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Standing 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
Initial scrutiny

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

Animal Health Australia and Plant Health Australia Funding Legislation Amendment Bill 2021

Purpose	This bill seeks to amend the *Australian Animal Health Council (Livestock Industries) Funding Act 1996* and the *Plant Health Australia (Plant Industries) Funding Act 2002* to streamline administrative processes by removing redundant provisions, to add provisions that create efficiencies and facilitate future levy arrangements, and to increase consistency between the Acts regarding the spending of emergency response levies.
Portfolio	Agriculture and Northern Australia
Introduced	House of Representatives on 25 November 2021

Instruments not subject to parliamentary disallowance[1]

1.2 Items 9 and 10 of Schedule 1 to the bill seek to amend the definition of relevant Plant Industry Member within the *Plant Health Australia (Plant Industries) Funding Act 2002* (the Act). Currently, section 3 of the Act defines relevant Plant Industry Member as meaning, for a plant product, a designated body for the plant product under either clause 13 of Schedule 27 to the *Primary Industries (Excise) Levies Act 1999* or clause 12 of Schedule 14 to the *Primary Industries (Customs) Charges Act 1999*. This has the effect of providing that a designated body is declared by the minister by legislative instrument. By contrast, the new definition of relevant Plant Industry Member inserted by the bill provides that a relevant Plant Industry Member is determined by the Secretary, or their delegate, by notifiable instrument.[2]

1.3 Once declared to be a relevant Plant Industry Member a body is taken to represent a particular plant product on which either a Plant Health Australia levy (PHA levy) or an Emergency Plant Pest Response levy (EPPR levy) may be imposed. A body

1 Schedule 1, items 9 and 10. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

2 Schedule 1, item 10, proposed subsection 3A(2).

may be the relevant Plant Industry Member for more than one plant product.[3] In addition, multiple bodies may be declared as relevant Plant Industry Members for a single product.[4]

1.4 The committee notes that notifiable instruments are not be subject to the tabling, disallowance or sunsetting requirements that typically apply to legislative instruments. As such there is no parliamentary scrutiny of the determinations issued under proposed subsection 3A(2). Noting this, the committee expects the explanatory materials to include a justification for why the determinations issued under proposed subsection 3A(2) are not legislative in character and should not be subject to parliamentary scrutiny. In this instance, the explanatory memorandum states:

> The making of these determinations by notifiable instrument is appropriate because this would be an administrative process to confirm that a body represents the industry for that EPPR plant product in the body's role as a Plant Industry Member. This would also allow those affected by these determinations to access an authoritative form of the instrument on the Federal Register of Legislation. It would be appropriate for the Secretary to make such a determination, having regard to their role and responsibilities. This would allow appropriate oversight of the process to determine a body, while also enhancing administrative efficiency, when compared to the existing process.[5]

1.5 In addition, the statement of compatibility notes:

> Declaring PHA industry members as designated bodies for the purposes of the PHA Act currently necessitates amendments to the designated bodies declarations under the Levies Act and the Charges Act. The Bill would simplify the process of identifying the relevant Plant Industry Member for a given plant product by providing a discretionary power for the Secretary of the Department to determine, by notifiable instrument, one or more bodies in relation to one or more specified EPPR plant products.[6]

1.6 While acknowledging these explanations, the committee has not generally accepted a desire for administrative flexibility to be a sufficient justification for providing that an instrument will not be a legislative instrument. In this instance the committee notes that determining that a body is a relevant Plant Industry Member has implications for the amount of funds payable to Plant Health Australia and the use of payments out of an EPPR fund by Plant Health Australia. Both of these funding amounts are determined based on the amount of levy payable in relation to a plant product represented by a relevant Plant Industry Member. The committee considers

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3 See section 10 of the *Plant Health Australia (Plant Industries) Funding Act 2002*.

4 See section 11 of the *Plant Health Australia (Plant Industries) Funding Act 2002*.

5 Explanatory memorandum, pp. 8-9.

6 Statement of compatibility, p. 19.

that key matters relating to levies should generally be included within legislative instruments to ensure an appropriate level of parliamentary scrutiny over levy schemes.

1.7 The committee therefore requests the minister's more detailed advice as to why it is considered necessary and appropriate to amend the *Plant Health Australia (Plant Industries) Funding Act 2002* to provide that relevant Plant Industry Members will no longer be declared by legislative instrument, noting that such declarations would therefore no longer be subject to parliamentary scrutiny.

Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021

Purpose	Schedules 1 to 4 to the Bill amend corporate and financial services law to establish a Corporate Collective Investment Vehicles as a new type of a company limited by shares that is used for funds management. Schedule 5 to the Bill amends the taxation law to specify the tax treatment for the Corporate Collective Investment Vehicles. Schedule 6 to the Bill amends the income tax law to extend the loss carry back rules by 12 months, allowing eligible corporate tax entities to claim a loss carry back tax offset in the 2022-23 income year. Schedule 7 to the Bill seek to amend the *Income Tax Assessment Act 1997.* Schedule 8 to the Bill makes a number of miscellaneous and technical amendments to various laws in the Treasury portfolio. Schedule 9 to the Bill amends the *Superannuation Industry (Supervision) Act 1993* to insert a new covenant that requires trustees of Registrable superannuation entities to develop a retirement income strategy for beneficiaries who are retired or are approaching retirement. Schedule 10 to the Bill amends the *Income Tax Assessment Act 1997* to remove cessation of employment as a taxing point for Employee share scheme interests which are subject to deferred taxation.
Portfolio	Treasury
Introduced	House of Representatives on 25 November 2021

Significant matters in delegated legislation[7]

1.8 Schedules 1 to 5 to the bill seek to amend the *Corporations Act 2001* and other relevant legislation to establish a regulatory and tax framework for Corporate

7 Schedule 1, item 4 proposed sections and subsections 1222K(5), 1230(5), 1230R, 1231A(4), 1233H(5) 1233L(4) 1234G, 1234J(4), 1234K and 1241A(6) and schedule 3, item 14, proposed subsection 243F(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

Collective Investment Vehicles (CCIVs). The bill seeks to insert a range of powers to prescribe matters in delegated legislation to:

- provide additional circumstances where a person is, or is not, a protected member of a CCIV;[8]
- the requirements for the issue of shares by a CCIV;[9]
- the requirements or restrictions for cross-investment;[10]
- the requirements for the reduction of share capital;[11]
- the matters to be considered in determining the extent to which money or property of a CCIV forms part of the assets of a sub-fund of the CCIV;[12]
- the matters to be considered in determining the extent to which a liability of a CCIV forms part of the liabilities of a sub-fund of the CCIV;[13]
- how the money or property of a CCIV may be held, including exempting classes of assets from these requirements;[14] and
- exempt conduct engaged in by the CCIV from being also engaged in by its corporate director.[15]

1.9 The committee's consistent scrutiny view is that matters which may be significant to the operation of a legislative scheme should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that there is not a justification for each of these provisions in the explanatory memorandum and that where there is, it often relies on a desire for flexibility or a similarity with either existing Commonwealth or comparable overseas regimes.[16]

1.10 The committee has generally not accepted a desire for administrative flexibility or consistency with existing legislation to be a sufficient justification for leaving significant matters to delegated legislation. It is unclear to the committee why at least high-level guidance regarding some of these matters could not be included on the face of the primary legislation. For example, in relation to proposed section 1230R,

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8 Proposed subsection 1222K(5).

9 Proposed subsection 1230(5).

10 Proposed section 1230R.

11 Proposed subsection 1231A(4).

12 Proposed subsection 1233H(5).

13 Proposed subsection 1233L(4).

14 Proposed section 1234G, subsection 1234J(4) and section 1234K.

15 Proposed subsection 1241A(6) and proposed subsection 243F(6).

16 See for example, explanatory memorandum p. 136.

the explanatory memorandum states that it is intended that the regulations will include a restriction on circular investment.[17] It is unclear to the committee why this could not be included on the face of the primary legislation.

1.11 The committee requests the Assistant Treasurer's more detailed advice regarding:

- **why it is considered necessary and appropriate to leave the matters outlined in paragraph [1.8] to delegated legislation; and**
- **whether the bill could be amended to provide at least high-level guidance regarding these matters on the face of the primary legislation.**

Henry VIII clause—modification of primary legislation by delegated legislation[18]

1.12 Proposed section 1243A provides that the regulations may modify proposed chapter 8B or any other provisions of the *Corporations Act 2001* in relation to specified CCIVs, specified classes of CCIVs or sub-funds or all CCIVs or sub-funds.

1.13 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.14 In this instance, the explanatory memorandum states:

> This regulation-making power is included to ensure timely resolution of any unforeseen outcomes arising from a new, untested regime. Enabling the modification of the operation of the Corporations Act by regulations will provide the Government with the necessary flexibility to make targeted adjustments that may be necessary to address inappropriate or anomalous outcomes that would be inconsistent with the policy intention of the establishment of CCIVs.[19]

1.15 While noting this explanation, the committee has not generally accepted a desire for administrative flexibility to be a sufficient justification for allowing delegated

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17 Explanatory memorandum, p. 136.

