fit to do so.

2.72 Finally, the committee also reiterates its concerns that by allowing the rules to make provision for the content of review reports, the bill would permit the minister to limit or control the information that is made public. This may significantly reduce the transparency of the review process.

2.73 In light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment on this matter.

Reversal of the evidential burden of proof²⁴

2.74 As the explanatory materials do not address this issue, the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.²⁵

Minister's response

2.75 The minister advised:

The Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) notes that placing the burden of proof on the defendant should be limited to where the matter is peculiarly within the knowledge of the defendant and where it is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The Guide also notes that a reverse burden provision is more readily justified if:

- the matter in question is not central to the question of culpability for the offence;
- the penalties are at the lower end of the scale; and
- the conduct proscribed by the offence poses a grave danger to public health or safety.

An additional factor to consider is whether the offences only impose an evidential burden (as the prosecution must still disprove the matters beyond reasonable doubt if the defendant discharges the evidential burden).

With regard to the offences raised by the Committee, it is necessary that the defendant bears the evidential burden in these sections in order to achieve the legitimate objectives of ensuring the objects of the Act are met. These clauses are reasonable and proportionate to the legitimate objectives because the defendant will have the information or knowledge that is evidence of the exception (i.e. that they were authorised by law to undertake the conduct).

These sections provide an exception to the relevant offence where a defendant has:

- acted in good faith or in purported compliance with the Act or rules (s31(2));

24 Clauses 31, 34 and 35. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2019*, pp. 9-11.

- the information is not false or misleading in a material particular (s34(2) and (s35(2));
- the information did not omit a matter or thing without which the information is misleading in a material particular (s34(3)); or
- the official receiving the information did not take reasonable steps to inform the person that they may be liable to a civil penalty (s34(4)).

The defendant bears the evidential burden with respect to these exceptions. Whether someone has acted in good faith, whether a document is misleading or whether or not a person has been informed that they may be liable to a civil penalty provision for contravening this clause is something peculiarly within the knowledge of that person.

It would be difficult for the prosecution to provide evidence that the person is not covered by an exemption when evidence relevant to whether an exemption applies can only be known by that person. It would also be significantly more difficult and costly for the prosecution to provide evidence that a document is false or misleading than for a defendant to provide evidence of the matter themselves.

Committee comment

2.76 The committee thanks the minister for this response, and notes the minister's advice that the offence-specific defences and exceptions to civil penalty provisions are peculiarly within the knowledge of the defendant. The committee also notes the minister's advice that it would be difficult for the prosecution to provide evidence that a person is not covered by a defence or exception, as relevant evidence may only be known to the defendant.

2.77 With regard to the offence-specific defence in subclause 31(2), the committee acknowledges that whether a person is acting in good faith and in purported compliance with the law may be peculiarly within that person's knowledge. However, as noted in the minister's response, an offence-specific defence may be more readily justified where associated penalties are 'at the lower end of the scale'.²⁶ In this case, the offence is punishable by two years' imprisonment, 120 penalty units, or both.

2.78 With regard to subclauses 34(2), 34(3) and 35(2), the committee notes that whether information is false or misleading in a material particular may, in some circumstances, be peculiarly within the defendant's knowledge. However, whether information is false or misleading may also be a factual matter which could be established through reasonable inquiries. Additionally, as noted in the minister's response, defences and exceptions may be more readily justified where relevant matters are not central to the question of culpability. In this instance, it appears that

26 See also Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

the matters in the exceptions would be central to the question of culpability, noting they essentially replicate elements of the associated civil penalty provisions.²⁷

2.79 Finally, with regard to the exception in subclause 34(4), it appears that whether an official took reasonable steps to inform the defendant of the potential for civil liability would be known to that official. While the committee acknowledges that it may be difficult for persons other than the defendant and the official to establish whether the official took such steps, it is not clear that this matter would be *peculiarly* within the knowledge of the defendant.

2.80 In light of these matters, it remains unclear to the committee that it is appropriate to reverse the evidential burden of proof in relation to the offence-specific defences and exceptions in subclauses 31(2), 34(2) to (4) and 35(2). In this regard, it would have been useful had the explanatory memorandum and/or the minister's response provided further information in relation to this matter.

