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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.

Aged Care Legislation Amendment (New Commissioner Functions) Bill 2019

Purpose	This bill seeks to amend various Acts in relation to aged care to transfer additional aged care regulatory functions to the Aged Care Quality and Safety Commissioner
Portfolio	Health
Introduced	Senate on 16 October 2019

Use of force¹

1.2 The bill seeks to insert new Part 6.4 into the *Aged Care Act 1997* (Aged Care Act) and Part 8A into the *Aged Care Quality and Safety Commission Act 2018* (Quality and Safety Act). Part 6.4 and Part 8A will trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) in relation to the provisions of the bill. These monitoring and investigation powers include coercive powers such as powers of entry and inspection.

1.3 Proposed subsections 92-1(6) and 92-3(4) of the Aged Care Act and subsections 74B(6) and 74D of the Quality and Safety Act also provide that authorised officers and persons assisting officers may use such force against things as is necessary and reasonable in the circumstances when executing a warrant under Part 2 or Part 3 of the Regulatory Powers Act. The committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion in a bill of any use of force power for the execution of warrants should only be allowed where a need for such powers can be identified. It states that a use of force power should be accompanied

1 Schedule 2, items 29 and 85, proposed Part 6.4 of the *Aged Care Act 1997* and proposed Part 8A of the *Aged Care Quality and Safety Commission Act 2018*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

by an explanation and justification in the explanatory memorandum and a discussion of proposed accompanying safeguards that the agency intends to implement.²

1.4 In relation to subsection 92-1(6), the explanatory memorandum states:

The ability to use force to enter premises under a warrant in order to exercise monitoring powers will be necessary where entry has been demanded but refused, or where an approved provider is not present at the premises or where there is evidence of non-compliance with a monitored provision being concealed. In those circumstances, it may be reasonably necessary for an authorised person executing a warrant to open locked doors, cabinets, drawers and other similar objects for the purposes of determining whether a monitored provision under the Aged Care Act is being complied with.³

1.5 The explanatory memorandum provides a similar explanation for the other provisions allowing for the use of force.

1.6 While noting the explanation provided in the explanatory memorandum, the committee notes that no information has been provided as to what safeguards will be implemented to ensure that force is only used in appropriate circumstances.

1.7 The committee therefore requests the minister's advice as to what safeguards will be in place to ensure that force is only used by authorised officers and persons assisting them in appropriate circumstances.

Broad delegation of investigatory powers⁴

1.8 Proposed subsections 92-1(5) and 92-3(3) of the *Aged Care Act 1997* and subsections 74B(5) and 74D(3) of the *Aged Care Quality and Safety Commission Act 2018* seek to allow authorised persons to be assisted by 'other persons' when exercising powers or performing functions or duties in relation to monitoring and investigation.

1.9 In relation to proposed subsection 74B(5), the explanatory memorandum states that:

Given authorised officers may require expertise from a wide range of disciplines and specialist clinical experience to determine compliance with

2 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 80.

3 Explanatory memorandum, p. 28.

4 Schedule 2, items 29 and 85, proposed subsections 92-1(5) and 92-3(3) of the *Aged Care Act 1997* and proposed subsections 74B(5) and 74D(3) of the *Aged Care Quality and Safety Commission Act 2018*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

the responsibilities of approved providers, ranging from the provision of quality of care, the protection of user rights and prudential compliance, external engagement of these persons may be an appropriate means of sourcing expertise to ensure it remains current.⁵

1.10 The explanatory memorandum provides a similar explanation for the other provisions regarding persons assisting authorised officers.

1.11 While the committee notes this explanation, the committee's consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have the appropriate training and experience. The committee understands the need for flexibility in determining who may be appropriate 'other persons' in the particular circumstances of an investigation, however the committee remains concerned that 'other persons' will be authorised to assist in monitoring and investigation without any requirement for them to have the appropriate training or expertise to use the relevant monitoring or investigatory powers. The committee's concerns are heightened in this instance by the inclusion of provisions allowing for the use of force.

1.12 The committee therefore requests the minister's advice as to the appropriateness of amending the bill to require that any person assisting an authorised officer have appropriate skills, training or experience.

Broad delegation of administrative power⁶

1.13 Item 90 of Schedule 2 seeks to insert new subsections 76(1A) and 76(1B) into the *Aged Care Quality and Safety Commission Act 2018*. These new subsections would allow the Aged Care Quality and Safety Commissioner to delegate any or all of their powers under Part 7B to a member of the staff of the Commission or an APS employee in the Department. The Commissioner would be required to be satisfied that the person has suitable training or expertise to properly perform the function or exercise the power.

1.14 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are

5 Explanatory memorandum, p. 45.

6 Schedule 2, item 90, proposed subsections 76(1A) and (1B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

considered necessary should be included in the explanatory memorandum. In relation to new subsections 76(1A) and 76(1B), the explanatory memorandum does not provide any information about why these powers and functions are proposed to be delegated to *any* Commission staff member or departmental employee.

1.15 Noting the above, the committee requests the minister's advice as to:

- **why it is necessary to allow the Commissioner's powers under Part 7B to be delegated to *any* Commission staff member or APS employee of the department; and**
- **the appropriateness of amending the bill to provide some legislative guidance as to the scope of the powers that might be delegated, or the categories of people to whom those powers might be delegated.**

Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019

<p>Purpose</p>	<p>This bill seeks to amend Acts in relation to combatting of money laundering and financing of terrorism and the Australian Federal Police to:</p> <ul style="list-style-type: none"> • expand the circumstances in which reporting entities may rely on customer identification and verification procedures undertaken by a third party; • prohibit reporting entities from providing a designated service if customer identification procedures cannot be performed; • increase protections around correspondent banking; • expand exceptions to the prohibition on tipping off to permit reporting entities to share suspicious matter reports and related information with external auditors, and foreign members of corporate and designated business groups; • provide a simplified and flexible framework for the use and disclosure of financial intelligence; • create a single reporting requirement for the cross-border movement of monetary instruments including physical currency and bearer negotiable instruments; • amend the Criminal Code to clarify that cash used in undercover operations is considered 'proceeds of crimes' for the purpose of Commonwealth money laundering offences; • expand the rule-making powers of the Chief Executive Officer of AUSTRAC; • make it an offence for a person to dishonestly represent that a police award has been conferred on them
<p>Portfolio</p>	<p>Home Affairs</p>
<p>Introduced</p>	<p>House of Representatives on 17 October 2019</p>

Reversal of the evidential burden of proof⁷

1.16 The bill seeks to create a number of offence-specific defences, both for new offences in the bill and for existing offences in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.⁸ These offence-specific defences reverse the evidential burden of proof.

1.17 At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.⁹

1.18 The committee 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.¹⁰

1.19 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 explanatory materials do not contain any information regarding any of the proposed reversals of the evidential burden contained in this bill.

1.20 In addition, it is not clear to the committee that all of the matters would be peculiarly within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. For example, proposed section 126 makes it an offence for a current or former official of a Commonwealth, State or Territory agency to make a record of, disclose or otherwise use AUSTRAC information they have obtained. Proposed subsection 126(3) provides that the offence will not apply if the disclosure is for the purposes of court or tribunal proceedings or for

7 Items 24, 26, 50, 51, 55 and 75 of Schedule 1, proposed subsections 123(5B), 126(7), 126(7AB), 50A(2), 121(2), 121(3), 126(2), 126(3), 126(5), 129(2) and 53(6). The committee draws senators attention to these provision pursuant to Senate Standing Order 24(1)(a)(i).

8 Proposed subsections 50A(2), 53(6), 121(2), 121(3), 123(5B), 126(2), 126(3), 126(5), 126(7), 126(7AB) and 129(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

9 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.

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

obtaining legal advice. This matter appears to be more appropriate for inclusion as an element of the offence.

1.21 As the explanatory materials do not 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 each 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.¹¹

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

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019

Purpose	This bill seeks to amend the <i>Australian Sports Anti-Doping Authority Act 2006</i> to: <ul style="list-style-type: none"> • provide information-sharing between Australian Sports Anti-Doping Authority (ASADA) and National Sporting Organisations; • amend ASADA's disclosure notice regime; and • extend statutory protection against civil actions to cover National Sporting Organisations in their exercise of anti-doping rule violation
Portfolio	Youth and Sport
Introduced	House of Representatives on 17 October 2019

Privacy¹²

1.22 Under the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act), the ASADA CEO may issue a written notice (disclosure notice) requiring a person to attend an interview to answer questions, or to produce documents or things. Currently, the CEO may only issue such a notice if the CEO reasonably believes that the recipient has information, documents or things that may be relevant to the administration of the National Anti-Doping Scheme, and three members of the Anti-Doping Rule Violation (ADRV) Panel are in agreement with the CEO's belief.¹³

1.23 The bill seeks to replace the requirement that the CEO 'reasonably believes' that the recipient of a disclosure notice has relevant information, with a requirement that CEO 'reasonably suspects' that the recipient has such information. It also seeks to remove the requirement that three members of the ADRV Panel agree with the CEO's belief, as a consequence of abolishing the Panel. This would have the effect of lowering the threshold for the issue of disclosure notices.

1.24 The explanatory memorandum explains that it is proposed to lower the threshold for issuing disclosure notices because:

12 Schedule 1, items 13, 43 and 44. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

13 Paragraph 13(1)(ea) and section 13A of the ASADA Act.

The current requirement necessitates that the ASADA CEO effectively already has evidence that suggests that an ADRV has taken place. By amending the threshold to 'reasonably suspects', the CEO will be able to issue disclosure notices to progress matters where there is a reason to suspect an ADRV has occurred but insufficient evidence to substantiate it. This brings the threshold into line with comparable statutory schemes.¹⁴

1.25 The statement of compatibility further notes that the Wood Review concluded that the current 'reasonable belief' standard means that disclosure notices are generally only sought and granted where ASADA already has evidence suggesting that an ADRV has taken place. It also states that lowering the threshold for issuing disclosure notices is necessary given the increasing reliance on intelligence and investigations in anti-doping matters.¹⁵

1.26 The committee appreciates the importance of ensuring that potential ADRVs are effectively investigated, however, it remains unclear why a disclosure notice could not be issued under the existing standard; that is, why a 'reasonable belief' could not be formed on the basis of intelligence gathered while investigating a potential ADRV.

1.27 The committee also notes that a disclosure notice may require the recipient to provide personal information as part of the investigation of a potential ADRV. The improper use or disclosure of this information may trespass significantly on the right to privacy. For example, the release of information that suggests an athlete has committed an ADRV could cause significant damage to the athlete's reputation, and limit future employment prospects. The committee would therefore expect the explanatory materials to identify any relevant safeguards against the unauthorised use or disclosure of personal information. The committee notes that no such safeguards are identified in the explanatory materials.

1.28 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice regarding the lowering of the threshold for the giving of disclosure notices and the impact this may have on the right to privacy. In particular, the committee requests further detail about:

- **why lowering the current 'reasonable belief' standard is necessary given that a 'reasonable belief' may be formed on the basis of intelligence gathered while investigating a potential anti-doping rule violation; and**
- **any safeguards that will be in place to guard against the unauthorised use or disclosure of personal information obtained under a disclosure notice.**

14 Explanatory memorandum, p. 17.

15 Statement of compatibility, p. 6.

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019

Purpose	This bill seeks to amend the <i>Australian Sports Anti-Doping Authority Act 2006</i> to establish the Sport Integrity Australia agency
Portfolio	Youth and Sport
Introduced	House of Representatives on 17 October 2019

Immunity from civil liability¹⁶

1.29 Proposed subsection 78(1A) provides that no civil liability will arise from any action taken by an Advisory Council member in good faith in the performance or purported performance of any functions of the Advisory Council. This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and therefore the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.30 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.¹⁷

1.31 The committee requests the minister's advice as to why it is considered appropriate to provide members of the Advisory Council with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

Privacy¹⁸

1.32 The bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* to replace the Australian Sports Anti-Doping Authority (ASADA) with Sport Integrity

16 Schedule 1, item 53 proposed subsection 78(1A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

17 Explanatory memorandum, p. 12.

18 Schedule 2, item 23. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Australia. Item 23 of Schedule 2 to the bill makes Sport Integrity Australia an enforcement body for the purposes of the *Privacy Act 1988*. This has number of effects for how personal information is managed by Sport Integrity Australia, including that Sports Integrity Australia would not be required to obtain an individual's consent to collect sensitive information and would be able to disclose personal information in certain circumstances.

1.33 The statement of compatibility states:

The exemptions will only apply in relation to circumstances where the use or disclosure of particular information is reasonably necessary for Sport Integrity Australia's enforcement related activities. Sport Integrity Australia will otherwise remain subject to the requirements of the Privacy Act, including the Australian Privacy Principles.¹⁹

1.34 The statement of compatibility further states that:

Appropriate protections remain in place to ensure information may only be accessed in certain circumstances, that is, relating to the investigation of possible breaches of anti-doping rules. Specifically, the current secrecy provisions in Part 8 of the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) will relevantly be retained for Sports Integrity Australia.²⁰

1.35 While the committee notes this explanation, the committee's consideration of the bill would be assisted by a fuller explanation of how Sport Integrity Australia's enforcement related activities will be undertaken in practice. This is particularly the case given that, as acknowledged in the statement of compatibility, unlike Sport Integrity Australia, most enforcement bodies under the Privacy Act are responsible for investigating matters that may result in civil penalties or criminal charges.²¹

1.36 The committee therefore requests the minister's more detailed advice as to why it is considered necessary and appropriate for Sport Integrity Australia to be an enforcement body for the purpose of the *Privacy Act 1988*. In particular, the committee's consideration of this matter would be assisted by a fuller explanation of how Sport Integrity Australia's enforcement related activities will be undertaken in practice, including the nature of the enforcement powers and who will be exercising the enforcement powers.

19 Statement of compatibility, p. 4.

20 Statement of compatibility, p. 4.

21 Statement of computability, p. 4.

Coal Prohibition (Quit Coal) Bill 2019

Purpose	This bill seeks to prohibit the mining, burning and the export and importation of thermal coal in Australia by 2030
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 14 October 2019

1.37 This bill is identical to a bill that was introduced in the House of Representatives on 18 February 2019, and lapsed on 11 April 2019 at the dissolution of the 45th Parliament. The committee raised a number of scrutiny concerns in relation to the earlier bill in [Scrutiny Digest 2 of 2019](#),²² and reiterates those comments in relation to this bill.

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2019*, at pp. 14-15.