18 Schedule 1, item 4, proposed section 1243A. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

19 Explanatory memorandum, p. 272.

legislation to modify the operation of primary legislation. The committee notes that delegated legislation, made by the executive, is not subject to the same level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.16 The committee therefore requests the Assistant Treasurer's more detailed advice regarding:

- **why it is considered necessary and appropriate to allow regulations made under proposed subsection 1243A(1) to modify any provision of proposed Chapter 8B or the *Corporations Act 2001* more generally; and**
- **whether the bill can be amended to provide at least high-level guidance constraining the scope of this broad modification power, for example, by providing that before the Governor-General makes regulations for the purposes of proposed subsection 1243A(1), the minister must be satisfied that the modifications would be consistent with the objects set out in the bill.**[20]

20 See proposed sections 1221 (objects of Chapter 8B—Corporate collective investment vehicles), 1235A (objects of Division 2 of Part 8B.6—Arrangements and reconstructions of sub-funds), 1236 (objects of Division 2 of Part 8B.6—Receivers, and other controllers, of property of sub-funds), 1237 (objects of Division 5 of Part 8B.6—Winding up of sub-funds), and 1238 (objects of Division 6 of Part 8B.6—Recovering property of sub-funds).

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021

Purpose	This bill seeks to amend the: • *Intelligence Services Act 2001*; • *Criminal Code Act 1995*; • *Crimes Act 1914*; • *Australian Passports Act 2005*; • *Foreign Passports (Law Enforcement and Security) Act 2005*; • *Office of National Intelligence Act 2018*; • *Inspector-General of Intelligence and Security Act 1986*; • *Australian Security Intelligence Organisation Act 1979*; and • *Telecommunications (Interception and Access) Act 1979*. This bill seeks to implement the government response to a number of recommendations of the *Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review)*. The measures in the bill seek to improve the legislative framework governing the National Intelligence Community by addressing key operational challenges facing the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Australian Signals Directorate, the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation and the Office of National Intelligence.
Portfolio	Home Affairs
Introduced	House of Representatives on 25 November 2021

Broad delegation of administrative powers[21]

1.17 Item 2 of Schedule 1 to the bill seeks to insert proposed section 9D into the *Intelligence Services Act 2001* (Intelligence Services Act) to provide that agency heads

21 Schedule 1, item 2, proposed subsection 9D(14). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

may provide emergency authorisations to allow for the gathering of intelligence regarding Australian persons overseas without their consent in circumstances where there is an imminent risk to their safety. Proposed subsection 9D(3) provides that the agency head may specify that the authorisation is subject to conditions.

1.18 Proposed subsection 9D(4) provides that the agency head must notify the minister, either orally or in writing, of the authorisation within 8 hours of the authorisation being made. Proposed subsection 9D(5) also provides that the agency head must ensure the authorisation is recorded in writing, including a summary of the relevant facts and provide a copy of this to both the responsible minister and the Inspector-General of Intelligence and Security.

1.19 Proposed subsection 9D(14) provides that an agency head may delegate all or any of their powers, functions or duties under proposed section 9D to a staff member. Proposed subsection 9D(15) provides that, in exercising a power, performing a function or discharging a duty under a delegation under proposed subsection 9D(14), the delegate must comply with any written directions of the agency head.

1.20 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.

1.21 In this instance, the explanatory memorandum states:

> ASIS, ASD and AGO operate in a range of operational environments, including overseas. The ability for the heads of these agencies to delegate their powers to staff members is necessary to ensure that each agency is able to act swiftly to protect Australian persons who are at imminent risk of harm overseas. The fact that this power must be expressly delegated, rather than given to all staff members, ensures that only those staff members that the agency head considers to be appropriately qualified to make such a significant decision will be authorised.[22]

1.22 While noting this explanation, and acknowledging the operational complexities involved, it remains unclear to the committee why all of the powers and functions of an agency head under proposed section 9D may be delegated to *any* staff member (other than a consultant or contractor). For example, it is unclear to the committee why it would be necessary or appropriate for an agency head to delegate their responsibilities under proposed subsection 9D(4) or (5). The committee's

22 Explanatory memorandum, p. 58.

concerns in this instance are heightened by significant nature of the powers involved, the fact that emergency authorisations may remain in force for up to six months,[23] and the potential impacts on an individual's privacy that may be a consequence of their use.

1.23 The committee therefore requests the minister's advice as to whether the bill can be amended to either:

- **limit the ability to delegate powers, functions or duties under proposed section 9D (relating to emergency authorisations) to staff members of the senior executive service (or equivalent) and above; or**
- **limit the scope of the powers, functions and duties under proposed section 9D that can be delegated to a staff member.**

Trespass on personal rights and liberties

Insufficiently defined administrative powers[24]

1.24 Schedule 2 to the bill seeks to amend the Intelligence Services Act to introduce a new counter-terrorism class ministerial authorisation. Currently, the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and Australian Geospatial Intelligence Organisation (AGO) are required to receive ministerial authorisation to produce intelligence on an Australian person (in addition to receiving agreement from the Attorney-General and, where conducting activities onshore, a warrant). Schedule 2 seeks to extend this to a class of persons by providing authority for these agencies to expeditiously produce intelligence on one or more members of a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation.[25]

1.25 Proposed subsection 9(1AAB) non-exhaustively provides that a person is involved with a listed terrorist organisation if they:

- direct or participate in the activities of the organisation;
- recruit a person to join the organisation;
- provide training to or receive training from the organisation;

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23 Proposed subsection 9D(9).