2.81 In light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment on this matter.

No requirement to table or publish reports²⁸

2.82 In [Scrutiny Digest 5 of 2019](#) the committee requested the minister's advice as to why there is no requirement for either review reports or annual reports to be tabled in Parliament and why there is no requirement for an annual report to be made publicly available, noting the potential detrimental impact on parliamentary scrutiny.²⁹

Minister's response

2.83 The minister advised:

Section 10(3) states that the Inspector-General must publish a report on each review conducted. The rules to be made under the *Inspector-General of Live Animal Exports Act 2019* will require that, as soon as practicable, each finalised review report will be available online on the Inspector-General's website. This level of transparency is appropriate and consistent with the activities of the Inspector-General of Biosecurity.

27 For example, subclause 34(2) provides that subclause 34(1) does not apply as a result of proposed subparagraph 34(1)(b)(i) if the relevant information is not false or misleading in a material particular. Proposed sub-clause 34(1)(b)(i) provides that a person is liable to a civil penalty if they provide information to the Inspector-General, knowing that the information is false or misleading.

28 Clauses 10 and 40. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2019*, p. 11.

Section 40(1) states that the Inspector-General must, as soon as practicable after the end of each financial year, prepare and give the Minister a report on the activities of the Inspector-General during that financial year (i.e. number of reviews under section 10 started and completed, and other information considered appropriate). It is anticipated that the Minister will report to Parliament and each annual report will be available on line on the Inspector-General's website. This level of transparency is appropriate and consistent with the activities of the Inspector-General of Biosecurity.

Committee comment

2.84 The committee thanks the minister for this response, and notes the minister's advice that rules made under the *Inspector-General of Live Animal Exports Act 2019* will require review reports to be made available online. The committee also notes the minister's advice that the Inspector-General would be required to provide an annual report to the minister, and the advice that it is anticipated that the minister will report to Parliament and that annual reports will be available online.

2.85 While noting this advice, the committee remains concerned that there is no express requirement that review reports be tabled in Parliament. The committee takes this opportunity to reiterate that, in general, review reports of Commonwealth entities should be tabled in Parliament and be made publicly available. Tabled documents in Parliament ensures parliamentarians are alerted to their existence, and provides opportunities for debate that may not otherwise be available.

2.86 In light of the fact the bill has now passed both Houses of Parliament, the committee makes no further comment on this matter.

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
Bill status	Passed both Houses on 15 October 2019

Significant matters in non-disallowable delegated legislation³⁰

2.87 In [Scrutiny Digest 6 of 2019](#) the committee requested the Minister'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.³¹

Minister's response³²

2.88 The minister advised:

Issue 1: Delegation

The Bill amends the *National Housing Finance and Investment Corporation Act 2018* (the Act) to establish the framework for the Scheme to assist eligible first home buyers to access the housing market sooner. It does this

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

31 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2019*, pp. 14-16.

32 The minister responded to the committee's comments in a letter dated 1 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

by expanding the functions of the National Housing Finance and Investment Corporation (NHFIC) to enable it to provide guarantees to improve access to home ownership.

The Act, as amended, will specify the matters that will be covered by the Investment Mandate, including decision-making criteria, limits on the making of guarantees by the NHFIC, and strategies and policies the NHFIC is to follow. The Government is preparing amendments to the Investment Mandate to outline key Scheme criteria - for example, eligible lenders, first homebuyers, loan types and price caps - limits on the making of guarantees by the NHFIC, and Scheme principles the NHFIC is to follow in administering the Scheme.

It is appropriate to prescribe the Government's expectations for the proposed Scheme in the Investment Mandate to ensure the Scheme is, and remains, responsive to market conditions, to facilitate additional consultation and to promote consistency with the existing legislative framework.

Responsiveness

Providing the Government's expectations for the Scheme in the Investment Mandate rather than in primary legislation allows the legislative framework to be flexible and responsive to the changing needs of lenders and first home buyers. It allows refinements to be made, within the scope permitted by the Bill, to reflect new information and changes in market conditions including changes to house prices, housing supply, wages and finance costs.

The Government's objectives for the Scheme would be hindered if central elements of the Scheme were to be included in primary legislation. For example, one of the central elements of the Scheme is that the value of purchased property be less than the price cap that applies in the area where the property is located. Price caps will be set in the Investment Mandate and will likely require periodic and timely amendment to ensure they continue to reflect prevailing market conditions and the Government's overall objectives for the Scheme.

Additional Consultation

Detailing the Government's expectations for the Scheme in the Investment Mandate will facilitate additional consultation on the proposed operation of the Scheme with scheme participants. On 12 May 2019, the Government announced that it would establish the Scheme to commence on 1 January 2020. To ensure the Scheme had legislative authority and the requisite funding arrangement in place by 1 January 2020, the Government prioritised the preparation and introduction of the Bill, which would give the NHFIC the appropriate powers and funding to operate the Scheme. Limited opportunities would have been available to consult on the details of the Scheme were they included in the primary legislation.