Communications Legislation Amendment (Deregulation and Other Measures) Bill 2019

Purpose	<p>This bill seeks to amend various Acts in relation to communications to:</p> <ul style="list-style-type: none"> • remove reporting requirements that require incoming controllers of regulated media assets to notify Australian Communications Media Authority (ACMA) of changes in the control of a licence or publication; • remove requirements for certain television broadcaster to apply different classification standards for films when developing industry codes of practice; • enable the Minister to appoint an industry-based numbering manager in place of ACMA; • update the transition support payment for Network Investments; • remove tariff-filing arrangements applying to the telecommunications industry; • review statutory information collection powers of ACMA and the Australian Competition and Consumer Commission every five years; • permit the National Broadband Network companies to dispose of surplus non-communications goods; • require ACMA to publish a notice both on its website and in one or more forms that are readily accessible when it is determining, varying or revoking a program standard or standard relating to datacasting; • remove the obligation on a developer to install fibre-ready pit and pipe; and • repeal various spent Acts
Portfolio	Communications, Cyber Safety and the Arts
Introduced	House of Representatives on 16 October 2019

Parliamentary scrutiny

Adequacy of review rights²³

1.38 The bill seeks to insert new Subdivision AA into Division 2 of Part 22 of the *Telecommunications Act 1997*. This will create a new industry-based scheme for the management of the numbering of carriage services in Australia and the use of numbers in connection with the supply of those services. Under the new provisions, the minister would be able to appoint a person as the numbering scheme manager by legislative instrument. The numbering scheme manager must manage the numbering scheme in accordance with the numbering scheme principles set out in proposed section 454C, which include that the numbering arrangements must be efficient and effective and that the rules and processes of the numbering scheme must be published and freely available. The minister, the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission are able to make directions to the numbering scheme manager in relation to the operation of the numbering scheme.

1.39 Under the current scheme, a numbering plan is made by the Australian Communications and Media Authority (ACMA) by disallowable legislative instrument.²⁴ The committee notes that if a numbering scheme manager is determined under proposed section 454A the scheme for the numbering of carriage services will no longer be set out in a disallowable legislative instrument. As such, the scheme will no longer be subject to parliamentary scrutiny and oversight.

1.40 The committee also notes that the current Telecommunications Numbering Plan 2015 contains rights for both internal review of decisions by the ACMA as well as independent merits review by the Administrative Appeals Tribunal.

1.41 While the committee notes that the numbering scheme principles under proposed section 454C include that the numbering scheme must make effective complaints processes available to both the telecommunications industry and users of carriage services,²⁵ there is no information on the face of the bill or the explanatory materials as to what that complaints process will entail. The committee further notes that a complaints process is quite different to a system for merits review. The latter typically provides for review by an independent tribunal or decision-maker who is empowered to make a substitute decision on the basis of their view of what the correct or preferable decision should be. It is also unclear as to whether a person will be able to seek effective judicial review of decisions made under the numbering scheme.

23 Schedule 6, item 10, proposed Subdivision AA of Division 2 of Part 22 of the *Telecommunications Act 1997*. The committee draws senators' attention to this provision pursuant to Senate Standing Orders 24(1)(a)(iii) and (v).

24 Section 455 of the *Telecommunications Act 1997*.

25 Proposed paragraph 454C(2)(n).

1.42 In light of the above, the committee requests the minister's advice as to:

- **the appropriateness of potentially removing parliamentary scrutiny and oversight of the scheme for the numbering of carriage services by providing an avenue for the scheme to be established other than by disallowable legislative instrument;**
- **whether judicial review and independent merits review of decisions made under a numbering scheme managed by the number scheme manager will be available; and**
- **the appropriateness of amending the bill to include additional guidance about what would constitute 'effective complaints processes' for the purposes of proposed paragraph 454C(2)(n).**

Broad delegation of administrative powers²⁶

1.43 Item 13 of Schedule 6 seeks to insert new section 459A into the *Telecommunications Act 1997*. Proposed section 459A would allow the ACMA to delegate any or all of the powers conferred on the ACMA by the numbering plan to a body corporate.

1.44 The committee has consistently drawn attention to legislation that allows the broad delegation of administrative powers. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this instance, the explanatory memorandum does not contain any information about why the delegation power is necessary.

1.45 The committee notes that, under proposed section 454A, when specifying a person as the numbering scheme manager, the minister must be satisfied that the person will manage the numbering scheme in accordance with the numbering scheme principles. It is unclear to the committee why similar requirements cannot be included in proposed section 459A.

1.46 In light of the above, the committee requests the minister's advice as to:

- **why it is considered necessary to allow for the ACMA's powers under the numbering plan to be delegated to any body corporate; and**
- **the appropriateness of amending the bill to provide guidance as to how a body corporate is to exercise any powers that are delegated to it.**

26 Schedule 6, item 13, proposed section 459A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

Education Legislation Amendment (2019 Measures No. 1) Bill 2019

Purpose	<p>This bill seeks to amend Acts in relation to higher education to:</p> <ul style="list-style-type: none"> • increase the combined Higher Education Loan Program (HELP) loan limit for students undertaking eligible aviation courses on or after 1 January 2020 at higher education providers; • enable the Minister to determine the aviation courses for which a person has the higher HELP loan limit; • provide for all or part of a person’s HELP debt to be remitted for their recognised initial teacher education course after they have been engaged as a teacher for four years in a school in a very remote location of Australia from the start of the 2019 school year; • reduce indexation on a person’s outstanding accumulated HELP debt while they are teaching in a school in a very remote location of Australia; and • allow the Department of Human Services restricted access to higher education data and VET student loans data in order to administer student benefits.
Portfolio	Education
Introduced	House of Representatives on 16 October 2019

Reversal of evidential burden of proof²⁷

1.47 Section 179-10 of the *Higher Education Support Act 2003* (HESA) makes it an offence for an officer to disclose, copy, or make a record of personal information collected by an officer in the course of their official employment, unless the disclosure occurs in the course of that official employment. Similarly, clause 73 of Schedule 1A to the HESA make it an offence for a vocational education and training (VET) officer to disclose, copy or record VET personal information. The offences both carry a penalty of 2 years' imprisonment.

1.48 Items 10 and 16 of Schedule 3 to the bill seek to insert a number of exceptions (offence specific defence) to these offences, stating that these offences do not apply if:

²⁷ Schedule 3, items 10, 16, 21, 22 and 23. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

- the person to whom the information relates has consented to the disclosure, or the making of the copy or record;
- the disclosure, or the making of the copy or record, is authorised or required by a law of the Commonwealth; or
- the disclosure, or the making of the copy or record, is authorised or required by a law of a State or Territory, provided that the disclosure, or the making of the copy or record relates to the administration, regulation or funding of education, or is specified in the Administration Guidelines or the VET Guidelines.

1.49 In addition, items 21, 22 and 23 seek to provide offence-specific defences to existing offences relating to the disclosure of personal information in sections 99 and 100 of the *VET Student Loans Act 2016*. The offence-specific defences provide that the offences will not apply if the person to whom the personal information relates has consented to the use or disclosure.

1.50 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.²⁸

1.51 The committee 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.

1.52 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 the bill have not been addressed in the explanatory materials.

28 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.

1.53 As the explanatory materials do not 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 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*.²⁹

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

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019

Purpose	This bill seeks to amend the <i>Foreign Acquisitions and Takeovers Fees Imposition Act 2015</i> to introduce a reconciliation fee on developers for dwellings sold to foreign persons under a near-new dwelling exemption certificate
Portfolio	Treasury
Introduced	House of Representatives on 23 October 2019

Retrospective application³⁰

1.54 Schedule 1 to the bill seeks to impose a reconciliation fee on developers with respect to dwellings sold to foreign persons under a near-new dwelling exemption certificate, and to set the amount of that fee. The measures complement the measures proposed in Schedule 3 to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019. Pursuant to item 5 of Schedule 1 to the bill, the amendments made by that Schedule are proposed to apply in relation to near-new dwelling acquisitions occurring on or after 1 July 2017. The amendments in Schedule 1 would therefore apply on a retrospective basis.

1.55 The committee has long-standing concerns about provisions that apply retrospectively, as such an approach challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has particular concerns where legislation will, or might, have a detrimental effect on individuals.

1.56 The committee also notes that, in the context of tax law, reliance on ministerial announcements, and the implicit requirement that persons arrange their affairs in accordance with such announcements rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective application or commencement, when used too widely or insufficiently justified, can diminish respect for the rule of law and its underlying values. In outlining issues around this matter previously, the committee has accepted that some amendments may apply retrospectively when legislation is introduced. However, this has been limited to the introduction of bills within six calendar months after the relevant announcement. In fact, where taxation amendments are not brought before the Parliament within six months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 45).

³⁰ Schedule 1, item 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.57 The committee notes that, in this case, the bill that first contained this measure—the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-New Dwelling Interests) Bill 2018—was introduced almost nine months after the budget announcement on 9 May 2017, and this bill was introduced well over two years after the announcement.

1.58 Generally, where proposed legislation will apply retrospectively, the committee would expect the explanatory materials to set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum states:

The retrospective application of this measure is consistent with the announcement of the near-new dwelling exemption certificate in the 2017-18 Budget announcement. Any adverse impact is expected to be minor, given the retrospective application was included in the Explanatory Statement that accompanied the regulations that introduced the near-new dwelling exemption certificate.³¹

1.59 The committee reiterates its long-standing concerns that provisions with retrospective application challenge a basic value of the rule of law that, in general, laws should only operate prospectively.

1.60 In light of the explanation provided in the explanatory memorandum as to the retrospective application of the amendments proposed by the bill, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying the amendments in the bill on a retrospective basis.

31 Explanatory memorandum, p. 37. The bill shares an explanatory memorandum with the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019.

Health Legislation Amendment (Data-matching and Other Matters) Bill 2019

Purpose	<p>This bill seeks to authorise the matching of certain kinds of information to identify whether payments that have been made by the Commonwealth under the main health-related programs should not have been made</p> <p>The bill will also enable Commonwealth-funded health treatment to various persons administered by the Minister for Veterans' Affairs to be taken into account in determining whether a practitioner has engaged in a prescribed pattern of services that may be considered inappropriate practice for the purposes of the Professional Services Review scheme</p>
Portfolio	Health
Introduced	House of Representatives on 23 October 2019

Significant matters in delegated legislation

Privacy³²

1.61 The bill seeks to create a new scheme to allow the Chief Executive Medicare to undertake data-matching of certain kinds of information for compliance related purposes. Proposed section 132F would require the minister to make data-matching principles by legislative instrument. Proposed subsection 132F(2) sets out a number of requirements for the principles, including that the principles must require the Chief Executive Medicare and authorised Commonwealth entities to keep records of information matched and to take reasonable steps to destroy information that is no longer needed.

1.62 The committee's view is that significant matters, such as the principles for how a data-matching scheme will operate, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. While the explanatory memorandum notes that the principles will be subject to Parliamentary oversight and the consultation requirements of the *Legislation Act 2003*, the explanatory materials do not contain any information as to why the data-matching principles cannot be included in the bill.³³ The committee notes that a legislative instrument, made by the executive, is not subject to the full range of

32 Schedule 1, item 1, proposed section 132F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

33 Explanatory memorandum, p. 9.

parliamentary scrutiny inherent in including the relevant principles in the primary legislation.

1.63 The committee's concerns are heightened by the fact that the data-matching scheme will potentially involve the use and disclosure of large amounts of personal information. The committee notes that the principles provide one of the main safeguards to ensure that information used for the data matching scheme is handled appropriately. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight of whether the safeguards for the data-matching scheme are sufficient.

1.64 The committee's view is that significant matters, such as the data-matching principles, should be included in primary legislation unless a sound justification is provided. The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave the data-matching principles to delegated legislation; and**
- **the appropriateness of amending the bill to set out the principles on the face of the primary legislation.**

Broad delegation of administrative powers³⁴

1.65 Item 5 of Schedule 1 seeks to insert new subsections 6(9)–(12) into the *National Health Act 1953*. The subsections would provide that the Chief Executive Medicare can delegate any of their powers or functions under the Act to any person.

1.66 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.67 In this instance, the explanatory memorandum states that this delegation power 'is in line with the Secretary's existing power of delegation' and further notes that the delegation allows the Chief Executive Medicare's powers to be delegated to officers for the purpose of data matching.³⁵ The committee does not consider that

34 Schedule 1, item 5, proposed subsections 6(9) – 6(12). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

35 Explanatory memorandum, p. 9.

this explanation provides a sufficient justification for such a broad and undefined delegation of administrative powers.

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

- **why it is necessary to allow *all* of the Chief Executive Medicare's powers and functions to be delegated to *any* person; and**
- **the appropriateness of amending the bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.**

National Integrity (Parliamentary Standards) Bill 2019

Purpose	<p>This bill seeks to create:</p> <ul style="list-style-type: none"> • statutory codes of conduct for members of each House of Parliament and their staff; • a statutory basis for a parliamentarians' register of interests; • a Parliamentary Integrity Adviser, to provide independent advice and guidance to members and staff; and • a Parliamentary Standards Commissioner, to assist presiding officers, the Ethics and Privileges Committees, the Prime Minister and the National Integrity Commission with assessment, investigation and resolution of breaches of applicable codes of conduct
Sponsor	Senator Larissa Waters
Introduced	Senate on 17 October 2019

1.69 This bill is similar to a bill that was introduced in the House of Representatives on 3 December 2018.³⁶ The committee raised a number of scrutiny concerns in relation to the earlier bill in [Scrutiny Digest 1 of 2019](#),³⁷ and reiterates those comments in relation to this bill.

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

37 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, at pp. 11-16.

Native Title Legislation Amendment Bill 2019

Purpose	This bill seeks to amend the <i>Native Title Act 1993</i> and the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> to modify the native title claims resolution, agreement-making, Indigenous decision making and dispute resolution processes
Portfolio	Attorney-General
Introduced	House of Representatives on 17 October 2019

Retrospective application³⁸

1.70 Schedule 9 to the bill deals with the validation of section 31 agreements made on or before the commencement of the Act. Section 31 agreements are agreements made under section 31 of the *Native Title Act 1993*, which deals with the normal negotiation procedure for agreements made under that Act.

1.71 In *McGlade v Native Title Registrar*³⁹ (*McGlade*), the Full Federal Court held that it was necessary for all members of a 'registered native title claimant' to sign an Indigenous Land Use Agreement for that agreement to be validly registered by the Native Title Registrar. The statement of compatibility to this bill states:

The reasoning in *McGlade* could similarly affect section 31 agreements, which primarily relate to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights.⁴⁰

1.72 In *Scrutiny Digest 3 of 2017*, the committee commented on the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, which contained amendments to retrospectively validate Indigenous Land Use Agreements made prior to the decision in *McGlade*. The committee stated that the fact that a court overturns previous authority is not, in itself, a sufficient basis for Parliament to retrospectively reinstate the earlier understanding of the previous legal position. In saying this, the committee recognised that when precedent is overturned this itself necessarily has a retrospective effect and may overturn legitimate expectations about what the law requires. Nevertheless, the committee considered that where Parliament acts to validate decisions which are put at risk, in circumstances where previous authority has been overturned, it is necessary for Parliament to consider:

38 Schedule 9, item 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

39 [2017] FCAFC 10.

40 Statement of compatibility, p. 14.

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

1.73 The committee considers that the same considerations would apply in relation to the proposed retrospective validations of section 31 agreements by this bill.