24 Schedule 2 and Schedule 3, item 1. The committee draws senators’ attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

25 Schedule 2, item 2, proposed subparagraph 8(1)(a)(iaa) and item 3, proposed subsection 9(1AAA).

- are a member of the organisation;
- provide financial or other support to the organisation; or
- advocate for, or on the behalf of, the organisation.

1.26 Schedule 3 to the bill seeks to amend section 8 of the Intelligence Services Act to provide that ASD and AGO can obtain an authorisation to produce intelligence on one or more members of a class of Australian persons when providing assistance to the Australian Defence Force in support of military operations.

1.27 The committee has previously commented on authorisations by class in relation to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.[26] The committee reiterates its previous concerns that a clear risk of class authorisations is that they may be overly inclusive. The idea that an entire class of persons, as opposed to an individual, are or are likely to be involved in certain activities or pose particular threats—in the absence of individual consideration to each member of the class—may be based on generalisations. Another related risk is that the class may not be specified with adequate precision.[27]

1.28 The committee notes the definition of persons involved with a terrorist organisation is very broad and that the authorisation powers are likely to adversely affect the rights and liberties of individuals who are the subject of an authorisation in significant ways, for example, in relation to the right to privacy. While the committee notes that proposed section 10AA provides additional safeguards in relation to class authorisations, given the broad nature of the power and potential impact on rights and liberties, the committee continues to have significant scrutiny concerns regarding the use of class authorisations in the Intelligence Services Act.

1.29 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the ministerial authorisation regime in the *Intelligence Services Act 2001* to enable ASIS, ASD and AGO to produce intelligence on a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation, noting the potential of these provisions to trespass on a person's rights and liberties.

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26 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp. 47-81.

27 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, p. 66.

Trespass on personal rights and liberties

Privacy[28]

1.30 Currently, section 13B of the Intelligence Services Act provides that if ASIO has notified ASIS that it requires the production of intelligence on Australians, ASIS may support ASIO in the performance of its functions by carrying out an activity to produce such intelligence, but only if the activity will be undertaken outside Australia. Item 1 of Schedule 5 to the bill seeks to amend section 13B to remove the requirement that the activity or series of activities will be undertaken outside Australia.

1.31 The statement of compatibility states:

> The Government considers that there is an increasing operational necessity to improve cooperation and integration between intelligence agencies, particularly as Australia's security environment becomes more complex and the lines of demarcation between foreign and security intelligence more porous. With more extensive and direct involvement of some Australians in international terrorist and extremist causes, and with greater scope for external covert interference in Australia generally, domestic and foreign sources of security threats have become less mutually exclusive. Security threats to Australians, in Australia, have increased and diversified as a result.[29]

1.32 While noting this explanation, the committee has significant scrutiny concerns regarding these amendments which would allow ASIS to undertake intelligence gathering on Australians in Australia. The committee considers that this provision may have a significant impact on individuals' privacy and does not consider that the explanatory materials have adequately justified why this is necessary or appropriate. The committee's concerns in this regard are heightened noting that this was not a measure recommended by the *Comprehensive Review of the Legal Framework of the National Intelligence Community,* on which a number of the other amendments in this bill are based.

1.33 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing ASIS to undertake intelligence gathering on persons in Australia, noting the potential of the measure to impact on a person's right to privacy.

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28 Schedule 5, items 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

29 Statement of compatibility, p. 26.

Broad discretionary power

Trespass on personal rights and liberties[30]

1.34 Currently, section 22A of the *Australian Passports Act 2005* (Passports Act) and section 15A of the *Foreign Passports (Law Enforcement and Security) Act 2005* (Foreign Passports Act) allow the Director-General of Security to request the Minister for Foreign Affairs to suspend a person's Australian passport or to order the temporary surrender of a person's foreign travel documents (including passports) for a period of 14 days.

1.35 Schedule 8 to the bill seeks to amend both the Passports Act and the Foreign Passports Act to extend this period to 28 days.