Under this approach, the Government also has the flexibility to finalise the Investment Mandate amendments at a later date which allows for further stakeholder consultation. To date, Treasury and NHFIC have conducted broad stakeholder consultation to inform the policy design and its implementation. The First Home Loan Deposit Scheme Reference Group was established to provide advice to the Government on the design and implementation of the Scheme. The Reference Group convened in July and August 2019 to discuss key design elements of the Scheme, and implementation and operational matters.

Consultation has informed design considerations including the setting of eligibility criteria, safeguarding the integrity of the Scheme, as well as operational details such as the first home buyer application process, and the relationship between the NHFIC and lenders participating under the Scheme. A public consultation process is planned for the proposed amendments to the Investment Mandate.

The Legislative Framework

Detailing the Government's expectations for the Scheme in the Investment Mandate is consistent with the legislative framework already approved by the Parliament and in place under the Act. The Act authorises broad functions that support three current programs outlined in the Investment Mandate: the Affordable Housing Bond Aggregator, the National Housing Infrastructure Facility and the NHFIC's capacity building function. I note this approach is consistent with other legislative frameworks, including the *Northern Australia Infrastructure Facility Act 2016*, the *Clean Energy Finance Corporation Act 2012*, *Regional Investment Corporation Act 2018*, and the *Future Fund Act 2006*.

Issue 2: Disallowance

The Investment Mandate should provide certainty to both the NHFIC Board and the market about the way in which the NHFIC is to exercise its functions and powers. For example, it is expected that commercial lenders will make long-term commitments to participate in the Scheme. Consequently, lenders will expect a level of certainty about the operation of the Scheme and the manner in which changes to the Scheme are made. Certainty would be compromised, due to potential delays, and unpredictable market conditions and regulatory environment, if the Investment Mandate were disallowable. Further, possible disallowance would place the NHFIC in a very difficult situation leading to significant uncertainty and impracticality for participants in the Scheme. The treatment of legislative instruments under the Act is consistent with the current treatment of all ministerial directions to corporate Commonwealth entities.

Like other legislative instruments, the Investment Mandate is required to be tabled in Parliament and registered on the Federal Register of Legislative Instruments. This enables the public and Parliament to hold the Government accountable for the directions it issues to the NHFIC.

Committee comment

2.89 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate to prescribe the Government's expectations for the proposed First Home Loan Deposit Scheme (the Scheme) in the National Housing Finance and Investment Corporation (NHFIC) Investment Mandate (which is not subject to disallowance by the Parliament) to ensure that the Scheme is, and remains, responsive to market conditions, to facilitate additional consultation and to promote consistency with the existing legislative framework. The committee also notes the minister's advice that if the Investment Mandate were subject to the usual parliamentary disallowance process certainty would be compromised.

2.90 In relation to the need for responsiveness, the committee's consistent scrutiny position is that the need for flexibility does not, of itself, justify leaving significant concepts relating to a proposed program or scheme to non-disallowable delegated legislation. In this instance, for example, it is not clear why key elements of the Scheme such as the proposed 10,000 annual cap on the number of guarantees issued, the proposed income thresholds for accessing the Scheme or a maximum price cap on property values under the Scheme, could not be included in primary legislation or at least in delegated legislation that is subject to disallowance. Setting out these key elements of the Scheme in disallowable delegated legislation would enable periodic and timely amendments to be made to the operation of the Scheme while still retaining a level of parliamentary oversight.

2.91 Further, the committee does not consider the fact that the executive has set a proposed start date for the Scheme to be a sufficient justification for leaving significant elements of the Scheme to non-disallowable delegated legislation. As the Scheme represents a significant piece of government policy, it is appropriate that the Parliament, rather than only the executive, approve the underpinning legislation. From a scrutiny perspective, the committee considers that the Parliament should not be asked to approve the framework for the Scheme where there is ongoing consultation to finalise how the Scheme will operate in practice, or where operation of the Scheme may be subject to change by executive action without effective parliamentary oversight.

2.92 In relation to the need for consistency with the existing legislative framework, the committee notes the minister's advice that three current programs—the Affordable Housing Bond Aggregator, the National Housing Infrastructure Facility and the NHFIC's capacity building function—are already established under the NHFIC Investment Mandate. The committee considers that the fact that these programs have been established through the non-disallowable Investment Mandate without effective parliamentary oversight provides further justification for providing that the ministerial directions constituting the NHFIC Investment Mandate be subject to the usual parliamentary disallowance process.