1.74 In justifying the retrospective application of the amendments, the statement of compatibility states:

Section 31 agreements underpin commercial operations and provide benefits for affected native title groups. The uncertainty created by their potential invalidity poses a significant risk to both those commercial operations and the benefits flowing to native title groups. Potential challenges to section 31 agreements may also divert resources away from finalising native title claims to litigate affected agreements and re-negotiate agreements that are already significantly resource-intensive.⁴¹

1.75 The committee notes this explanation and acknowledges the statement that the majority of stakeholders favoured the retrospective validation of agreements. However, no detail is provided about whether there will be any detrimental effect to any involved parties. The committee reiterates that it has long-standing scrutiny concerns about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has particular concerns if the legislation will, or might, have a detrimental effect on individuals. The committee considers that the explanatory materials have not adequately addressed this issue.

1.76 Noting the committee's scrutiny concerns regarding the retrospective validation of certain native title agreements, the committee requests the Attorney-General's more detailed advice as to the necessity and appropriateness of retrospectively validating section 31 agreements, including more detailed information regarding whether there will be a detrimental effect to any involved parties.

41 Statement of compatibility, p. 15.

Telecommunications (Interception and Access) Amendment (Assistance and Access Amendments Review) Bill 2019

Purpose	This bill seeks to amend the <i>Intelligence Services Act 2001</i> and the <i>Telecommunications (Interception and Access) Act 1979</i> to defer the legislative deadline for the Parliamentary Joint Committee on Intelligence and Security to report on its third review of the operation of the amendments introduced by the <i>Telecommunications and Other Legislation (Assistance and Access) Act 2018</i> to 30 September 2020
Portfolio	Home Affairs
Introduced	House of Representative on 17 October 2019

Trespass on personal rights and liberties⁴²

1.77 This bill seeks to amend the date that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) is to report on its third review of the operation of the amendments introduced by the *Telecommunications and Other Legislation (Assistance and Access) Act 2018* (the Act) to 30 September 2020.

1.78 In [Scrutiny Digest 12 of 2018](#) and [Scrutiny Digest 14 of 2018](#) the committee made extensive comments about the Telecommunications and Other Legislation (Assistance and Access) Bill 2018 (2018 bill).⁴³ The committee noted that Schedule 1 to the 2018 bill provided broad discretionary powers to interception agencies to issue a technical assistance request, a technical assistance notice, or a technical capability notice and noted that many of the details in relation to how these powers operated could be provided for in delegated legislation. The committee also raised significant scrutiny concerns regarding the bill's enhancement of the ability of agencies to utilise information gained under existing warrant or authorisation regimes.

1.79 Noting the committee's scrutiny concerns about the amendments introduced by the *Telecommunications and Other Legislation (Assistance and Access) Act 2018*, the committee leaves to the Senate as a whole the

42 Schedule 1, item 1, proposed paragraph 29(1)(bca). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

43 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, pp. 12-49; and *Scrutiny Digest 14 of 2018*, pp. 23 - 82.

appropriateness of deferring the deadline for the PJCIS to report on its third review of the amendments to 30 September 2020.

Transport Security Amendment (Serious Crime) Bill 2019

Purpose	<p>This bill seeks to amend the <i>Aviation Transport Security Act 2004</i> and the <i>Maritime Transport and Offshore Facilities Security Act 2003</i> to:</p> <ul style="list-style-type: none"> • establish a regulatory framework for introducing new eligibility criteria under the aviation and maritime security identification card schemes; • allow regulations to prescribe penalties for offences; • clarify the legislative basis for undertaking background checks of individuals; and • make technical amendments
Portfolio	Home Affairs
Introduced	House of Representatives on 23 October 2019

Significant matters in delegated legislation

Penalties in delegated legislation⁴⁴

1.80 Proposed subsection 38AB(1) provides that the regulations may, for the purposes of preventing the use of aviation in connection with serious crime, prescribe requirements in relation to areas and zones established under Part 3 of the *Aviation Transport Security Act 2004*. Proposed subsection 38AB(3) provides that the regulations made under this section may prescribe penalties for offences against those regulations. The subsection provides that for an offence committed by an airport or aircraft operator the maximum penalty is 200 penalty units; for an aviation industry participant, 100 penalty units; and for an accredited air cargo agent or any other person, 50 penalty units. The bill also seeks to insert new section 113F, which replicates these provisions in the *Maritime Transport and Offshore Facilities Security Act 2003*.

1.81 The committee has consistently raised concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's

⁴⁴ Schedule 1, items 4 and 17, proposed sections 38AB and 113F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

view is that significant matters, such as the requirements relating to access to relevant aviation and maritime transport zones, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this case the explanatory materials do not provide an explanation as to why the relevant matters cannot be included in primary legislation. The committee notes that delegated legislation, 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.

1.82 It is unclear to the committee why at least high level guidance about the eligibility criteria for access to relevant zones cannot be included on the face of the bill. For example, the committee notes that the explanatory memorandum lists the offence categories that will make up the new eligibility criteria, including offences relating to anti-gang or criminal organisation legislation and the illegal importation of goods.⁴⁵ It is unclear to the committee why these criteria cannot be provided for on the face of the primary legislation.

1.83 In addition, the *Guide to Framing Commonwealth Offences* suggests that penalties that exceed 50 penalty units should not normally be imposed by regulations.⁴⁶ In relation to this, the explanatory memorandum states that:

Such a strong deterrent is appropriate to enact in delegated legislation:

- because of the security-sensitive nature of the aviation environment, which may be targeted by criminal enterprises to facilitate the movement of illicit goods, and
- to align with other regulation-making provisions of the Aviation Act.

It is also noted that the higher maximum penalties would apply to a limited number of persons, being selected aviation industry participants, and not to the general public. This means that the enhanced deterrence is tailored specifically to an appropriate cohort of persons, and not the public at large.⁴⁷

1.84 While the committee notes this explanation, the committee's longstanding view is that serious offences and penalties should be contained in the primary legislation to allow for appropriate levels of Parliamentary scrutiny.

45 Explanatory memorandum, p. 2.

46 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 44-45.

47 Explanatory memorandum, pp. 5-6.

1.85 The committee's view is that significant matters, such as the requirements relating to access to relevant aviation and maritime transport zones, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the committee's scrutiny concerns are heightened by the fact that the bill allows for the regulations to contain offences with maximum penalties above what is recommended in the *Guide to Framing Commonwealth Offences*. The committee therefore requests the minister's advice as to:

- why it is considered necessary and appropriate to leave the new eligibility criteria for access to relevant aviation and maritime transport zones to delegated legislation, and the appropriateness of amending the bill to provide at least high level guidance in this regard; and
- the appropriateness of amending the bill to either include all relevant penalties and offences in the primary legislation or for the maximum penalties to be reduced to be consistent with the *Guide to Framing Commonwealth Offences*.

Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019

Purpose	<p>This bill seeks to amend various Acts in relation to taxation and foreign acquisitions and takeovers</p> <p>Schedule 1 seeks to amend the <i>Income Tax Assessment Act 1997</i> to:</p> <ul style="list-style-type: none"> • remove the entitlement to the capital gains tax (CGT) main residence exemption for foreign residents under certain circumstances; and • modify the foreign resident CGT regime <p>Schedule 2 seeks to provide an additional affordable housing capital gains discount</p> <p>Schedule 3 seeks to enable a reconciliation payment to be made by developers who sell dwellings to foreign persons under a near-new dwelling exemption certificate</p>
Portfolio	Treasury

Retrospective application⁴⁸

1.86 Schedule 1 to the bill seeks to remove foreign residents' entitlements to the capital gains tax (CGT) main residence exemption, and to modify the foreign resident CGT regime to clarify that, for the purposes of determining whether an entity's underlying value is principally derived from taxable Australian real property (TARP), the principal asset test⁴⁹ is to be applied on an associate inclusive basis.

1.87 Schedule 2 to the bill seeks to provide additional CGT discounts on CGT events that occur with respect to residential premises that have been used to provide affordable housing.

1.88 Schedule 3 to the bill seeks to create a reconciliation mechanism to ensure that where a near-new dwelling is sold by a developer to a foreign person, the developer provides a reconciliation payment in respect of that sale. The measures in Schedule 3 are complemented by the provisions of the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019.

48 Schedule 1, items 33 and 36; Schedule 2, item 3; and Schedule 3, item 11. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

49 The principal asset test applies in relation to certain membership interests held by a foreign resident entity in another entity. The test is satisfied if the market value of the other entity's TARP assets exceeds the market value of its non-TARP assets.

1.89 It is proposed that all of the measures identified above would apply retrospectively. The measures in Schedule 1 (relating to CGT exemptions for foreign residents) are proposed to apply to CGT events happening on or after those measures were announced in the 2017-18 Budget (7.30 pm on 9 May 2017).⁵⁰ The measures in Schedule 2 (relating to CGT discounts with respect to affordable housing) are proposed to apply to CGT events happening on or after 1 January 2018.⁵¹ The measures in Schedule 3 (relating to payments with respect to near-new dwellings) are proposed to apply in relation to the acquisition of a near-new dwelling occurring on or after 1 July 2017.⁵²

1.90 The committee has a long-standing concern about provisions that apply retrospectively, including provisions that back-date commencement to the date of the announcement of particular measures (i.e. 'legislation by press release'), as such an approach challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has particular concerns where legislation will, or might, have a detrimental effect on individuals.

1.91 The committee also notes that, in the context of tax law, reliance on ministerial announcements, and the implicit requirement that persons arrange their affairs in accordance with such announcements rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective application or commencement, when used too widely or insufficiently justified, can diminish respect for the rule of law and its underlying values. In outlining issues around this matter previously, the committee has accepted that some amendments may apply retrospectively when legislation is introduced. However, this has been limited to the introduction of bills within six calendar months after the relevant announcement. In fact, where taxation amendments are not brought before the Parliament within six months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 45).

1.92 The committee notes that, in this case, the bill that first contained this measure—the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018—was introduced almost nine months after the budget announcement on 9 May 2017, and this bill was introduced well over two years after the announcement.

1.93 Generally, where proposed legislation will apply retrospectively, the committee would expect the explanatory materials to set out the reasons why

50 Schedule 1, items 33 and 36.

51 Schedule 2, item 3.

52 Schedule 3, item 11.

retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.94 With respect to the amendments in Schedule 1, the explanatory memorandum states that the measures need to generally apply from the date of announcement to prevent opportunities for affected taxpayers or entities to dispose of their dwelling or assets to avoid application of the measures.⁵³

1.95 With respect to the amendments in Schedule 2, the explanatory memorandum states that 'the additional CGT discount provides a benefit to taxpayers and does not disadvantage any taxpayers'.⁵⁴

1.96 With respect to the amendments in Schedule 3, the explanatory memorandum states that:

The retrospective application of this measure is consistent with the announcement of the near-new dwelling exemption certificate in the 2017-18 Budget announcement. Any adverse impact is expected to be minor, given the retrospective application was included in the Explanatory Statement that accompanied the regulations that introduced the near-new dwelling exemption certificate.⁵⁵

1.97 The committee reiterates its long-standing concerns that provisions with retrospective application (including where provisions are back-dated to the date of announcement of an initiative) challenge a basic value of the rule of law that, in general, laws should only operate prospectively.

1.98 In light of the explanation provided in the explanatory memorandum as to the retrospective application of the amendments proposed by the bill, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying the amendments in the bill on a retrospective basis.

53 Explanatory memorandum, pp. 32–3. The bill shares an explanatory memorandum with the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019.

54 Explanatory memorandum, p. 55.

55 Explanatory memorandum, p. 61.

Bills with no committee comment

1.99 The committee has no comment in relation to the following bills which were either restored to the *Notice Paper*, introduced or reintroduced into the Parliament between 14 – 24 October 2019:

- Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2019;
- Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019;
- Customs Tariff Amendment (Growing Australian Export Opportunities Across the Asia-Pacific) Bill 2019;
- Fair Work Amendment (Restoring Penalty Rates) Bill 2018 [No. 2];
- Farm Household Support Amendment (Relief Measures) Bill (No. 1) 2019;
- Official Development Assistance Multilateral Replenishment Obligations (Special Appropriation) Bill 2019;
- Productivity Commission Amendment (Addressing Inequality) Bill 2017;
- Protecting Australian Dairy Bill 2019; and
- Refugee Protection Bill 2019.

Commentary on amendments and explanatory materials

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

- Crimes Legislation Amendment (Police Powers at Airports) Bill 2019;⁵⁶
- Emergency Response Fund Bill 2019;⁵⁷
- Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures) Bill 2019;⁵⁸
- National Housing Finance and Investment Corporation Amendment Bill 2019;⁵⁹
- Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019;⁶⁰
- Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019.⁶¹

56 On 14 October 2019 the Senate agreed to two Centre Alliance amendments. On 15 October 2019 the House of Representatives agreed Senate amendment no. 2 and disagreed to Senate amendment no. 1. On the same day the Senate did not insist on its amendment no. 1 and the bill was passed.

57 On 17 October 2019 the Senate agreed to 25 Opposition amendments. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

58 On 16 October 2019 the Senate agreed to two Opposition amendments and the bill was read a third time.

59 On 14 October 2019 the Senate agreed to one Opposition amendment. On 15 October 2019 the House of Representatives agreed to the Senate amendment and the bill was passed.

60 On 16 October 2019 the Senate agreed to one Government, two Opposition and two Centre Alliance amendments and the bill was read a third time.

61 On 23 October 2019 the House of Representatives agreed to three Opposition amendments and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

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

<p>Purpose</p>	<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>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
Portfolio	Agriculture
Introduced	House of Representatives on 18 September 2019
Bill status	Before House of Representatives

Computerised decision-making¹

2.2 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's 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;
- 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.²

Minister's response³

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).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 1-4.

2.3 The minister advised:

Authorising the APVMA to implement computerised decision-making—where applied properly and with appropriate safeguards—will provide the agency with the flexibility to further streamline services, reduce costs and liberate resources. This will support efforts by the APVMA to provide enhanced services, reduce the length of time for some transactions and generally improve efficiency.

The APVMA's decisions about implementing computerised decision-making will be guided by the best practice principles developed by the Administrative Review Council, outlined in its report *Automated Assistance in Administrative Decision Making: Report to the Attorney-General* (Report No. 46, 2004), available from the Attorney-General's Department website (arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo46.aspx).

This will ensure that decision-making done by or with the assistance of computer systems is consistent with the administrative law values of lawfulness, fairness, rationality, transparency and efficiency. Relevantly, these best practice principles include (but are not limited to) the following in relation to expert systems (automated systems that make or support decisions):

- expert systems that make a decision—as opposed to helping a decision maker make a decision—would generally be suitable only for decisions involving non-discretionary elements (principle 1)
- expert systems should not automate the exercise of discretion (principle 2)
- if expert systems are used as an administrative tool to assist in exercising discretion, they should not fetter the decision maker (principle 3)
- the construction of an expert system, and the decisions made by or with the assistance of expert systems, must comply with administrative law standards (principle 7)
- expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy (principle 10).