1.36 The committee has previously raised scrutiny concerns regarding the introduction of the 14-day suspension power in its *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.[31] In its report, the committee noted that the Independent National Security Legislation Monitor had recommended a strict timeframe for interim cancellations and suggested that an initial period of 48 hours, followed by extensions of up to 48 hours at a time for a maximum period of seven days may be appropriate.[32]

1.37 In this instance, the explanatory memorandum states:

> Operational requirements have evolved since the amendments conferring the ability to suspend or temporarily surrender travel documents were introduced via the Foreign Fighters Act. In particular, the conflict in Syria and Iraq has demonstrated that events overseas can drive significant and sustained increases in the number of people who may seek to leave Australia to engage in harmful conduct overseas. The suspension and cancellation powers are used only where necessary, and in a relatively small proportion of all passport matters. Since the commencement of the powers in December 2014, around 190 Australian passports have been cancelled or refused in relation to the conflict in Syria and Iraq, while in the same period around 40 passports were subject to temporary suspension. On a number of occasions, the first time a person has come to ASIO's attention has been as they are preparing to travel overseas to a conflict zone. It has therefore been necessary to take action in a very short timeframe to prevent them

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30 Schedule 8, items 1 and 4, subsections 22A(1) and 15A(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

31 Senate Standing Committee for the Scrutiny of Bills, *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 23 October 2014, pp. 6-8.

32 Senate Standing Committee for the Scrutiny of Bills, *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 23 October 2014, p. 7.

> from leaving Australia. A security assessment must be prepared by officers who may also be involved in other (or related) priority investigations.[33]

1.38 While noting this explanation, from a scrutiny perspective, it remains unclear to the committee that it is necessary or appropriate to extend the ability of the minister to suspend or to the order the temporary surrender of a person's Australian or foreign travel documents from 14 to 28 days. The committee does not consider that the infrequent use of these broad powers to be a sufficient justification. As a result, the committee continues to have significant scrutiny concerns regarding the minister's broad discretionary power to suspend or to order the temporary surrender of a person's travel documents for up to 28 days.

1.39 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of extending the period of time the minister may suspend, or order the temporary surrender of, a person's travel documents from 14 to 28 days, noting the potential of the measure to trespass on a person's rights and liberties.

Tabling of documents[34]

1.40 Item 2 of Schedule 10 to the bill seeks to amend subsection 15(5) of the Intelligence Services Act to provide that the responsible ministers for ASIS, ASD and AGO must ensure that the relevant agency's privacy rules, which regulate the communication and retention by the agency of intelligence information concerning Australian persons, are published on the agency's website except to the extent that the rules contain operationally sensitive or prejudicial information.

1.41 Additionally, item 12 seeks to insert proposed section 41C into the Intelligence Services Act to provide that the responsible minister for the Defence Intelligence Organisation (DIO) must make privacy rules. Proposed subsection 41C(6) provides that the minister must ensure that that the privacy rules are published on DIO's website except to the extent that the rules contain operationally sensitive or prejudicial information.

1.42 There is no legislative requirement for any of the relevant privacy rules to be tabled in Parliament.

1.43 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available

33 Explanatory memorandum, p. 77.

34 Schedule 10, items 2 and 12, proposed subsections 15(5) and 41C(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

where documents are not made public or are only published online. The explanatory materials contain no justification as to why none of the privacy rules published by the relevant agencies (with operationally sensitive information excluded) are required to be tabled in Parliament.

1.44 The committee therefore requests the minister's advice as to whether the bill can be amended to provide that the privacy rules published online under proposed subsections 15(5) and 41C(6) are also tabled in the Parliament.

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Miscellaneous Measures) Bill 2021

Purpose	This bill seeks to amend the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* to improve the effectiveness and efficiency of the Ozone Protection and Synthetic Greenhouse Gas Program in order to reduce the burden on business, streamline and reduce the complexity of the Act, and ensure the Program can continue to achieve important environmental outcomes.
Portfolio	Environment
Introduced	House of Representatives on 2 December 2021

Reversal of the evidential burden of proof

Significant matters in delegated legislation[35]

1.45 The bill seeks to establish several defences which reverse the evidential burden of proof. Proposed subsection 13(1) provides that it is an offence if a person manufactures a scheduled substance and the person does not hold a licence that allows the manufacture. Proposed subsections 13(2), (4), and (6) of the bill provide offence-specific defences to this offence to the effect that the offence does not apply to a person in a circumstance prescribed by the regulations.

1.46 Similarly, proposed subsection 13AA(1) provides that it is an offence if a person imports a scheduled substance and the person does not hold a licence that allows the importation. Proposed subsection 13AB(1) provides that it is an offence if a person exports a scheduled substance and the person does not hold a licence that allows the exportation. Proposed subsections 13AA(2), (6) (7), (8) and (9) and proposed subsections 13AB(2), (4) and (6) provide offence-specific defences to these offences to the effect that the offences do not apply to a person in a circumstance prescribed by the regulations.