2.93 It is also not clear to the committee how providing that the Investment Mandate be subject to the usual parliamentary disallowance process would

necessarily reduce certainty for the NHFIC Board or the market. In fact, it may be considered that allowing the Investment Mandate to be altered by the executive without any effective parliamentary oversight may decrease certainty because the executive may more readily make changes to the Investment Mandate knowing that it will not be subject to effective parliamentary oversight.

2.94 The committee notes the minister's advice that 'possible disallowance would place the NHFIC in a very difficult situation leading to significant uncertainty and impracticality for participants in the Scheme'. However, noting that the usual parliamentary disallowance period is limited to a period of 15 sitting days, and this statement is not further explained, it remains unclear to the committee how providing for disallowance would lead to significant ongoing uncertainty or impracticality. In addition, the disallowance process does not allow the Parliament to amend delegated legislation. It only allows the Parliament to reject proposals brought forward by the executive.

2.95 Finally, the committee notes the minister's advice that the treatment of the Investment Mandate is consistent with the current treatment of all ministerial directions to corporate Commonwealth entities. However, the committee notes that the Operating Mandate of the Regional Investment Corporation is subject to the usual parliamentary disallowance process.³³ This suggests that it is possible to set out ministerial directions to investment corporations such as the NHFIC in disallowable delegated legislation without necessarily compromising responsiveness or certainty.

2.96 The committee notes that the bill has already passed both Houses of the Parliament. However, the committee takes this opportunity to note that it considers that, from a scrutiny perspective, it may have been appropriate if the bill had been amended to provide that, similar to directions forming part of the Regional Investment Corporation Operating Mandate, directions forming part of the NHFIC Investment Mandate are subject to the usual parliamentary disallowance process.

2.97 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

33 *Regional Investment Corporation Act 2018*, s 11(4).

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
Bill status	Before the House of Representatives

Broad discretionary power³⁴

2.98 In [Scrutiny Digest 6 of 2019](#) the committee requested 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.³⁵

Minister's response³⁶

2.99 The minister advised:

34 Schedule 1, item 39, proposed subsections 124PJ(2A) and (2B). The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(ii) and (iv).

35 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2019*, pp. 19-21.

36 The minister responded to the committee's comments in a letter dated 3 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

Proportion of payments placed on to the Cashless Debit Card

The ability to vary rates for participants under new subsections 124PJ(2A), 124PJ(2B) and 124PJ(2C) ensures the effective operation of the Cashless Debit Card and allows for response to the particular needs of individual communities and support for individual participants in the Northern Territory.

The Bill proposes that participants in the Northern Territory have between 50 per cent and 70 per cent of their welfare payment placed on to the Cashless Debit Card. This is less than the proportion in the existing Cashless Debit Card trial areas, which have 80 per cent of their welfare payment placed onto the Cashless Debit Card and was designed in response to feedback from communities and other stakeholders.

New subsections 124PJ(2A) and 124PJ(2B) each allow the Minister to make a determination, by notifiable instrument, that varies the restricted portion of welfare payments accessible through the Cashless Debit Card by trial participants who reside in the Northern Territory. The subsections operate with respect to different classes of trial participants. The restricted portions are established in subsections 124PGE(1), 124PGE(2) and 124PGE(3) and reflect the existing portions that are applied under the Income Management regime.

Subsection 124PJ(2A) relates to trial participants under subsection 124PGE(1) who are currently covered by the Income Management Long-Term Welfare Recipient and Disengaged youth measures and whose restricted portion is set at 50 per cent under subsection 124PJ(1B). As outlined in the Explanatory Memorandum, new subsection 124PJ(2A) will be used to reflect community requests relating to discretionary expenditure.

Subsection 124PJ(2B) relates to people who are trial participants under subsection 124PGE(2) (who are covered by the current Child Protection measure) and subsection 124PGE(3) (who are covered by the current Supporting People at Risk measure). The restricted portions for these participants are set, respectively, by subsection 124PJ(1C) at 70 per cent and subsection 124PJ(1D) at 50 per cent. The power in subsection 124PJ(2B) will allow employees or officers of relevant authorities, including Northern Territory child protection officers and the Northern Territory Banned Drinkers Registrar, to request an increase or decrease in the proportion of payments accessible through the Cashless Debit Card.