A key issue guiding the APVMA's implementation will be the distinction between administrative decisions for which the decision maker is required to exercise discretion and those for which no discretion is exercisable once the facts are established. Full automation of the decision-making process is likely to be considered appropriate in the latter case. For example,

3 The minister responded to the committee's comments in a letter dated 30 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

computerised decision-making might be used for decisions involving completeness checks of applications.

Decisions that require interpretation or evaluation of evidence—such as where fact finding or weighing evidence is required—would not be made by automated systems. Complex decisions such as these will continue to be determined by a human decision maker. For example, decisions that require assessment of technical applications to issue permits, as per the scenario raised by the committee, would not be made by a computer. Such decisions require a decision-maker to take account of a broad and complex range of information and to ensure that all relevant matters are considered, in order to form a particular state of mind as the basis for exercising their judgement.

Review mechanisms provide safeguards to ensure that any automated decision is correct or preferable. For example, the APVMA will be able to substitute a decision for a decision made by a computer program if the APVMA is satisfied that the decision made by the computer program is incorrect. This ensures that if a computer program is not operating correctly, or has produced a decision that the APVMA considers is wrong, the action can be substituted by the APVMA without the need for formal administrative review.

Additionally, the items 37-43 of the Bill have the effect that a decision made by a computer program may be subject to reconsideration (review) by the APVMA and external merits review by the Administrative Appeals Tribunal. These review mechanisms are available for any computerised decision (or a decision by the APVMA in substitution of a computerised decision) and are the same as those available if the decision were made by an APVMA staff member. Judicial review is also available under the *Administrative Decisions (Judicial Review) Act 1977*.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that authorising the APVMA to implement computerised decision-making—where applied properly and with appropriate safeguards—will provide the agency with the flexibility to further streamline services, reduce costs and liberate resources.

2.5 The committee also notes the minister's advice that decisions that require interpretation or evaluation of evidence—such as where fact finding or weighing evidence is required—would not be made by automated systems and that these kinds of complex decisions will continue to be determined by a human decision maker.

2.6 The committee further notes the minister's advice that a key issue guiding the APVMA's implementation of computerised decision-making will be the distinction between administrative decisions for which the decision maker is required to exercise discretion and those for which no discretion is exercisable once

the facts are established and that there will be appropriate review mechanisms in place to ensure that any automated decision is correct or preferable.

2.7 The committee reiterates 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.

2.8 While noting the minister's advice that there will be appropriate mechanisms in place to ensure that only appropriate decisions will be made by computers, the committee notes that there is no limitation on the types of decisions that will be subject to computerised decision-making on the face of the primary legislation. As a result, from a scrutiny perspective, the committee considers that it may be appropriate for the bill to be amended to:

- limit the types of decisions that can be made by computers thereby enabling the committee and others to evaluate the appropriateness of computerised decision-making by reference to the best practice principles identified in the Administrative Review Council report, *Automated Assistance in Administrative Decision Making*; and/or
- provide that the APVMA must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.

2.9 In light of the committee's scrutiny concerns, the committee requests the minister's further advice as to whether the minister proposes to bring forward amendments to the bill to:

- **limit the types of decisions that can be made by computers; and/or**
- **provide that the APVMA must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.**

2.10 The committee also requests that the key information provided by the minister 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*).

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
Bill status	Before House of Representatives

Trespass on personal rights and liberties

Broad discretionary powers⁴

2.11 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's more detailed advice 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.

2.12 The committee also requested 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.

2.13 The committee considered 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 sought the ministers advice in this regard.⁵

Minister's response⁶

2.14 The minister advised:

4 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).

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

6 The minister responded to the committee's comments in a letter received 8 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

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.

The essential purpose of the Bill is to replace the current operation of law provisions for citizenship loss with a decision-making model. This is consistent with the recommendation of the Independent National Security Legislation Monitor (INSLM) in his recent report on the review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the *Australian Citizenship Act 2007* (the INSLM Report).

Under the Ministerial decision-making model contained in the Bill, the Minister must consider a number of matters when making a determination to cease a person's citizenship. This includes being satisfied that the person's conduct demonstrates a repudiation of allegiance to Australia.

A requirement based on the decision-maker's satisfaction is entirely consistent with a decision-making model. The satisfaction requirement is consistent with current section 35A(1)(d) of the *Australian Citizenship Act 2007* and echoes the requirements in current section 34, that the Minister be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen and in relation to whether a person is a dual citizen or not.

In addition, the Minister's satisfaction that a person's conduct demonstrates a repudiation of their allegiance to Australia must be reasonable. The High Court has said 'satisfaction' is a state of mind, which must be formed reasonably and on a correct understanding of the law.

A decision-making model based on Ministerial satisfaction is also consistent with recommendations made in the INSLM Report.

Under existing decision-making models, relevant information is provided to the Minister via a Ministerial Submission from the Department of Home Affairs. The Submission provides extensive and detailed information relevant to the case drawn from a range of other departments and agencies.

The Bill also contains several safeguards so that, following a cessation determination, an affected person or their delegate can challenge the grounds of the Minister's satisfaction.

- Firstly, once notice of cessation is provided, the person may apply to the Minister for a revocation of the determination (section 36H). The Minister must review an application and must revoke the determination if satisfied the person did not engage in the conduct to which the determination relates, or that the person was not a national or citizen of another country at the time the determination

was made. The Minister must observe the rules of natural justice in this process.

- Secondly, the Minister may, on the Minister's own initiative, revoke a determination if satisfied this is in the public interest (section 36J).
- Thirdly, the Minister's determination is automatically overturned and the person's citizenship taken never to have ceased if a court finds that the person did not engage in the conduct to which the determination relates (section 36K).
- Finally, all decisions of the Minister, whether a determination to cease citizenship or a decision not to revoke a determination, are also subject to judicial review.

In addition, as an elected official, the Minister can be held accountable to Parliament in exercising the powers conferred upon him or her by this Bill.

The Committee noted at paragraph 1.12 that "what constitutes 'repudiation' of a person's citizenship is not precisely defined beyond the conduct itself". When the terrorism-related citizenship cessation provisions were enacted through the *Allegiance to Australia Act (2015)*, the Parliament recognised that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia. This declaration of Parliament's intention is repeated in the Bill in proposed s36A. As such, what constitutes repudiation of allegiance to Australia is behaviour that all Australians would view as repugnant and in opposition to the shared values of the Australian community. As an elected representative and member of the Australian Parliament, the Minister for Home Affairs is well-placed to identify such conduct.

Noting the established and tested processes of a decision-making model based on Ministerial satisfaction, and the number of safeguards built into the proposed legislation, a model based on the Ministerial subjective satisfaction is both necessary and appropriate.

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.

As noted above, under the Ministerial decision-making model in the Bill, the Minister may cease a person's citizenship if satisfied of a number of key matters. These include that the person engaged in specified terrorism-related conduct, that the conduct demonstrates a repudiation of allegiance to Australia, that it would be contrary to the public interest for the person to remain an Australian citizen, and that in making a cessation determination the person would not become a person who is not a

national or citizen of any country. The answer above (question 1.16) outlines why a decision based on Ministerial satisfaction rather than jurisdictional fact is both necessary and appropriate.

The Bill also contains multiple safeguards to guard against or rectify an erroneous determination.

- Firstly, once notice of cessation is provided, the person may apply to the Minister for a revocation of the determination (section 36H). The Minister must review an application and must revoke the determination if satisfied that the person did not engage in the conduct to which the determination relates, or was not a national or citizen of any other country at the time the decision was made, and may revoke if revocation would be in the public interest. The Minister must observe the rules of natural justice in relation to this process.
- Secondly, the Minister may, on the Minister's own initiative, revoke a determination if satisfied this is in the public interest (section 36J).
- Thirdly, the Minister's determination is automatically overturned and the person's citizenship taken never to have ceased in a number of circumstances (section 36K). This includes:
 - if a court finds that the person did not engage in the conduct to which the determination relates;
 - if a court finds that the person was not a national or citizen of any other country at the time the decision was made;
 - if the court conviction to which a determination under section 36D relates is reduced below the requisite three years; or
 - if a declaration under section 36C (declared terrorist organisation) is disallowed by either House of the Parliament.
- Finally, all decisions of the Minister, whether a determination to cease citizenship or a decision not to revoke a determination, are subject to judicial review generally.

In addition, as an elected official, the Minister can be held accountable to Parliament in exercising the powers conferred upon him or her by this Bill.

Noting the reasons outlined above (question 1.16) regarding the preference for Ministerial satisfaction and the number of safeguards built into the legislation, a model based on the Ministerial subjective satisfaction of the key matters is both necessary and appropriate.

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.

The Minister agrees that paragraph 40 of the Explanatory Memorandum could be amended to note that paragraphs 36B(1)(a)-(c) outline the

matters the Minister must, not may, be satisfied of when determining to cease a person's Australian citizenship.

Committee comment

2.15 The committee thanks the minister for this response. The committee notes the minister's advice that providing the minister with the power to cease a person's citizenship by reference to the minister's subjective satisfaction of key matters is consistent with current section 35A(1)(d) of the *Australian Citizenship Act 2007* and echoes the requirements in current section 34, that the minister be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen and in relation to whether a person is a dual citizen or not.

2.16 The committee further notes the minister's advice that the established and tested processes of a decision-making model based on ministerial satisfaction, and the number of safeguards built into the proposed legislation, means that a model based on the ministerial subjective satisfaction is both necessary and appropriate.

2.17 While the committee notes this advice, the committee reiterates that providing for a person's citizenship to cease by reference to the minister's subjective satisfaction of key matters is likely to undermine the effectiveness of any judicial review of a citizenship cessation determination. While a person will be entitled to seek judicial review of a determination made by the minister, 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 Further, while it is correct to say that the minister's 'satisfaction' must be formed reasonably on a correct understanding of the law, it is also the case that the test for invalidating such a decision on the basis of its legal unreasonableness is 'necessarily stringent' and 'extremely confined', the assumption being that courts will not lightly interfere with the exercise of statutory powers on this ground.⁸

2.18 Additionally, in a judicial review application, a court would not consider whether or not the alleged conduct had, as a matter of fact, occurred. The committee therefore remains of the view that the bill 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.

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

8 See, for example, *Minister for Immigration and Border Protection v SXVFW* [2018] HCA 30, [12], [52], [135].

2.19 The committee also reiterates its scrutiny concerns that the practical effect of proposed subsections 36B(5) and (6) 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. From a scrutiny perspective, the committee remains of the view 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. The committee does not consider that the minister's response has adequately addressed these scrutiny concerns.

2.20 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with a broad discretionary power to cease a person's citizenship under proposed sections 36B and 36D by reference to the minister's subjective satisfaction of key matters, including that they have repudiated their allegiance to Australia.

2.21 In relation to the committee's question about the text of the explanatory memorandum, the committee welcomes the minister's advice that the EM could be amended to clarify that paragraphs 36B(1)(a)–(c) outline the matters the minister must, rather than may, be satisfied of when determining to cease a person's Australian citizenship. Noting the importance of explanatory materials as a point of access to understanding the law, the committee looks forward to a revised EM being tabled incorporating this clarification as soon as it is practicable to do so.

Trespass on personal rights and liberties⁹

2.22 In [Scrutiny Digest 7 of 2019](#) the committee requested 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.¹⁰

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).

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

Minister's response

2.23 The minister advised:

The justification for moving to a decision-making model based on the decision-maker being satisfied of certain matters has been explained above (question 1.16).

The Minister's power to make a cessation determination is dependent on the Minister being satisfied, among other things, that the person would not become a person who is not a national or citizen of any country. In forming this satisfaction, the Minister will be required to turn his or her mind to the issue, using the materials available to him or her at the time. This formulation is consistent with the provisions of the existing section 34(3)(b) which provides for the revocation of citizenship for serious offences and has been used regularly. It is also consistent with the citizenship loss provisions in the *British Nationality Act 1981*. As such, there are well-established practices and processes in this regard.

In addition, as outlined above, a decision based on satisfaction ensures demonstration of the Minister's state of mind and active engagement with the material. Further, as noted by the INSLM on page 59 of his report on the existing loss provisions, "conditioning the power on the fact that a person is a dual citizen ... may make it very uncertain whether the power is even engaged".

The Bill also contains multiple safeguards to protect from or rectify determinations that result in an individual becoming a person that is not a national or citizen of any country.

- Firstly, once notice of cessation is provided, they may apply to the Minister for a revocation of the determination (section 36H). The Minister must review an application and must revoke the determination if satisfied that the person was not a national or citizen of any other country at the time the decision was made. The Minister must observe the rules of natural justice in this process.
- Secondly, the Minister may, on the Minister's own initiative, revoke a determination if satisfied this is in the public interest (section 36J).
- Thirdly, the Minister's determination is automatically overturned and the person's citizenship taken never to have ceased if a court finds that the person was not a national or citizen of any other country at the time the decision was made (section 36K).
- Finally, all decisions of the Minister, whether a determination to cease citizenship or a decision not to revoke a determination, are subject to judicial review generally.

In addition, as an elected official, the Minister can be held accountable to Parliament in exercising the powers conferred upon him or her by this Bill.

Noting the reasons outlined above (question 1.16), a model based on the Ministerial subjective satisfaction of a person's dual citizenship is both necessary and appropriate. The Department has extensive experience and well-developed processes for implementing such legislation. Noting the number of safeguards and avenues for appeal built into the legislation, the Bill sufficiently protects a person's rights and liberties, and upholds Australia's international obligations.

Committee comment

2.24 The committee thanks the minister for this response. The committee notes the minister's advice that the formulation regarding the minister being satisfied that a person would not become a person who is not a citizen or national of another country is consistent with existing paragraph 34(3)(b) which provides for the revocation of citizenship for serious offences and has been used regularly. The committee further notes the minister's advice that a decision based on satisfaction ensures demonstration of the minister's state of mind and active engagement with the material and that there are a number of legislative safeguards in the bill.

2.25 While noting this advice, the committee reiterates that the 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).

2.26 The committee also reiterates 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. In this respect, the committee notes that a non-citizen of Australia who does not possess a valid visa¹¹ may be detained indefinitely in immigration detention if no other country is willing to accept that person. As such, the committee continues to have scrutiny concerns that these amendments have the potential to unduly trespass on personal rights and liberties. The committee does not consider that these scrutiny concerns have been adequately addressed by the minister.

2.27 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of replacing 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

11 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*.

citizenship cessation determination if the minister is satisfied that such a determination would result in the person becoming a person who is not a national or citizen of any country.

Merits review¹²

2.28 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's advice as to why decisions under proposed sections 36B and 36D are not subject to independent merits review.¹³

Minister's response

2.29 The minister advised:

Avenues for review exist in the Bill. Many of these avenues are in addition to those provided for in the existing legislation. These avenues have been outlined in the response to question 1.17.