35 Schedule 1, item 52, proposed subsections 13(2), 13(4), 13(6), 13AA(2), 13AA(6), 13AA(7), 13AA(8), 13AA(9), 13AB(2), 13AB(4), 13AB(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

1.47 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[36] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.48 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. In this instance, the explanatory memorandum states:

> The reversal of the burden of proof is appropriate as the matter to be proved is a matter than would be peculiarly in the knowledge of the defendant. For instance, the defendant would be best placed to know the circumstance in which, or purpose for which, they manufactured a scheduled substance. Further, there may be a number of circumstances or purposes prescribed in the regulations for which a licence would not be required to manufacture a scheduled substance. In the event of a prosecution, it would be significantly more difficult and costly for the prosecution to disprove all possible circumstances than it would be for a defendant to establish the existence of one potential circumstance or purpose.[37]

1.49 Similar explanations are provided in relation to the other offence-specific defences listed above.

1.50 It is not clear to the committee how the relevant matters can be said to be peculiarly within the knowledge of the defendant or why it would be significantly more difficult and costly for the prosecution to disprove the matters than it would be for a defendant to establish them when the content of the offence-specific defences have not yet been prescribed.

1.51 In addition, the committee's view is that significant matters, such as the key details of an offence-specific defence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states in relation to the use of delegated legislation that:

> The ability to prescribe such matters in regulations made under the Act is consistent with good regulatory practice and ensures continued compliance with Australia's international obligations under the Montreal Protocol and

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36 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.

37 Explanatory memorandum, p. 25.

> other relevant international treaties. In the past, the Montreal Protocol has adopted decisions to exempt certain circumstances or purposes from the scope of the treaty. Over time, exemptions may be adopted or amended, and domestic requirements will need to be able to be quickly updated to reflect these changes, in order to support decision-makers and ensure both compliance with international obligations and minimal disruptions to licence applicants and holders. Continuing to allow the regulations to prescribe such matters provides the necessary flexibility to quickly respond to changes in the international regulatory regime.[38]

1.52 The committee has not generally considered a desire for flexibility to be a sufficient justification, of itself, for prescribing significant matters in delegated legislation. In this instance the committee's scrutiny concerns are heightened given the significance of prescribing key details of an offence-specific defence, which reverses the evidential burden of proof and limits fundamental common law rights, within 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.

1.53 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 proposed subsections 13(2), 13(4), 13(6), 13AA(2), 13AA(6), 13AA(7), 13AA(8), 13AA(9), 13AB(2), 13AB(4) and 13AB(6) in relation to matters that do not appear to be peculiarly within the knowledge of the defendant and of leaving the prescription of key details of these defences to delegated legislation.

Significant matters in delegated legislation[39]

1.54 Proposed subsection 45C(1) provides that a person contravenes the subsection if the person uses an HCFC that was manufactured or imported on or after 1 January 2020 and the use is not for a purpose prescribed by the regulations. Contravention of the subsection is an offence (subject to a maximum penalty of 300 penalty units for the fault-based offence and 60 penalty units for the strict liability offence). Additionally, a person is liable to a civil penalty of 400 penalty units for contravening proposed subsection 45C(1).The committee's view is that significant matters, such as key elements of an offence, particularly an offence of strict liability which undermines fundamental criminal law principles, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

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38 Explanatory memorandum, pp. 24-25.

39 Schedule 1, item 111, proposed section 45C. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

In this instance, the explanatory memorandum does not provide a justification for leaving this significant matter to delegated legislation.

1.55 In light of the above, the committee requests the minister's detailed justification as to:

- **why it is considered necessary and appropriate to leave the prescription of permitted uses of HCFCs for the purposes of offence and civil penalty provisions to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.**

Reversal of the evidential burden of proof[40]

1.56 Proposed section 65U of the bill makes it an offence to disclose protected information by a person who is, or has been, an entrusted person and who obtained the protected information in their capacity as an entrusted person. The fault-based offence carries a maximum penalty of 180 penalty units, or 2 years of imprisonment, or both. The strict liability offence carries a maximum penalty of 60 penalty units. Proposed subsection 65U(2) provides that it is a defence if the use of disclosure is authorised or required by the Act, another law of the Commonwealth or a prescribed law of a State or a Territory.

1.57 The defendant bears an evidential burden in relation to the defence set out at proposed subsection 65U(2). As noted above, at common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[41] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.58 The committee expects any such reversal of the evidential burden of proof to be justified. In this instance, the explanatory memorandum states:

> The reversal of the burden of proof is justified in this instance as the matter to be proved (that is, that the use or disclosure of protected information was authorised by a Commonwealth law or a prescribed State or Territory law) is a matter that would be peculiarly in the knowledge of the defendant.

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40 Schedule 1, item 145, proposed section 65U. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

41 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.