With respect to the Northern Territory, the Minister can respond to changing community conditions as reflected in requests from communities or referring employees and officers. However, it is intended that the Minister would only respond to requests made by a community or an employee or officer of a relevant authority in appropriate circumstances. For example, a child protection officer may seek to increase or decrease the restricted rate based on the individual circumstances of a specific participant.

As explained in the Explanatory Memorandum, the Act provides that the portion of a participant's welfare payment that is restricted can be varied by the Secretary under subsection 124PJ(3). The Bill extends that power to new trial participants. This safeguard allows the Secretary to revise a trial participant's restricted portion as appropriate to the individual's circumstances notwithstanding the Minister's general determination under subsection 124PJ(2A) or 124PJ(2B).

It is important for the Minister to respond to changes in community needs, and for the Secretary to respond to in a targeted way to changes in an individual's circumstances as and when they arise. The Minister's power to determine restricted portions is better exercised by notifiable instrument to ensure that trial participants have responsiveness, transparency and certainty about their financial arrangements.

Committee comment

2.100 The committee thanks the minister for this response. The committee notes the minister's advice that the power in proposed subsections 124PJ(2A) and (2B) to determine the portion of income that is designed as 'restricted', for classes of participants in the Cashless Debit Card (CDC) trial, is better exercised by notifiable instrument. The committee notes the advice that the proposed approach is to ensure that trial participants have responsiveness, transparency and certainty about their financial arrangements.

2.101 The committee also notes the minister's advice that it is intended that the powers would be used in response to requests from communities and government officers (for example, child protection officers), and that the minister would only respond to such requests in appropriate circumstances.

2.102 The committee further notes the minister's advice that the secretary's power under subsection 124PJ(3) acts as a safeguard on the minister's powers under proposed subsections 124PJ(2A) and (2B), as the secretary would be able to vary the restricted portion of an individual trial participant's payments notwithstanding a general determination by the minister. In this regard, the committee notes the advice that it is important for the minister to respond to changes in community needs, and for the secretary to respond in a more targeted way to changes in an individual's circumstances.

2.103 While noting this advice, from a scrutiny perspective, the committee remains concerned that the bill would confer on the minister a broad power to determine the portion of a trial participant's payments that are subject to income management. In this respect, the committee notes that the minister would be able to exercise this

power in relation to large classes of trial participants, and that the determination may specify that *all* payments are to be subject to income management.³⁷

2.104 In light of these matters, the committee considers that the determinations should at least be made by legislative instrument (rather than notifiable instrument), to ensure a higher level of parliamentary oversight through the tabling, disallowance and sunseting requirements which apply to legislative instruments under the *Legislation Act 2003*. The committee also considers that the determinations could be made by legislative instrument without compromising responsiveness, transparency or certainty for trial participants.

2.105 The committee also remains concerned that—notwithstanding how it is intended the powers in proposed subsections 124PJ(2A) and (2B) would operate—there appears to be little or no guidance on the face of the bill as to how the powers are to be exercised. For example, it does not appear that the minister would be required to consider any particular matter before exercising the powers, or that the exercise of the powers would be required to follow a request from the community or from a relevant officer. Additionally, it remains unclear that the secretary's power to vary the restricted portion of an individual trial participant's payments would be an effective and appropriate safeguard in relation to the minister's power to vary the restricted portion of payments for classes of participants. This approach may, for example, place undue burden on a trial participant by requiring them to approach the secretary to seek a variation.

Trial area determinations

2.106 The committee takes this opportunity to note that item 14 of the bill would insert subsection 124PD(1A) into the *Social Security (Administration) Act 1999* (Administration Act). The new provision would permit the minister to determine, by notifiable instrument, an area for the purposes of the definition of 'Cape York area'. Such a determination may have the effect of making a person a participant in the CDC trial.

2.107 Additionally, item 15 of the bill would amend subsection 124PD(2) of the Administration Act, to permit the minister to determine, by notifiable instrument, a part of the Northern Territory that is excluded from the definition of 'trial area'.

2.108 The explanatory statement explains that the power to make a notifiable instrument under proposed subsection 124PD(1A) is consistent with the existing power under subsection 124PD(2) of the Administration Act. It also notes that the existing power is to be modified to bring the Northern Territory into the trial. No

37 Proposed subsections 124PJ(2A) and (2B) each allow the minister to vary the portion of payments that are restricted (that is, subject to income management) to a percentage that is less than or equal to 100 per cent in relation to 'persons who are trial participants'.

further justification is provided for why the determinations would be made by notifiable instrument.