In addition, a person can access merits review of the Australian Security Intelligence Organisation's Qualified Security Assessment, which will inform the Minister's satisfaction that a person has engaged in relevant conduct, in the Security Appeals Division of the Administrative Appeals Tribunal.

Consistent with the approach in the *Migration Act 1958*, it is not appropriate for the Tribunal to review a decision made personally by the Minister, who is responsible to Parliament, in relation to the public interest.

Committee comment

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that there are avenues for review in the bill. The committee also notes the minister's advice that a person can access merits review of the Australian Security Intelligence Organisation's Qualified Security Assessment, which will inform the minister's satisfaction that a person has engaged in relevant conduct.

2.31 The committee further notes that the minister's advice that the approach in the bill is consistent with the approach in the *Migration Act 1958* and that it is not appropriate for the Administrative Appeals Tribunal to review a decision made personally by the Minister, who is responsible to Parliament, in relation to the public interest.

12 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).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, p. 8.

2.32 While noting the response, the committee has not generally accepted the fact that a decision maker is a minister is, of itself, a sufficient basis to conclude a decision should not be subject to independent merits review. Further, although merits review of an ASIO Qualified Security Assessment may be available, the minister's powers do not appear to be conditioned on the existence of an assessment. The committee has also outlined considerable concerns with both the avenues for review existing in the bill and the adequacy of judicial review. As such, from a scrutiny perspective, the committee does not consider that the minister's response adequately justifies why merits review is not available in relation to decisions made under proposed sections 36B and 36D.

2.33 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing independent merits review of decisions made under proposed sections 36B and 36D.

Significant matters in delegated legislation¹⁴

2.34 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's advice as to the necessity and appropriateness of leaving the declaration of terrorist organisations under proposed section 36C to delegated legislation.¹⁵

Minister's response

2.35 The minister advised:

The Bill repeals current section 35AA and repeats it unchanged into the new legislation. There are no substantive changes to the intent or substance of the section.

Under proposed section 36C, the Minister maintains the power to declare, by legislative instrument, a declared terrorist organisation, within the meaning of paragraph (b) of the definition of terrorist organisation in subsection 102.1(1) of the Criminal Code. This reflects the existing power in current subparagraph 35AA(1), which also allows the Minister to declare a declared terrorist organisation by legislative instrument. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to potential threats and emerging issues from terrorist organisations.

A declaration under proposed section 36C is a legislative instrument that is subject to the scrutiny framework set out by the *Legislation Act 2003*, including the provisions related to disallowance. In the event that either House of Parliament considered that the declaration under proposed

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

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, p. 9.

section 36C was not appropriate, it would be possible for the instrument to be disallowed. A further consequence of disallowance is that any cessation determination reliant on that declaration is automatically revoked (section 36K) and the person's citizenship taken never to have ceased.

A declaration under proposed section 36C is also subject to additional scrutiny by the Parliamentary Joint Committee on Intelligence and Security, as set out in proposed subsection 36C(4). This will allow the Committee to review the declaration and report the Committee's recommendations to each House of Parliament, within specified timeframes, as is now the case with declarations under existing s35AA.

Given the complex and dynamic nature of potential threats, and noting the oversight mechanisms available to the Parliament, the use of delegated legislation for the purpose of a declaration under proposed section 36C remains necessary and appropriate.

Committee comment

2.36 The committee thanks the minister for this response. The committee notes the minister's advice that the bill 'repeals current section 35AA and repeats it unchanged into the new legislation' and that there are no substantive changes to the intent or substance of the section. The committee also notes the minister's advice that providing for these details in delegated legislation, rather than primary legislation, gives the government the ability to respond quickly to potential threats and emerging issues from terrorist organisations.

2.37 The committee further notes the minister's advice that a declaration under proposed section 36C is a legislative instrument that is subject to the scrutiny framework set out by the *Legislation Act 2003*, including the provisions related to disallowance.

2.38 While the committee acknowledges that potential terrorist threats are complex and dynamic, it takes this opportunity to reiterate its general and long-standing scrutiny view that significant matters should be included in primary legislation.

2.39 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the declaration of terrorist organisations under proposed section 36C to delegated legislation.

Trespass on personal rights and liberties

Broad discretionary powers¹⁶

2.40 In [Scrutiny Digest 7 of 2019](#) the committee requested 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.¹⁷

Minister's response

2.41 The minister advised:

The Bill provides that section 36D applies to a person convicted of a specified terrorism offence from 29 May 2003 onwards if the period or periods of imprisonment totals at least 3 years. In practice, this lowers the existing threshold from 6 years for convictions from 12 December 2015 to present and from 10 years for convictions from 12 December 2005 to 12 December 2015.

This amendment better acknowledges the seriousness of conduct that has resulted in conviction for a terrorism offence. It recognises that citizens convicted of certain terrorism-related offences may have engaged in conduct incompatible with the shared values of the Australian community and have severed the common bond bestowed through citizenship. This, in itself, justifies the Minister being able to consider whether a person has repudiated their allegiance to Australia, and whether it is in the public interest for the person to remain an Australian citizen. However, in considering whether it would be in the public interest for the person to remain an Australian citizen, the Minister must have regard to the matters set out in s36E, including the severity of the relevant conduct and the degree of threat currently posed by the person to the Australian community.

The INSLM supported this view in his review of the current citizenship cessation. He states at page xiii of his report 'a serious terrorism offence is the paradigm case of an offence against the Australian community and one which may be fairly seen to break to common bond'.

While the Bill acknowledges that terrorism-related conduct is serious enough to warrant consideration for citizenship cessation, there are appropriate safeguards in place. This includes that the Minister:

- be satisfied that the conviction/s demonstrates the person has repudiated allegiance to Australia;

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

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 9-10.

- have regard to severity of the conduct that was the basis of the conviction(s); and
- factor in any leniency a person received in the sentence.

Committee comment

2.42 The committee thanks the minister for this response. The committee notes the minister's advice that the amendment 'better acknowledges the seriousness of conduct that has resulted in conviction for a terrorism offence' and recognises that citizens convicted of certain terrorism-related offences may have engaged in conduct incompatible with the shared values of the Australian community. The committee further notes the minister's advice that there are appropriate safeguards in place.

2.43 The committee reiterates that the loss of citizenship is a severe consequence, which may ultimately lead to a person being physically excluded from the Australian community.

2.44 The committee also reiterates that when the Parliamentary Joint Committee on Intelligence and Security (PJCIS) reported on the bill that originally introduced 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.¹⁸ 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.¹⁹

2.45 Noting the broad discretionary powers of the minister in proposed section 36D and the potential serious consequences flowing from loss of citizenship, from a

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

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

scrutiny perspective, the committee does not consider that the minister's response or the explanatory materials adequately explain why it is necessary or appropriate to reduce the relevant sentence to three years.

2.46 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness, in relation to the powers under section 36D, of reducing the relevant sentence to three years.

Procedural fairness²⁰

2.47 In [Scrutiny Digest 7 of 2019](#) the committee requested 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 proposed section 36B or 36D.

2.48 The committee considered 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 also requested the minister's advice in relation to this.

Minister's response

2.49 The minister advised:

The Bill does not remove natural justice from the citizenship cessation process. Under existing sections 33AA and 35, natural justice is not afforded to the person unless the Minister considers rescinding and exempting them from the cessation. Existing section 35A provides natural justice at the point in time when the Minister considers making a cessation determination.

The Bill provides that if the Minister gives notice of cessation to the affected person, that person may apply to the Minister to have the determination revoked (section 36H). The Minister must observe the rules of natural justice in relation to that process. As such, the Bill introduces natural justice for a person ceased under section 36B (current 33AA and 35) and alters the point in time when natural justice is afforded to a person ceased under section 36D (current 35A). The removal of the requirement to provide natural justice in advance of a determination under section 36D is offset by the provision in proposed section 36H,

20 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).

which provides the right to seek revocation of a cessation determination. Likewise, under the current provisions, while the Minister must provide natural justice if exercising the discretionary power to rescind and exempt a person from the cessation, the Bill reverses this position and provides that the Minister must consider an application under 36H.

The structure of an initial decision without natural justice, followed by a revocation process in which natural justice applies, mirrors provisions in the *Migration Act 1958*. In addition, affording natural justice after the cessation determination removes the potential for the Minister's determination being frustrated by the person taking steps to remove their second citizenship, thus nullifying the Minister's ability to consider the person for cessation of citizenship. This possibility was also recognised by the INSLM, whose recommended model also excluded natural justice at the initial stage (see page 59 of the INSLM Report).

Although natural justice is excluded from the Minister's cessation determination, it is relevant to note that an affected person has the right to access judicial review of that decision.

The Minister will consider amending the Bill so that section 36F(3) provides requires that the Minister must, not may, give additional notice in circumstances where the original notice was not received and the Minister is aware of the person's electronic address.

The Minister will also give consideration to amending the Bill so that section 36H(2)(b) provides an affected person a period greater than 30 days to make an application for revocation if notice of the cessation is provided a second time in accordance with section 36F(3).

Committee comment

2.50 The committee thanks the minister for this response. The committee notes the minister's advice that the structure of an initial decision without natural justice, followed by a revocation process in which natural justice applies, mirrors provisions in the *Migration Act 1958* and that affording natural justice after the cessation determination removes the potential for the minister's determination being frustrated by the person taking steps to remove their second citizenship, thus nullifying the minister's ability to consider the person for cessation of citizenship.

2.51 However, the committee reiterates that it does not consider that providing natural justice at the point where a person applies to have a citizenship cessation determination revoked adequately compensates for the removal of natural justice at earlier stages. This is particularly the case noting the seriousness of a citizenship cessation decision, which includes an immediate impact on the reputation of a person. In addition, the committee reiterates that there may be limitations on the effectiveness of the provision of natural justice at the application for revocation 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 remains 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 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. The committee notes that these limitations have not been addressed by the minister.

2.52 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that the minister will not be required to observe the requirements of natural justice when making a determination to cease a person's citizenship under proposed section 36B or 36D.

2.53 The committee welcomes the minister's advice that he will consider bringing forward amendments to:

- subsection 36F(3) to provide that the minister must, rather than may, give additional notice in circumstances where the original notice was not received and the minister is aware of the person's electronic address; and
- paragraph 36H(2)(b) to provide an affected person with a period greater than 30 days to make an application for revocation if notice of the cessation is provided a second time in accordance with subsection 36F(3).

2.54 The committee will monitor the passage of this bill to ascertain whether any amendments along these lines are circulated by the government, and will report in a future Scrutiny Digest its views on any such amendments.

Judicial review²¹

2.55 In [Scrutiny Digest 7 of 2019](#) the committee requested 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.

Minister's response

2.56 The minister advised:

A determination by the Minister under section 36B and 36D, or a decision by the Minister under proposed subsection 36H(3) is subject to judicial review by the Federal Court and High Court. As such, the usual grounds for

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

judicial review of administration decisions would be available. This allows the Federal Court and High Court to have adequate oversight over issues such as whether the Minister has reached his or her satisfaction reasonably by identifying the correct issues, asking the correct questions or taking into account relevant material, or whether the decision is affected by irrationality, illogicality or unreasonableness.

Paragraphs 36K(1)(a) to (c) do not limit the scope of a court's powers or the usual grounds of judicial review identified above. Rather, it sets out additional consequences if the events in paragraphs 36K(1)(a) to (c) occur, by outlining that the determination made under subsection 36B(1) and 36D(1) is taken to be revoked, without any decision or exercise of power by the Minister. If this occurs, then the person's citizenship is also taken never to have ceased.

The Bill affords appropriate mechanisms for judicial review, which allow a court to consider whether or not the powers under proposed sections 36B, 36D and 36H have been exercised lawfully.

Committee comment

2.57 The committee thanks the minister for this response. The committee notes the minister's advice that the usual grounds for judicial review will be available and that this would allow the Federal Court and High Court to have adequate oversight over issues such as whether the minister has reached his or her satisfaction reasonably by identifying the correct issues, asking the correct questions or taking into account relevant material, or whether the decision is affected by irrationality, illogicality or unreasonableness.

2.58 The committee further notes the minister's advice that paragraphs 36K(1)(a)–(c) do not limit the scope of a court's powers or the usual grounds of judicial review and that the bill affords appropriate mechanisms for judicial review, which allow a court to consider whether or not the powers under proposed sections 36B, 36D and 36H have been exercised lawfully.

2.59 The committee notes this advice, however the committee reiterates that in circumstances where a court is asked to determine whether the minister was lawfully 'satisfied' of relevant matters the court is not required to determine whether the considerations of the minister were factually correct. The result is that in a 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 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. The committee considers that the minister's response has not adequately addressed these concerns.

2.60 The committee further reiterates that 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 or the minister's response. 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.

2.61 The committee reiterates that its 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).

2.62 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the adequacy of judicial oversight of the factual determinations upon which cessation of citizenship decisions (made under sections 36B, 36D and 36H) are to be based.

Retrospective application²²

2.63 In [Scrutiny Digest 7 of 2019](#) 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.

Minister's response

2.64 The minister advised:

The Bill proposes that section 36B(5)(a)-(h) and 36D apply from 29 May 2003 as this was the date the offences referenced in 36D were fully enacted in the *Criminal Code Amendment (Terrorism) Act 2003*. Providing for both 36B and 36D to apply in respect of conduct (s36B) or convictions (s36D) to the same date ensures legislative consistency between the two provisions. Further, there is a natural synergy to use that date as the point in time to assess conduct, as the conduct provisions are broadly based on the offences.

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

In adopting a Ministerial decision-making model, not everyone who has engaged in conduct or was subject to a terrorist-related conviction from 29 May 2003 onwards will necessarily have their citizenship ceased. Under the proposed model, the Minister must consider a range of factors including the severity of the conduct and the degree of threat currently posed by the person at the time of consideration. This requires the Minister to weigh up a number of public interest considerations in deciding whether a person's citizenship should cease. Further, once the Minister makes a cessation determination, the person's citizenship is taken to have ceased from the date of that determination.

For conduct specified in proposed paragraph 36B(5)(j) which relates to where an individual serves in the armed forces of a country at war with Australia, proposed section 36B applies to any such conduct before or after commencement of the Bill. This reflects a long standing provision dating back to the *Australian Citizenship Act 1948*, which provided that an Australian citizen who, under the law of a foreign country, is a national or citizen of that country and serves in the armed forces of a country at war with Australia shall, upon commencing so to serve, cease to be an Australian citizen.

Committee comment

2.65 The committee thanks the minister for this response. The committee notes the minister's advice that in adopting a ministerial decision-making model, not everyone who has engaged in conduct or was subject to a terrorist-related conviction from 29 May 2003 onwards will necessarily have their citizenship ceased. The committee further notes the minister's advice that under the proposed model, the minister must consider a range of factors including the severity of the conduct and the degree of threat currently posed by the person.