> Further, there would be a number of authorised uses and disclosures set out in Division 3 of Part VIIIB of the Act (as inserted by this Bill) and across Commonwealth law generally. In the event of a prosecution, it would be significantly more difficult and costly for the prosecution to disprove all possible circumstances than it would be for a defendant to establish the existence of one potential circumstance.[42]

1.59 While the committee acknowledges that it may be significantly more difficult and costly for the prosecution to establish that a person did not have lawful authority to engage in the conduct set out in proposed section 65U(2) than the defendant, it is not clear to the committee why the relevant matters would be *peculiarly* within the knowledge of the defendant. For example, whether disclosure of information is authorised by another Commonwealth law would appear to be a matter that the prosecution could readily ascertain.

1.60 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 proposed subsection 65U(2) in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

Incorporation of external material as in force from time to time[43]

1.61 Proposed subsection 45A(4) provides that regulations made for the purposes of proposed section 45A may incorporate an instrument or other writing as in force or existing from time to time.

1.62 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant

42 Explanatory memorandum, p. 118.

43 Schedule 1, Item 111, proposed subsection 45A(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.63 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

1.64 In this instance, the explanatory memorandum explains:

> The purpose of this amendment is to allow the regulations concerning the end use of scheduled substances to incorporate documents (such as standards or qualifications) as existing from time to time. This is appropriate as such documents are regularly updated and amended, and it is important that end use permit holders and applicants are at all times required to comply with the most up to date and appropriate qualifications and standards for the substance they are using.[44]

1.65 While acknowledging this justification and recognising the importance of being able to regularly update and amend standards and qualifications, it is not clear to the committee from this explanation whether the incorporated materials will be freely and readily available.

1.66 Noting the above comments, the committee requests the minister's advice as to whether standards and any other documents incorporated into the regulations will be made freely available to all persons interested in the law.

No-invalidity clause[45]

1.67 Item 145 of Schedule 1 to the bill seeks to insert proposed subsections 65Y(3) and 65ZB(3) into the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* to provide that a failure to provide a written notice of a decision, including the reasons for the decision and the details of person's right to have the decision reviewed, would not affect the validity of the original reviewable decision or reconsideration decision.

1.68 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these

44 Explanatory memorandum, p. 71.

45 Schedule 1, item 145, proposed subsection 65Y(3), and proposed subsection 65ZB(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum. In this instance, the explanatory memorandum states:

> This would provide the necessary certainty for both industry and the Commonwealth as to whether a licence is in force and covers a relevant import, manufacture or export.[46]

1.69 While noting this explanation, the committee does not consider that a desire for administrative certainty, on its own, does not provide sufficient justification for the inclusion of no-invalidity clauses.

1.70 As the explanatory materials do not adequately address this issue, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsection 65Y(3) and proposed subsection 65ZB(3) of the bill.

46 Explanatory memorandum, pp. 123-124.

Bills with no committee comment

1.71 The committee has no comment in relation to the following bills which were introduced into the Parliament between 22 November 2 December 2021:

- Australian Research Council Amendment Bill 2021
- Higher Education Support Amendment (2021 Measures No. 1) Bill 2021
- Illegal Detention of Australian Journalists (Free Julian Assange) Bill 2021
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Fight for Australia's Coastline) Bill 2021
- Social Services and Other Legislation Amendment (Pension Loans Scheme Enhancements) Bill 2021

Commentary on amendments and explanatory materials

Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021

1.72 On 30 November 2021, the Senate agreed to two Australian Greens amendments to the bill and the Assistant Minister for Forestry and Fisheries (Senator Duniam) tabled an addendum to the explanatory memorandum relating to the bill.

1.73 The committee welcomes the Senate amendments to the bill which appear to address the committee's scrutiny concerns relating to the tabling of documents in Parliament.

1.74 The committee also thanks the assistant minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.[47]

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

1.75 On 1 December 2021, the Senate agreed to four government amendments to the bill and the Minister for Emergency Management and National Recovery and Resilience (Senator McKenzie) tabled a supplementary explanatory memorandum relating to the government amendments to the bill.

1.76 The committee welcomes the Senate amendments to the bill which appear to address the committee's scrutiny concerns relating to computerised decision-making.[48]

Defence Legislation Amendment (Discipline Reform) Bill 2021

1.77 On 1 December 2021, the Minister for Foreign Affairs (Senator Payne) tabled an addendum to the explanatory memorandum relating to the bill.

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47 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2021*, pp. 4-5; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021*, pp. 42-44.

48 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2019*, pp. 1-4; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2019*, pp. 37-42; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2019*, pp. 31-33.

1.78 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.[49]

Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021

1.79 On 1 December 2021, the House of Representatives agreed to 17 government amendments to the bill and the Minister for Health and Aged Care (Mr Hunt) presented an addendum to the explanatory memorandum and a supplementary explanatory memorandum to the bill.