2.109 The committee is concerned that proposed subsection 124PD(1A), and existing subsection 124PD(2) (as modified by the bill), would confer on the minister a broad power to determine areas for the CDC trial by notifiable instrument, with only limited guidance on the face of the bill as to how the power is to be exercised. 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. Parliamentary scrutiny of the determinations would therefore be limited.

2.110 The committee's longstanding view is that significant matters, such as the areas in which trials of cashless welfare arrangements are to be carried out, should be included in primary legislation or at least in delegated legislation which is subject to parliamentary disallowance. In this respect, the committee has previously raised concerns that permitting the minister to determine areas that are excluded from the definition of 'trial area' by notifiable instrument may undermine parliamentary scrutiny.³⁸

2.111 The committee considers that it may be appropriate for the bill to be amended to:

- **provide that determinations under proposed subsections 124PJ(2A) and (2B) of the *Social Security (Administration) Act 1999 (Administration Act)*, to vary the restricted portion of social security benefits for a class of trial participants, are to be made by disallowable legislative instrument; and**
- **provide that determinations under proposed subsection 124PD(1A) and existing section 124PD(2) of the Administration Act, to determine areas for the purpose of the definition of 'Cape York area' and 'trial area', are to be made by disallowable legislative instrument.**

2.112 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of leaving significant elements of the Cashless Debit Card trial, including the specific areas in which the trial is to be conducted and the portion of participants' payments that are subject to income management, to notifiable instruments which are not subject to parliamentary disallowance.

2.14 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

38 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, p. 18, in relation to amendments to the Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018.

Privacy³⁹

2.113 In [Scrutiny Digest 6 of 2019](#) 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.⁴⁰

Minister's response

2.114 The minister advised:

Information sharing powers

Powers to obtain and share information about trial participants are necessary to facilitate the effective administration of the Cashless Debit Card trial and enable trial participants and their communities to be appropriately supported, including in times of crisis.

The Bill proposes new sections 124POB, 124POC and 124POD to authorise certain information disclosures to the Queensland Commission (currently the Family Responsibilities Commission (PRC)), a child protection officer of the Northern Territory or recognised State/Territory authority of the Northern Territory. These entities are responsible for referring participants to the Cashless Debit Card trial under section 124PGD (PRC) and 124PGE(2) (a child protection officer of the Northern Territory or recognised State/Territory authority of the Northern Territory).

The measures replicate existing provisions in Part 3B of the Act and are necessary to ensure that the personal circumstances of participants can be disclosed to ensure that participants are correctly placed onto the Cashless Debit Card trial and correctly authorised to cease to be trial participants. For example, information about a potential participant's address will be necessary to determine if the individual is a resident of a trial area.

In addition, the Bill amends section 192 of the Act to include the operation of Part 3D in this section to facilitate collection of information relevant to trial participation. This replicates arrangements under Part 38 of the Act for the Income Management regime and will support the operation of the Cashless Debit Card trial, including with respect to exit and wellbeing exemptions. Information that may be obtained pursuant to this provision

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 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2019*, pp. 18-19.

includes trial participant residential addresses, payment types and mental and social wellbeing. This information will support the administration of the trial including the identification of trial participants and the management of wellbeing exemption and exit processes.

As you have noted, the Bill addresses disclosure of information to community bodies and the Queensland Commission and officers and employees of certain state or territory authorities (including child protection officers). As explained in the Explanatory Memorandum, sections 124POA, 124POB 124POC and 124POD replicate the current information sharing provisions in Part 38 of Act.

The information to be shared under the proposed 124POA, 124POB 124POC and 124POD is protected information for the purposes of the Act and relates to participation in, and exit from, the Cashless Debit Card trial. The information that may be disclosed is limited in scope according to the body involved. For example, section 124POA specifies that the Secretary may only disclose to a relevant community body the fact that the person has ceased to be a trial participant or a voluntary participant, the day the person ceased to be a participant and the fact that participation ceased due to a determination under subsection 124PHA(1) or 124PHB(3). In other contexts, the information required will be material to whether a person is a trial participant and may relate, for example, to the person's place of residence.

The Department of Social Services (the department) is subject to a range of legal obligations relating to privacy, which are supplemented by policies and practices to ensure that individual's privacy is protected in relation to protected (personal) information obtained under the Act. Personal information collected by the department in connection with the Cashless Debit Card trial is held securely by the department and is not disclosed otherwise than for the administration of Part 3D of the Act or in connection with possible breaches of the law.