2.66 The committee notes this advice; however, the committee reiterates that it is a fundamental principle of the rule of law that the existence of an offence and penalty be established prospectively. From a scrutiny perspective, the committee does not consider that either the minister's response or the explanatory memorandum provide an adequate justification for the retrospective application of a provision of this nature.

2.67 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively applying the power to remove citizenship based on conduct engaged in, or convictions made, up to 16 years ago.

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
Bill status	Before the Senate

Significant matters in delegated legislation²³

2.68 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's 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.²⁴

Minister's response²⁵

2.69 The minister advised:

As outlined in the Explanatory Memorandum, the cash payment limit offences apply to a very wide range of transactions and it was considered important to provide flexibility to ensure that new kinds of transactions or business practices are not inappropriately affected by the cash payment limit.

As the Committee notes, such flexibility could in theory be provided by setting out the known exceptions (defences) in the primary law and providing a power to specify further defences in the Rules.

However, while the scope of any future changes is unknown, it is expected that it would be more likely to involve expanding or limiting the scope of the current proposed defences rather than creating entirely new defences.

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

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 18-19.

25 The minister responded to the committee's comments in a letter dated 24 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

While making such adjustments to defences in the primary law, using the Rules, may be technically possible, it would be cumbersome and introduce unnecessary complexity. Given the wide scope of an economy-wide cash payment limit, it was not reasonable to potentially require that all affected entities to deal with that degree of legal uncertainty and complexity, leading to the imposition of avoidance compliance costs and red tape.

It would also give rise to concerns around system complexity and access to law, as understanding the scope of an expanded defence would require a close reading of the primary law in conjunction with the Rules, which could be challenging for some stakeholders to work out how the law deals with their particular circumstances.

Additionally, it was also considered that placing all of the defences in the Rules, rather than splitting them between the primary law and the Rules, would result in simpler legislation that would be easier to find, understand and apply. While ideally all of the defences would be set out in the primary law, it was necessary to provide flexibility to establish new defences in the Rules and it is likely that this flexibility would need to be used. Given this, the only way to ensure all defences could be found in one place, minimising compliance costs and red tape for business, was to place them all in the Rules which are subject to full Parliamentary scrutiny.

Committee comment

2.70 The committee thanks the minister for this response. The committee notes the minister's advice that including the main exemptions in the primary legislation, with the ability to add additional exemptions in the rules, would be cumbersome and introduce unnecessary complexity. The committee also notes the minister's advice that this approach would require a close reading of the primary law in conjunction with the rules, which could be challenging for some stakeholders to work out how the law deals with their particular circumstances.

2.71 The committee further notes the minister's advice that the only way to ensure all defences could be found in one place, minimising compliance costs and red tape for business, is to place all the defences in the rules which are subject to full parliamentary scrutiny.

2.72 While noting this advice, the committee considers that all of the defences could be included in the primary legislation and the legislation could be amended to expand existing defences or add additional ones as required. This would likely provide the least cumbersome and simplest approach for stakeholders as they would be able to access both the relevant offences and defences in the same piece of legislation. In addition, the committee reiterates 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. In light of this, from a scrutiny perspective, the committee does not consider that the minister's advice has adequately justified the need for leaving the kinds of transactions that will be exempt from offences to delegated legislation.

2.73 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving all of the exceptions to the offences in the bill to delegated legislation.

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

Significant penalties²⁶

2.75 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's more detailed advice as to the justification for the significant custodial penalty proposed in clause 13. In particular, the committee requested the minister's advice as to specific examples of applicable penalties for comparable Commonwealth offence provisions.

Minister's response

2.76 The minister advised:

The proposed offences relating to the cash payment limit seek to prohibit conduct that facilitates or enables other criminal behaviour. Given this, it was identified that the existing offences to which they were most closely comparable were the offences relating to dealing in the proceeds of crime in Division 400 of the Criminal Code as these offences similarly involve conduct that facilitates or enables other criminal activity.

The maximum penalties for the proceeds of crime offences vary based on the amount of assets in question and the knowledge or intention of the party. A person who deals in proceeds of crime with a value of \$10,000 or more, being reckless about the fact that the money or property is or may become the proceeds of crime is subject to a maximum penalty of 5 years imprisonment or 300 penalty units or both. A person who does the same thing but is negligent about the fact that the money or property is or may become the proceeds of crime is subject to a maximum penalty of 2 year imprisonment or 120 penalty units.

The cash payment limit mental element offences most closely resemble the proceeds of crime offence for which the mental element is recklessness. However, as the cash payment limit offences involve less direct assistance to other criminal activity, it was considered that they were less serious. Given this, the penalty for the cash payment limit offences was aligned to the maximum penalty that applies to the proceeds of crime offences for which the mental element is the lower standard negligence, where culpability is similarly less.

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

More generally, I consider that it is important that an appropriate period of imprisonment be available to the courts as a maximum penalty for entities that recklessly flout the cash payment limit. Criminal activity associated with the black economy is a serious problem for Australia. The use of large cash payment is key in facilitating activity in the black economy and a substantial deterrent is required to change existing practices and behaviours that enable this conduct.

Committee comment

2.77 The committee thanks the minister for this response. The committee notes the minister's advice that the most closely comparable offences to the proposed cash payment limit offences are the offences relating to dealing in the proceeds of crime in Division 400 of the *Criminal Code* as these offences similarly involve conduct that facilitates or enables other criminal activity.

2.78 The committee further notes the minister's advice that the proposed offences most closely resemble the proceeds of crime offence for which the mental element is recklessness. However, given that the proposed offences involve less direct assistance to other criminal activity, it was considered that they were less serious, and therefore the penalty for the proposed offences was aligned to the maximum penalty that applies to the proceeds of crime offences for which the mental element is the lower standard negligence, where culpability is similarly less.

2.79 The committee requests that the key information provided by the minister 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*).

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

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
Bill status	Before the Senate

Significant matters in delegated legislation²⁷

2.81 In [Scrutiny Digest 7 of 2019](#), in relation to the power in proposed paragraphs 66A(1)(b) and 166-5(1)(b), the committee requested 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.²⁸

Minister's response²⁹

2.82 The minister advised:

The committee expresses valid concerns about whether the Education Amendment (Tuition Protection and Other Measures) Bill 2019 ('the TP Bill') should include 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. In this instance however, it is not desirable or necessary to include such explicit guidance.

The purpose of the TP Bill is to provide a sustainable framework for the provision of tuition protection for students accessing VET Student Loans, FEE-HELP or HECS-HELP at a private education provider or TAFE. In part, this will be achieved by ensuring that there are adequate funds in the VET Student Loans Tuition Protection Fund and the HELP Tuition Protection

27 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).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 21-23.

29 The minister responded to the committee's comments in a letter dated 29 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

Fund. It is therefore implicit from the overarching purpose of the new tuition protection scheme that generally it is those providers that are of minimal risk of default and/or have the capability to protect students in the event of a default, who are likely to be exempt from the schemes. Table A providers (i.e. public universities) have been expressly excluded from this regime given they are considered very low risk, and in the unlikely event of a default, should have the capacity and capability to place students without the assistance of a Director.

Further, it is desirable to allow the delegated legislation maximum flexibility to exempt classes of providers. This is because the circumstances and classes of providers for which it may be appropriate to exempt are not certain and cannot necessarily be foreseen. Specifying this detail in the delegated legislation may avoid the need to amend the primary legislation in order to exempt a class of provider not currently contemplated for an exemption.

The reliance on the Guidelines and the Rules for the purposes of proposed subsections 49A(2) and 19-66A(3) is appropriate because it will allow administrative and technical details of the schemes to be adjusted relatively quickly (compared to the provisions of the primary legislation), in the event that changes in policy give rise to the need for changes in the administration of the schemes. The use of delegated legislation allows the Minister, with appropriate parliamentary scrutiny, to work out the application of the law as it applies to the administrative details of the schemes. For instance, it is desirable that Rules be able to be made relating to the refund, remission and waiver of tuition protection levies, in order to provide greater flexibility in responding to circumstances where this may be appropriate.

Committee comment

2.83 The committee thanks the minister for this response. In relation to proposed paragraphs 66A(1)(b) and 166-5(1)(b), the committee notes the minister's advice that it is desirable to allow the delegated legislation maximum flexibility to exempt classes of providers because the circumstances and classes of providers for which it may be appropriate to exempt are not certain and cannot necessarily be foreseen. In relation to proposed subsections 49A(2) and 19-66A(3), the committee notes the minister's advice that the use of delegated legislation allows for greater flexibility and for administrative and technical details of the scheme to be adjusted quickly.

2.84 While noting this advice, the committee reiterates its scrutiny concerns that significant matters, such as the 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. From a scrutiny perspective, the committee does not generally consider flexibility, on its own, to be sufficient justification for including significant matters (including broad exemptions) in delegation legislation.

2.85 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including significant matters, such as the core elements of a tuition protection scheme and the entities to which the scheme is to apply, in delegated legislation.

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

Broad discretionary power³⁰

2.87 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's 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.

2.88 The committee also requested 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.³¹

Minister's response

2.89 The minister advised:

The power for the Minister to determine, by non-legislative instrument, individual providers to which the tuition protection scheme in the proposed Part 5-1A of the *Higher Education Support Act 2003* (proposed Part 5-1A) applies, enables the Minister to react to changes in a dynamic sector, while retaining the discretion to consider the relevant and unique circumstances of individual providers.

Provider funding and governance structures, historical arrangements, existing and emerging compliance risks, and other characteristics vary widely across the sector, and continue to evolve. In recognition of this, the Minister can make a determination that proposed Part 5-1A does not apply to a provider based on the individual circumstances of that provider. Anticipating through legislation the factors the Minister must consider before making a determination risks restricting the Minister's ability to consider individual provider circumstances.

30 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).

31 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 23-24.

As a non-legislative instrument, a determination under proposed subsection 166-5(2) enables rapid response to provider and sector changes. This is critical as conditions or time limitations specific to individual providers made under subsections 166-5(3)(a) and (b) can be introduced, amended or revoked without delay. Non-legislative instruments give certainty to providers that the Minister's decision is final and not capable of disallowance. This ensures that providers have certainty about whether the tuition assurance obligations apply to them, which assists with financial and compliance planning. This level of certainty is particularly important for providers given that the Minister's determination has the additional consequence that the provider is not a 'leviable provider' for the purposes of the Higher Education Support (HELP Tuition Protection Levy) Bill 2019 ('HELP Levy Bill').

On the question of the appropriateness of amending the TP Bill to provide that determinations made under proposed subsection 166-5(2) are legislative instruments, the overarching purpose of the Bill is to ensure that students are adequately protected in the event of provider failure. It is essential that changes in provider circumstances can be responded to rapidly and with certainty for students, as well as for the HELP Tuition Protection Director. This purpose can be achieved by retaining the current proposed subsection 166-5(4).

On the question of the appropriateness of amending the Bill to provide guidance on how the Minister is to make determinations under proposed subsection 166-5(2), it is impractical and restrictive to anticipate the factors that the Minister may take into account when considering whether to make a determination, and therefore, it is not appropriate to amend the Bill.

Committee comment

2.90 The committee thanks the minister for this response. The committee notes the minister's advice that amending the bill to provide that determinations made under proposed subsection 166-5(2) are legislative instruments would undermine flexibility and certainty for students and that it would be impractical to amend the bill to provide guidance as to how the minister's powers to make determinations are to be exercised.

2.91 While the committee notes this advice, the committee reiterates its scrutiny concern 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 *Higher Education Support Act 2003* 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 further reiterates its concern that the use of non-legislative instruments would limit parliamentary oversight of the relevant determinations.

2.92 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole 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 powers³²

2.93 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's 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 noted that its 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.

2.94 The committee also requested 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.³³

Minister's response

2.95 The minister advised:

The committee expresses valid concerns about the delegation of administrative powers to a relatively large class of persons without specification as to the delegates' qualifications, attributes or expertise. In this instance, however, I consider it necessary and appropriate to permit the VSL Tuition Protection Director and the HELP Tuition Protection Director to be able to delegate their powers and functions to officers at the APS 6 level for the reasons articulated below. I have explained this rationale in relation to the VSL Tuition Protection Director specifically but the same rationale, albeit different provisions, applies to the HELP Tuition Protection Director.

32 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).

33 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 24-27.

Firstly, a key role of each Director is to provide support to students when their provider defaults. While reforms have been implemented, especially in the vocational and education sector, to minimise the risk of provider failure, it is inevitable that defaults will occur from time to time. Such defaults cause significant disruption and stress to students for whom support needs to be provided as soon as practicable. It is difficult to anticipate with precision the nature and volume of matters to be determined by the Directors, but suffice to say the office of the Director needs to be able to respond in a timely fashion at times of crisis and for this, needs to have within his or her powers, the ability to delegate to a broad class of persons. For example, the catastrophic failure of Careers Australia impacted over 16,000 students. The Director, under proposed section 66E of the VSL Act will be required to assess for each individual student whether there is a suitable replacement course. This will most likely require a broad level of delegation if the students are to be given the appropriate support. In circumstances such as these, I do not consider a delegation to only a senior executive level will ensure the necessary student support is delivered in a timely manner.

Secondly, the same person is undertaking the role of TPS Director, VSL Tuition Protection Director and HELP Tuition Protection Director. It is often the case that providers enrol students in all three sectors, and so it is reasonable to assume that in the event of a default, the volume of the resultant workload will be significant.

Thirdly, whilst the VSL Tuition Protection Director has a range of powers and functions, most of these are more administrative and process driven rather than being decisions of significant consequence. Notably, the critical function of the Director- having to make the legislative instrument under the VSL Student Loans (VSL Tuition Protection Levy) Bill ('the VSL Levy Bill') has not been delegated. For example:

- (a) a key function of the Director is to assess under proposed section 66E whether there is a suitable replacement course for a student, having regard to the matters listed in section 66E(2). While such a decision has important implications for an individual student, this decision is reviewable (proposed section 74), and cannot be reviewed by the same delegate, and must be reviewed by a person who occupies a position at a level not lower than that of the delegate who made the decision (proposed section 78A);
- (b) powers of the Director in proposed sections 66C and 66F to require providers to give to the Director certain information to assist with the tuition protection process;
- (c) the requirement for the Director (proposed section 66H) to notify the Secretary of the default and notify the provider of the re-credit amount and invite submissions. Critically, it is the Secretary that determines the actual re-credit amount - the role of the Director is to give the provider procedural fairness.

Fourthly, proposed subsection 114(4) ensures that any delegate when exercising powers or performing functions under the Act is required to comply with any directions of the VSL Tuition Protection Director - ensuring that the Director maintains overarching oversight of any exercise of his or her powers.

I also consider it unnecessary to specify that the delegates possess expertise particular to the delegated power or function. The powers and functions to be exercised by the Directors are general in nature and I consider it sufficient that the delegates, as officials under the Public Governance, Performance and Accountability Act 2013 ('the PGPA Act'), will understand the nature and scope of the powers being delegated. Officials under the PGPA Act are required pursuant to sections 25 to 29 to exercise their powers with due care and diligence, honestly, in good faith and for proper purpose. The TPS Director is similarly an official for the purposes of the PGPA Act (per section 54N of the Education Services for Overseas Students Act 2000 ('the ESOS Act')).

Importantly, under proposed subsection 89(1A), the powers and functions of the VSL Tuition Protection Director under the Regulatory Powers Act 2014 (as an authorised applicant, infringement officer or relevant chief executive) are only able to be delegated to an SES employee or acting SES employee. The committee queries how this aligns with the Director's ability, in subsection 114(3), to delegate any or all of the Director's powers or functions under 'this Act' (with the exclusion of paragraph 66N(l)(e)) to APS Level 6 employees or above-this is in light of section 66N, which sets out the functions of the VSL Tuition Protection Director and include 'any other function conferred by this Act or any other law of the Commonwealth' (for example, the Regulatory Powers Act 2014).

As the VSL Tuition Protection Director is conferred functions and powers by different Acts (relevantly, the VET Students Loans Act 2016 and the Regulatory Powers Act 2014), subsections 114(3) and 89(1A) separately provide for the Director's ability to delegate powers or functions conferred on him/her under those Acts.

To the extent that there might be any ambiguity as to whether subsection 114(3) might extend to the delegation of functions or powers conferred on the Director by the Regulatory Powers Act 2014 (because of section 66N). This is resolved by the operation of subsection 89(1A) itself as it relates specifically to the delegation of such powers or functions.

Committee comment

2.96 The committee thanks the minister for this response. The committee notes the minister's advice that the volume of matters to be determined by the VSL Tuition Protection Direction and HELP Tuition Protection Director is likely to be significant. The committee also notes the advice that the powers that would be delegated by the Directors are general and largely administrative, rather than legislative.

2.97 The committee further notes the minister's advice that it is not considered necessary for delegates to possess expertise particular to the delegated power or function because the delegates are officials under the PGPA Act and, as such, have sufficient knowledge of the nature and scope of the relevant powers. The committee also notes the advice that the VSL Tuition Protection Director maintains oversight of any exercise of their power by a delegate by ensuring that delegate must comply with any direction given.

2.98 While noting the minister's advice, from a scrutiny perspective, the committee remains concerned that the bill would permit the delegation of significant powers to APS 6 officers, without requiring any specific qualifications, attributes or expertise. 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 general preference is that delegates be confined to holders of nominated officers, and/or to members of the SES.

2.99 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the VSL Tuition Protection Director and the HELP Tuition Protection Director to delegate their powers and functions to officers at the APS 6 level, without legislatively requiring delegates to possess expertise appropriate to the delegated power or function.

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

Purpose	<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
Portfolio	Education
Introduced	House of Representatives on 18 September 2019
Bills status	Before House of Representatives

Significant matters in delegated legislation³⁴

2.100 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's more detailed advice as to:

³⁴ 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).

- why it is considered necessary and appropriate to leave significant elements of the provision of subsidies for in home care to delegated legislation; and
- 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.³⁵

Minister's response³⁶

2.101 The minister advised:

The primary purpose of this amendment is to enable targeted eligibility criteria for Child Care Subsidy for In Home Care to be prescribed and clarified in the Child Care Subsidy Minister's Rules 2017, and to enable an assessment of whether individuals meet that eligibility criteria to occur, prior to such individuals accessing In Home Care. These eligibility criteria 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.

Section 85BA of the Assistance Act contains a high-level criteria for Child Care Subsidy eligibility. If a family is not eligible for Child Care Subsidy then they will not meet the first requirement for eligibility for In Home Care.

Given that the primary eligibility requirement for In Home Care is contained in the Assistance Act, incorporating targeted eligibility criteria for In Home Care in the Child Care Subsidy Minister's Rules 2017, is appropriate, as it enables the other criteria to be amended in response to changes in demand for the program.

I note further, that section 85BA of the Assistance Act has other similar certain eligibility criteria prescribed in the Child Care Subsidy Minister's Rules such as:

- subparagraph 85BA(1)(c)(iii) which refers to circumstances where no one is eligible for a session of care (Part 2, Division 1, 8)
- paragraph 85BA(2)(a) allows eligibility requirements for children aged over 13 or attending secondary school to be prescribed in Minister's rules (Part 2, Division 1A)
- subsection 85CA(4) which refers to circumstances in which a child is taken to be at risk of serious abuse or neglect - child at risk of suffering harm (Part 2, Division 2)

35 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 28-30.

36 The minister responded to the committee's comments in a letter dated 6 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

- subsection 85CG(2) which refers to circumstances in which an individual is taken to be experiencing temporary financial hardship (Part 2, Division 3, 12).

Committee comment

2.102 The committee thanks the minister for this response. The committee notes the minister's advice that given that the primary eligibility requirement for in home care is contained in the *A New Tax System (Family Assistance) (Administration) Act 1999* (Assistance Act), incorporating targeted eligibility criteria for in home care in the Child Care Subsidy Minister's Rules 2017, is appropriate, as it enables the other criteria to be amended in response to changes in demand for the program.

2.103 While the committee notes this advice and it welcomes the fact that at least some eligibility requirements are set out in the primary legislation, the committee reiterates its long-standing scrutiny view that significant matters, such as the eligibility criteria 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. The committee has generally not accepted administrative flexibility, on its own, as a sufficient justification for leaving significant matters to delegated legislation. In this regard, 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. From a scrutiny perspective, it remains unclear why high level guidance regarding the eligibility criteria, the nature of which are outlined in the minister's response, cannot be included in primary legislation.

2.104 The committee 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 provision of subsidies for in home care to delegated legislation.

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

Merits review³⁷

2.106 In [Scrutiny Digest 7 of 2019](#) the committee requested the minister's 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*.³⁸

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

38 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, p. 30.

Minister's response

2.107 The minister advised:

Decisions made under subsection 202(4A), which was the equivalent provision to sections 197H and 197J in the Administration Act as it existed prior to amendments, which came into effect on 2 July 2018, were not reviewable by the AAT through operation of section 138 of the Administration Act as it existed at the time.

When amendments in the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* were being drafted, decisions under the new sections 197H and 197J were not intended to be reviewable by the AAT, that is, the existing exceptions would continue under the new Act, but these exemptions were omitted by oversight.

It is important for the Committee to note that a person affected by a decision made under sections 197H or 197J may still seek internal merits review of the decision under subsection 109A(1B) of the Administration Act. At this point, the Secretary of the Department of Education, or an authorised review officer appointed under section 109C of the Administration Act, must independently review the original decision and decide to affirm, vary or set aside the original decision based on the evidence before them.

When conducting this review, the Secretary or authorised review officer may relevantly consider whether there was a mistake of fact as to whether the relevant circumstances in sections 197H or 197J had arisen.

Committee comment

2.108 The committee thanks the minister for this response. The committee notes the minister's advice that previous exemptions from merits review were unintentionally omitted from the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*.

2.109 The committee also notes the minister's advice that a person affected by a decision made under sections 197H or 197J may still seek internal merits review of the decision under subsection 109A(1B) of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

2.110 While the committee notes this advice, the committee reiterates 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. 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. From a scrutiny perspective, the committee does not consider the existence of internal review processes to be an appropriate substitute for independent merits review.

2.111 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of removing merits review in relation to decisions made under sections 197H and 197J of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

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
Bill status	Before the Senate

Charges in delegated legislation³⁹

2.112 In *Scrutiny Digest 7 of 2019*, the committee drew its scrutiny concerns to the attention of senators, and left 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.

Minister's response⁴⁰

2.113 The minister advised:

I consider there are sufficient checks and balances and guidance provided within the respective levy Bills to ensure the core elements of the levy are appropriately determined. I explain this below for each of the three

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

40 The minister responded to the committee's comments in a letter dated 29 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2019* available at: www.apf.gov.au/senate_scrutiny_digest

components to the tuition protection levy: administrative fee, risk rated premium component and the special tuition protection component. Again, I have explained this rationale in relation to the VSL Levy Bill but the same rationale, albeit different provisions, applies to the HELP Levy Bill.

The VSL Levy Bill provides for the administrative fee to be calculated having regard to the amounts determined in a legislative instrument made by the Minister. However, the Bill specifically provides for an upper limit beyond which the administrative fee cannot exceed. This upper limit was determined in consultation with the Australian Government Actuary.

The risk rated premium component of the levy is calculated according to a detailed methodology provided for in the Bill (see proposed section 11 of the VSL Levy Bill), which was developed by the Australian Government Actuary. This methodology takes into consideration the provider's level of exposure under the relevant loan scheme in terms of total student numbers and loan amounts as well as the provider's risk of default based on certain risk factors such as volatility in student numbers, course completion rates, length of operation, by way of example.

The VSL Tuition Protection Director is responsible for determining in a legislative instrument certain amounts necessary to calculate a provider's risk rated premium. In making this instrument, the Director is required to have regard to the advice of the VSL Tuition Protection Fund Advisory Board as well as the sustainability of the VSL Tuition Protection Fund. Notably, members of the Advisory Board are required to include, amongst others, representatives from the Department of Finance, the Australian Prudential Regulatory Authority and the Australian Government Actuary (see section 55C ESOS Act). The Treasurer is also required to approve the legislative instrument before the Director makes the instrument, providing an extra measure of scrutiny to the legislative instrument.

The VSL Tuition Protection Director is similarly responsible for determining in the same legislative instrument (and so with the same checks and guidance) the percentage to multiply the providers' total loan amounts by in order to calculate the special tuition protection component. This component of the levy is intended to be imposed on providers to enable the VSL Tuition Protection Fund to grow.

Similar levy components apply under the *Education Services for Overseas Students (TPS Levy) Act 2012* with both the Minister and the TPS Director making the relevant legislative instruments. This approach towards the handling of the levy in respect to providers with international students has been operating successfully since 2012.

Consistent with other delegated legislation, the Minister and the Director will consult with the sector as part of the annual levy setting process and similarly both instruments will be subject to Parliamentary scrutiny through the disallowance process after tabling in both Houses of Parliament.

Committee comment

2.114 The committee thanks the minister for this response. The committee notes the minister's advice that the bill specifically provides for an upper limit beyond which the administrative fee cannot exceed and that this upper limit was determined in consultation with the Australian Government Actuary.

2.115 The committee also notes the minister's advice that the relevant methodology takes into consideration the provider's level of exposure under the relevant loan scheme in terms of total student numbers and loan amounts, as well as the provider's risk of default based on certain risk factors such as, for example, volatility in student numbers, course completion rates and length of operation.

2.116 The committee further notes the minister's advice that the minister and director will consult with the sector as part of the annual levy setting process and both instruments will be subject to parliamentary scrutiny through the disallowance process after tabling in both Houses of the Parliament.

2.117 The committee requests that the key information provided by the minister 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*).

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

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
Bill status	Before the Senate

Computerised decision-making⁴¹

2.119 In [Scrutiny Digest 7 of 2019](#) the committee requested 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.⁴²

Minister's response⁴³

2.120 The minister advised:

These new provisions provide the Chief Executive Medicare (CEM) with a discretionary power to authorise the use of computer programs for any purpose for which the CEM may or must take administrative action if it is deemed necessary and appropriate to do so.

Consideration will be given to what decisions are suitable for automation in line with administrative law requirements. In general, they will be decisions where particular facts are reliably established without the need for complex assessment or the need to assess information so as to form a particular position. Decisions that involve assessment of information provided by applicants in order to make a decision and making findings on whether specified statutory criteria are met or not met will not form part of the automated decision making process. Complex administrative decisions that involve consideration of technical information from many sources would require that persons that are adversely affected by the decision be accorded procedural fairness. These are not the types of decisions that are proposed to be covered by automated decision making.

The reasoning for applying proposed sections 76A and 87A broadly across both the MI Act and MPICCS Act through these amendments, rather than

41 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).

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 33-35.

43 The minister responded to the committee's comments in a letter dated 1 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

limiting it to just section 37 of the MI Act, is to ensure that the CEM is lawfully permitted to move other aspects of its decision making to an automated system in the future where suitable.

The circumstances in which a computer program will be used to take or make an administrative action will be for indemnity insurance applications and claims submitted on line for payments to eligible insurers. Services Australia is implementing on line claiming and automation of payment and claims for a range of indemnity insurance fund schemes they administer.

At this stage, the only decisions which will be suitable for computerised decision making relate to section 37 whereby the CEM has the authority to make certain (Premium Support Scheme) payments following successful submission and manual assessment of claims data. It is not intended that all decisions will be automated.

My Department, in consultation with Services Australia, will be maintaining the current practice of conducting certain administrative actions (for example, assessing claim applications and making decisions on whether to accept or reject a claim) by a person rather than just by a computer system. We are developing extensive system requirements and eligibility rules along with ongoing manual complex claims interventions where a person will be required to make decisions not just a computer program. My Department will always maintain the pursuance of making administrative decisions that are robust, lawful and comply with administrative law.

Implementation of computerised decision making is expected to deliver a number of potential benefits. Automation is expected to streamline services, significantly reduce duplication of work for insurers and Services Australia and improve security of claims data.

Committee comment

2.121 The committee thanks the minister for this response. The committee notes the minister's advice that consideration will be given to what decisions are suitable for automation in line with administrative law requirements and that in general, they will be decisions where particular facts are reliably established without the need for complex assessment or the need to assess information so as to form a particular position.

2.122 The committee also notes the minister's advice that, at this stage, the only decisions that will be suitable for computerised decision-making relate to section 37 but that the reasoning for applying proposed sections 76A and 87A broadly across both the *Medical Indemnity Act 2002* (MI Act) and *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (MPICCS Act) is to ensure that the Chief Executive Medicare (CEM) is lawfully permitted to move other aspects of its decision making to an automated system in the future where suitable.

2.123 The committee reiterates 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.

2.124 While noting the minister's advice that the use of computerised decision making will be appropriately limited, the committee notes that there is no limitation on the types of decisions that will be subject to computerised decision-making on the face of the primary legislation. As the minister has noted that computerised decision making will only be used for decisions under section 37 of the MI Act, from a scrutiny perspective, the committee considers that it would be appropriate for the bill to limit the use of computerised decision making to decisions under this section only. The relevant Acts could be further amended in the event that a broader power to allow computerised decision making was required.

2.125 Alternatively, the committee notes that it may be appropriate for the bill to be amended to:

- generally limit the types of decisions that can be made by computers thereby enabling the committee and others to evaluate the appropriateness of computerised decision-making by reference to the best practice principles identified in the Administrative Review Council report, *Automated Assistance in Administrative Decision Making*; and/or
- provide that the CEM must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.

2.126 In light of the committee's scrutiny concerns, the committee requests the minister's further advice as to whether the minister proposes to bring forward amendments to the bill to:

- **limit computerised decision making to decisions under section 37 of the *Medical Indemnity Act 2002*; and/or**
- **generally limit the types of decisions that can be made by computers; and/or**

- provide that the Chief Executive Medicare must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.

2.127 The committee also requests that the key information provided by the minister 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*).