Importantly, the Act contains confidentiality provisions, including offence provisions, to ensure that trial participant information is stringently protected. Protected information can only be disclosed in specified circumstances. Division 3 of Part 5 of the Act creates a series of strict liability offences, which are punishable, upon conviction, by a term of imprisonment not exceeding two years.

In addition, the Privacy Act 1988 applies to the collection, use, storage and disclosure of personal information by the department, Services Australia and certain other entities.

The department uses a secure Archiving, Record Keeping and Compliance (Arc) system. Access controls are placed on each person's individual record and group of individual records to ensure only authorised people have access to the protected information. For auditing and compliance purposes, Arc metadata records who has viewed, updated, modified, destroyed or contributed to a document. Assessment and quality

assurance processes are performed regularly to ensure that staff manage protected information within the secure Arc environment.

People with access to protected data will:

- be engaged by the Department of Social Services and required to comply with, among other things, the Australian Public Service Code of Conduct and Conflict of Interest Disclosure policy;
- hold a Australian Government Security Vetting Agency (AGSVA) Baseline Security Clearance as a minimum;
- be trained in handling protected information before given access to protected information; and
- be appropriately supervised.

Committee comment

2.115 The committee thanks the minister for this response. In relation to the types of information that may be collected under paragraph 192(db), the committee notes the minister's advice that this includes trial participants' residential addresses and payment types, as well as information relating to participants' mental and social wellbeing. The committee also notes the advice that this information will support the administration of the CDC trial, including the identification of trial participants and management of the wellbeing exemption and exit processes.

2.116 As to the information that may be shared under proposed sections 124POA, 124POB, 124POC and 124POD, the committee notes the advice that the information is 'protected information' for the purposes of the Administration Act, and relates to participation in, and exit from, the CDC trial. The committee also notes the advice that the information that may be disclosed is limited in scope according to the body involved, and the examples of the information that may be disclosed in particular circumstances.

2.117 In relation to the safeguards that apply to the collection, use and sharing of information, the committee also notes the minister's advice that the Department of Social Services (DSS) is subject to a range of legal obligations relating to privacy, which are supplemented by policies and practices to ensure privacy is protected in relation to protected information. In this respect, the committee notes the advice that personal information connected with the CDC trial is held securely by DSS, and is not disclosed other than for the administration of Part 3D of the Administration Act or in connection with possible breaches of the law.

2.118 The committee further notes the minister's advice that the Administration Act contains confidentially provisions, including offence provisions, to ensure that

trial participant information is stringently protected.⁴¹ The committee also notes the advice that the *Privacy Act 1998* applies to the collection, use, storage and disclosure of personal information by DSS, Services Australia and certain other entities.

2.119 Finally, the committee notes the minister's advice that DSS uses a secure Archiving, Record Keeping and Compliance (ARC) system, which ensures that only authorised persons have access to protected information. The committee also notes the advice that assessment, quality assurance and auditing processes are performed regularly to ensure staff manage the information within the secure ARC environment.

2.120 The committee requests that the information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and, if necessary, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

41 For example, section 202 of the Administration Act sets out the circumstances in which protected information may be collected, used and disclosed. Sections 203 and 204 create offences relating to unauthorised access to and unauthorised use (including disclosure) of protected information.

Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019

Purpose	This bill seeks to amend <i>Corporations Act 2001</i> to remove grandfathering arrangements for conflicted remuneration and other banned remuneration from 1 January 2021
Portfolio	Treasury
Introduced	House of Representatives on 1 August 2019
Bill status	Passed both Houses on 14 October 2019

Significant matters in delegated legislation⁴²

2.122 In [Scrutiny Digest 5 of 2019](#) the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave the scheme for the rebate of conflicted remuneration to regulations; and
- whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003* (Legislation Act)) can be included in the legislation (with compliance with such obligations a condition of the validity of the regulations).⁴³

Treasurer's response⁴⁴

2.123 The Treasurer advised:

Issue 1: Use of Regulations

The regulation-making power, which provides the rules around how grandfathered benefits are to be passed through to retail clients is justified in recognition of the need to account for the variety of financial products and arrangements in relation to which rebates may need to be paid, and the variety of potential recipients of those rebates. It is designed to ensure the application of primary legislation remains flexible to adapt to market developments and applies in a way consistent with the intended policy and the enabling provisions in the Bill, specifically, to ensure that the benefits

42 Schedule 1, item 9, section 963N. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2019*, pp. 26-27.

44 The minister responded to the committee's comments in a letter dated 27 September 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

of ending grandfathered conflicted remuneration go to customers. Specifying these requirements in regulations is the most appropriate approach as it provides the flexibility to make more detailed rules on how benefits must be passed through and to respond to changing industry circumstances in a timely manner.

While the rebating scheme must be sufficiently adaptable to cover the wide variety of situations in which conflicted remuneration may be provided, it will only be applicable to a limited class of persons. The rebating scheme would only apply to those covered persons, within the meaning of proposed section 963M of the *Corporations Act 2001* (the Act) where the person would be legally obliged (disregarding the ban on conflicted remuneration in Subdivision C of Division 4 of Part 7.7A of the Act) to give conflicted remuneration to another person, on or after 1 January 2021.

That is, the obligations to make payments in accordance with the regulations would only apply to those covered persons who still had obligations to pay conflicted remuneration as at 1 January 2021 under an arrangement that had been in place prior to the application date of Division 4 of Part 7.7A of the Act (generally 1 July 2013).

Given the limited class of persons who would be required to pay rebates in accordance with the regulations, it is appropriate that these matters are dealt with in subordinate laws, rather than in the primary law. If matters in relation to rebating were to be inserted into the Act, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of persons. This would result in additional cost and unnecessary complexity for other users of the Act.

Issue 2: Specific consultation obligations included in the legislation

The Committee's concerns about the lack of a specific consultation requirement before making regulations for the purposes of proposed section 963N of the Act are noted. Consistent with standard practice, consultation is expected to occur before making regulations for the purposes of this proposed section, especially where this would impact businesses and consumers, as required under section 17 of the *Legislation Act 2003*. In addition, if the Government were to proceed with regulations that were subject to less than four weeks public consultation, the Government is obligated under the Corporations Agreement 2002 to provide a statement of reasons for the shorter consultation period to States and Territories.

In this case, on 28 March 2019, the Government released exposure draft regulations proposed to be made pursuant to proposed section 963N of the Act for four weeks of public consultation. The Government received feedback from consumer groups, industry and the Australian Securities and Investments Commission. Since then, Treasury has undertaken further targeted consultation on the draft regulations.

Given the already existing standard legislative consultation requirements and the other existing safeguards, making the validity of regulations made for the purposes of section 963N of the Act contingent on further legislated consultation obligations appears unnecessary and inconsistent with other regulation making powers within the Act.

Committee comment

2.124 The committee thanks the Treasurer for this response. In relation to the proposal to leave significant elements of the scheme for the rebate of conflicted remuneration to regulations, the committee notes the Treasurer's advice that this approach is justified by the need to account for the variety of financial products and arrangements in relation to which rebates may need to be paid, and by the variety of potential recipients of those rebates. The committee also notes the advice that this approach is designed to ensure that primary legislation remains flexible to adapt to market developments, provides the flexibility to respond to changing industry circumstances, and applies in a way consistent with the policy objectives of the bill—specifically, to ensure the benefits of ending grandfathered conflicted remuneration are passed on to customers.

2.125 The committee further notes the Treasurer's advice that the rebate scheme will only apply to a limited class of persons, and the advice that enacting the scheme by in the primary Act would result in additional costs and unnecessary complexity for other users of the primary legislation.

2.126 As to the inclusion of specific consultation obligations in the bill, the committee notes the Treasurer's advice that consultation is expected to occur before the regulations are made, in accordance with the requirements of the Legislation Act. The committee also notes the advice regarding the consultation that has occurred in relation to draft regulations proposed to be made for the purposes of the scheme. The committee further notes the Treasurer's view that, in light of the requirements in the Legislation Act and other existing safeguards, making the validity of the regulations contingent on additional consultation obligations is unnecessary, and would be inconsistent with other regulation-making powers in the Act.

2.127 The committee acknowledges that consultation is expected to occur before regulations are made for the purposes of proposed section 963N, and that this is supported by the consultation that has already occurred on the draft regulations. Nevertheless, the committee remains concerned that the bill does not contain any positive requirement that consultation take place before the regulations are made.

2.128 The committee notes that it would have been useful had the key information provided by the Treasurer been included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and, if necessary, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.129 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

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:

- **Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019** — Schedule 1, Part 1, Division 1, clause 66J(1) and Schedule 2, Part 1, Division 1, clause 167-1(1) (SPECIAL ACCOUNTS: CRF appropriated by virtue of section 80 of the Public Governance, Performance and Accountability Act 2013).

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](#).