Reversal of evidential burden of proof⁴⁴

2.128 In [Scrutiny Digest 7 of 2019](#) the committee requested 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 noted that its 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*.⁴⁵

Minister's response

2.129 The minister advised:

Subsection 77(2) of the MI Act and subsection 88(2) of the MPICCS 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.

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. As pointed out by the Committee, the new provisions would create offence specific defences to the offences in subsections 77(2) and 88(2). The defences reverse the evidential burden of proof.

44 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).

45 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 35-36.

The Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (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.⁴⁶

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).

The defendant bears the evidential burden with respect to the exceptions under subsection 77(2) of the MI Act and subsection 88(2) of the MPICCS Act. Whether someone has acted in the performance of his or her duties, or in the exercise of his or her powers or functions, under the medical indemnity legislation and relevant legislation, or had acquired the information in the performance of those duties, 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.

The Guide notes that an evidential burden does not completely displace the prosecutor's burden (it only defers that burden).⁴⁷ The defendant must point to evidence establishing a reasonable possibility that these defences are made out. If this is done, the prosecution must refute the defence beyond reasonable doubt.

Committee comment

2.130 The committee thanks the minister for this response. The committee notes the minister's advice that whether someone has acted in the performance of his or her duties, or in the exercise of his or her powers or functions, under the medical indemnity legislation and other relevant legislation, or had acquired the information in the performance of those duties, is something peculiarly within the knowledge of that person.

2.131 The committee further notes the minister's advice that 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.

46 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 51.

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

2.132 The committee requests that the key information provided by the minister 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*).

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

Broad delegation of legislative power⁴⁸

2.134 In [Scrutiny Digest 7 of 2019](#) the committee requested 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.⁴⁹

Minister's response

2.135 The minister advised:

The proposed provisions that the Committee has drawn my attention to, are consistent with provisions across the indemnity schemes where the Commonwealth is making payments to compensate administrative costs incurred by medical indemnity insurers in respect of incidents notified to insurers that could give rise to claims in relation to which certain indemnities could be payable.

These new provisions would only allow for modification, rather than actual amendment, of the primary legislation. In addition, the proposed provisions include limitations on what can be modified (see, for example, subsection 34ZZZD(3) to the Bill, which provides that paragraph 34ZZD(2)(b) does not allow the regulations to modify a provision that creates an offence, or that imposes an obligation which, if contravened, constitutes an offence).

The modification is only in relation to particular subject matter, that is, certain liabilities associated with costs that have been paid by the Commonwealth for the benefit of the Commonwealth. Any regulations

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

49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, p. 37.

that would need to be made will be subject to Parliamentary scrutiny and disallowance.

The reliance on regulations to modify the application of the MI Act in relation to certain liabilities associated with costs which have been paid, is based on the principle that delegated legislation is necessary and justified. This is because it allows administrative and technical detail to be adjusted relatively quickly (compared to provisions of the primary legislation), in the event that shifting policy requirements give rise to the need to change policy at an administrative level. The use of delegated legislation such as legislative instruments allows policy departments, with appropriate parliamentary scrutiny, to work out the application of the law in greater detail within, but not exceeding, the principles that the Parliament has laid down by statute in the primary legislation.

As highlighted by the Administration Law Branch of the Attorney General's Department, Henry VIII clauses are usually only appropriate if they are intended to allow modification to keep the legislation up to date by adopting changes made in other legislation or in international agreements.

Consultation

Extensive consultation formed part of the development of these reforms. My Department consulted with Services Australia, the Department of the Prime Minister and Cabinet, the Department of Treasury and the Department of Finance. Views and evidence from stakeholders, including the Australian Medical Association, the Insurance Council of Australia, other peak bodies and medical indemnity insurers were considered as part of the policy development process. My Department will continue to work collaboratively with other Government Departments and other affected stakeholders on the specific content of the legislative instruments.

Committee comment

2.136 The committee thanks the minister for this response. The committee notes the minister's advice that the proposed provisions are consistent with provisions across the indemnity schemes where the Commonwealth is making payments to compensate administrative costs incurred by medical indemnity insurers. The committee further notes the minister's advice that the modification power is only in relation to a particular subject matter, that is, certain liabilities associated with costs that have been paid by the Commonwealth for the benefit of the Commonwealth.

2.137 While the committee notes this advice, the committee reiterates that it has significant scrutiny concerns regarding provisions enabling delegated legislation to modify the operation of primary legislation, noting these clauses are akin to Henry VIII clauses (which authorise delegated legislation to make substantive amendments to primary legislation). From a scrutiny perspective, the committee is concerned that these clauses impact parliamentary oversight and may subvert the appropriate division of powers between Parliament and the executive.

2.138 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing regulations to modify and exempt matters from the primary legislation.

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

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
Bill status	Before the Senate

Reversal of evidential burden of proof⁵⁰

2.140 In [Scrutiny Digest 7 of 2019](#) 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 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*.⁵¹

Minister's response⁵²

2.141 The minister advised:

The reversal of evidential burden is applied to section 26FEGA Using fuel oil – exceptions through a Note amended to the end of subsection 26FEGA(7), stating that a defendant bears an evidential burden in relation to the section. The same reversal of evidential burden is applied to section 26FEHA Australian ship in emission control area – exceptions through a Note at the end of subsection 26FEHA(5).

The principle to consider an offence-specific defence that places the burden of proof on the defendant is that it should only be included when “it is peculiarly within the knowledge of the defendant; and, the defence

50 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).

51 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 39-40.

52 The minister responded to the committee's comments in a letter dated 31 October 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter”.

Section 13.3(3) of the *Criminal Code 1995* allows for an evidential burden to be placed on a defendant who wishes to rely on an exception. However, section 13.3(4) allows for the discharge of this burden if evidence is sufficiently adduced by the prosecution or the Court.

In order to access the exceptions to the offences provided for in subsections 26FEG and 26FEH, the defendant bears the evidential burden in sections 26FEGA and 26FEHA to establish the matter for the following defences:

- Subsections 26FEGA(1) and (2) *Exception for ships with Annex VI equivalent*s provide exceptions to the ordinary and strict liability offence.

A defendant, including the master and owner of a ship, would peculiarly have the ability to adduce or point to evidence that the ship has an Annex VI equivalent (such as exhaust gas cleaning systems) approved for use on board the ship and operating in accordance with the regulations. Defences would include compliance documentation issued by the country of administration and operational logs kept onboard the ship, as provided for by the IMO guidelines and regulations. The prosecution does not have ready access to this information outside its provision by the master of the ship, in particular for foreign-flagged ships, in where the government of the country where the ship is registered provides the approval. It would be more costly for the prosecution to disprove operation of an approved Annex VI equivalent than for a defendant to provide the evidence. The Australian regulator does not travel on the ship. However, where the Australian regulator has approved operation of an Annex VI equivalent, the prosecution or the court can discharge some or all of the evidential burden.

- Subsections 26FEGA(3) – (6) *Exceptions for emergencies* provide exceptions for the strict liability offence only.

The master and owner of the ship would peculiarly be able to adduce or point to evidence that the ship was operating to secure the safety of the ship, saving a life at sea or where unintentional damage has occurred. This information is carried on board the vessel, through routine operational record keeping. The Australian regulator is not aboard the ship during these occurrences and would have no knowledge of the event and actions taken until the ship arrives at an Australian port and this information is then provided to the regulator for scrutiny. It would be significantly more costly for the prosecution to disprove a claimed action than for the defendant to provide the onboard evidence.

- Subsections 26FEHA(1) – (4) Exceptions for emergencies provide exceptions to the strict liability offence only for an Australian ship within an emission control area.
- Subsection 26FEGA(7) Exception for the unavailability of fuel oil with a sulphur content of not more than the prescribed limit provides an exception to the ordinary and strict liability offence.

The defendant could peculiarly adduce or point to evidence that compliant fuel was not available at the last port of call through the required IMO notification and reporting mechanisms. The IMO 2019 Guidelines for consistent implementation of the 0.50% sulphur limit under MARPOL Annex VI include a standard format for a fuel non-availability report. Under the IMO Guidelines, it is an obligation on the master of the ship to obtain a [certified] report for presentation at the next port of call in circumstances where the ship was not able to obtain compliant fuel. It would be significantly more costly for the prosecution to disprove the non-availability claim than for the defendant to provide a completed non availability report, which is internationally accepted evidence. However, where the regulator has received prior notification of fuel non-availability at the preceding port, the prosecution or the Court can discharge the evidential burden.

- Subsection 26FEHA(5) Unavailability of fuel oil with a sulphur content of not more than the prescribed limit provides an exception to the ordinary and strict liability offence for an Australian ship within an emission control area.

This subsection is similar in operation to that in section 26FEGA for unavailability of fuel oil outside the emission control area.

It should also be noted that these reversals of evidential burden are consistent with similar exception provisions contained within Part IIID – Prevention of air pollution of the Protection of the Sea (Prevention of Pollution of Ships) Act 1983, specifically subsections 26FEG(5), (6) and 26FEH(6), (9).

Committee comment

2.142 The committee thanks the minister for this response. The committee notes the minister's advice that, in relation to proposed subsections 26FEGA(1) and (2), a defendant, including the master and owner of a ship, would peculiarly have the ability to adduce or point to evidence that the ship has an Annex VI equivalent (such as exhaust gas cleaning systems) approved for use on board the ship and operating in accordance with the regulations. The committee also notes the minister's advice that the prosecution does not have ready access to this information outside its provision by the master of the ship, in particular for foreign flagged ships, where the government of the country where the ship is registered provides the approval.

2.143 In relation to proposed subsections 26FEGA(3) – (6), the committee notes the minister's advice that the master and owner of the ship would peculiarly be able to adduce or point to evidence that the ship was operating to secure the safety of the ship, saving a life at sea or where unintentional damage has occurred. The committee also notes the minister's advice that it would be significantly more costly for the prosecution to disprove a claimed action than for the defendant to provide the onboard evidence.

2.144 In relation to proposed subsection 26FEGA(7), the committee notes the minister's advice that the defendant could peculiarly adduce or point to evidence that compliant fuel was not available at the last port of call through the required IMO notification and reporting mechanisms. The committee also notes the minister's advice that it would be significantly more costly for the prosecution to disprove the non-availability claim than for the defendant to provide a completed non-availability report, which is internationally accepted evidence.

2.145 The committee notes that in many of the circumstances described by the minister, there would be records that would be available to the prosecution. As a result, some of the information does not appear to be peculiarly within the knowledge of the defendant. The committee therefore considers that, on the information provided, the proposed presumptions do not appear to accord with the principles set out in the *Guide to Framing Commonwealth Offences*⁵³ and may therefore not be appropriate for inclusion in an offence-specific defence.

2.146 As the minister's response does not adequately address the committee's concerns, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to proposed sections 26FEGA and 26FEHA of the bill.

Reversal of legal burden of proof⁵⁴

2.147 In [Scrutiny Digest 7 of 2019](#) the committee requested 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.⁵⁵

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

54 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).

55 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2019*, pp. 40-41.

Minister's response

2.148 The minister advised:

Subsections 26FEG(4) - (6) and 26FEH(6) provide "presumption[s] that the matter exists unless the contrary is proved" and notes are included outlining that the defendant bears a legal burden of proof as allowed for in Section 13.4(c) of the Criminal Code 1995).

- Regulation 2, Annex VI, MARPOL defines fuel oil as fuel "intended for combustion purposes for propulsion or operation on board a ship".

Subsection 26FEG(4) provides a presumption for sections 26FEG and 26FEGA that fuel oil carried on board a ship is carried for use as fuel. A defendant to the strict and ordinary offences (26FEG) and to exceptions to these offences (26FEGA) would be able to demonstrate that the fuel is not cargo or ballast.

A defendant can establish whether or not the fuel oil is carried in bunker tanks connected to the engine and is being used for combustion purposes for the propulsion or operation on board a ship. For example, a defendant would be uniquely able to prove that there was a permanent disconnect or barrier to the connection between the bunker fuel oil storage tanks and engine. It would be significantly more costly for the prosecution to disprove that this is the case than for a defendant to establish proof.

- Subsection 26FEH(6) provides the same presumption for sections 26FEH and 26FEHA for ships operating within an emission control area.
- Subsections 26FEG(5) and 26FEG(6) provide presumptions for subsections 26FEG(1) and (2) for the ordinary and strict liability offences, which presume the conduct of the offence was located within the Australian maritime jurisdiction as specified in subsection 26FEG(1)(d).

A defendant to an offence would have peculiar knowledge as to the location of the ship at the time of the offence. This is information carried on board the vessel through routine operational record keeping. The Australian regulator is not aboard the ship during these occurrences and would have no knowledge of the event and actions taken until the ship arrives at an Australian port and the records are provided for scrutiny. It would be significantly more costly for the prosecution to disprove that this is the case than for defendant to establish proof.

It should also be noted that a reversal of legal burden of proof are consistent with similar presumptions for fuel oil currently contained in the Protection of the Sea (Prevention of Pollution of Ships) Act 1983 in subsections 26FEG(4) and 26FEN(3).

Committee comment

2.149 The committee thanks the minister for this response. The committee notes the minister's advice that, in relation to the presumptions in proposed subsections 26FEG(4) and 26FEH(6), a defendant can establish whether or not the fuel oil is carried in bunker tanks connected to the engine and is being used for combustion purposes for the propulsion or operation on board a ship. The committee further notes the minister's advice that it would be significantly more costly for the prosecution to disprove.

2.150 In relation to proposed subsections 26FEG(5) and (6), the committee notes the minister's advice that a defendant to an offence would have peculiar knowledge as to the location of the ship and the time of the offence. The committee further notes the minister's advice that it would be significantly more costly for the prosecution to disprove that this is the case than for defendant to establish proof.

2.151 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 reiterates its expectation that any provision that places a legal burden of proof on the defendant should be fully justified, including why it is necessary to reverse the legal, rather than evidential, burden of proof.

2.152 The committee notes that the minister's response does not contain any information as to why the legal burden, rather than the evidential burden, has been reversed in relation to the provisions of the bill. In addition, it is unclear on the information provided to the committee that the presumptions in proposed subsections 26FEG(5) and (6) are peculiarly within the knowledge of the defendant. In this respect, the committee notes the minister's advice that the Australian regulator is not aboard the ship and would have no knowledge of the event and actions taken until the ship arrives at an Australian port and the records are provided for scrutiny. If the location of the ship is recorded and the records are provided to the regulator, it does not appear that the information is therefore peculiarly within the knowledge of the defendant. The committee therefore considers that the proposed presumption does not appear to accord with the principles set out in the *Guide to Framing Commonwealth Offences*.⁵⁶

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

2.153 As the minister's response does not adequately address the committee's concerns, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the legal burden of proof by including presumptions in items 20 and 27 of Schedule 1 to the bill.

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:

- Official Development Assistance Multilateral Replenishment Obligations (Special Appropriation) Bill 2019 — clause 6.

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](#).