1.80 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.[50]

1.81 The committee makes no comment on amendments made or explanatory materials relating to the following bill:

- Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021 (previous title: Autonomous Sanctions Amendment (Thematic Sanctions) Bill 2021)[51]
- Corporation Amendment (Meetings and Documents) Bill 2021[52]
- Electoral Legislation Amendment (Contingency Measures) Bill 2021[53]

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49 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2021*, pp. 4-7; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021*, pp. 84-94.

50 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2021*, pp. 25-29; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021*, pp. 83-104.

51 On 1 December 2021, the Senate agreed to two opposition amendments and one Australian Greens amendment to the bill. Additionally, on 2 December 2021, the Minister for Regional Health (Dr Gillespie) presented a revised explanatory memorandum to the bill.

52 On 29 November 2021, the House of Representatives agreed to four government amendments to the bill and the Assistant Minister to the Minister for Industry, Energy and Emissions Reduction (Mr T R Wilson) presented a supplementary explanatory memorandum to the bill. On 2 December 2021, the Assistant Minister to the Attorney-General (Senator Stoker) tabled a revised explanatory memorandum relating to the bill.

53 On 1 December 2021, the House of Representatives agreed to one government amendment to the bill and the Assistant Minister for Waste Reduction and Environmental Management (Mr Evans) presented a supplementary explanatory memorandum to the bill. Additionally, on 2 December 2021, the Assistant Minister for Forestry and Fisheries (Senator Duniam) tabled a revised explanatory memorandum relating to the bill.

- Electoral Legislation Amendment (Political Campaigners) Bill 2021[54]
- Independent National Security Legislation Monitor Amendment Bill 2021[55]
- Treasury Laws Amendment (2021 Measures No. 5) Bill 2021.[56]

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54 On 1 December 2021, the Senate agreed to 25 government amendments to the bill and the Minister for Foreign Affairs (Senator Payne) tabled a supplementary explanatory memorandum relating to the government amendments to the bill.

55 On 1 December 2021, the Minister for the Public Service (Mr Morton) presented a revised explanatory memorandum to the bill.

56 On 1 December 2021, the Senate agreed to one Government and five Opposition amendments to the bill and the Minister for Superannuation, Financial Services and the Digital Economy (Senator Hume) tabled a supplementary explanatory memorandum relating to the government amendment to the bill.

Chapter 2

Commentary on ministerial responses

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

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

Purpose	This bill seeks to amend the *Aged Care Act 1997*, the *Aged Care Quality and Safety Commission Act 2018,* the *Aged Care (Transitional Provisions) Act 1997*, the *National Health Reform Act 2011*, the *Veterans' Entitlements Act 1986*, the *Military Rehabilitation and Compensation Act 2004*, and the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* to implement eight measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety.
Portfolio	Health
Introduced	House of Representatives on 1 September 2021
Bill status	Before the Senate

Significant matters in delegated legislation[1]

2.2 The committee initially scrutinised this bill in *Scrutiny Digest 16 of 2021* and requested the minister's advice.[2] In *Scrutiny Digest 17 of 2021* the committee scrutinised 14 government amendments that were made to the bill in the House of Representatives on 25 October 2021 and requested the minister's advice in relation to whether the bill can be amended to:

- include at least-high level guidance regarding the matters to be included in the Quality of Care Principles on the face of the primary legislation, such as an inclusive list of the persons who can provide informed consent; and

1 Schedule 9, item 3, proposed section 54-11. The committee draws senator's attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 4–5.

- provide that the amendments made by Schedule 9 to the bill will sunset on 1 July 2023.[3]

Ministers' response[4]

2.3 The ministers advised:

> We would like to clarify that the justification provided in the explanatory memorandum for leaving these matters to delegated legislation is not based on a desire for administrative flexibility but rather operational necessity. We enclose additional detail on this matter.
>
> Given the Committee's interest in the matters which will be included in the Quality of Care Principles with regard to substituted decision making, my Department would be happy to provide the Committee's secretariat with an in-confidence copy of this draft instrument. This draft instrument will contain a schedule which will repeal the arrangements established within this instrument for substituted decision making from 1 July 2023. This draft instrument will be subject to consultation and change.
>
> In relation to the Committee's commentary on my response to the scrutiny issues raised in *Scrutiny Digest 16 of 2021*, the Committee has requested that we include key information from my response in an addendum to the revised explanatory memorandum for the Bill.
>
> We agree to the Committee's request. Specifically, we will table an addendum to the revised explanatory memorandum in relation to the following:
>
> - item 51, schedule 1 regarding the broad delegation of functions and powers under Part 2.3 of the Aged Care Act;
> - item 4, schedule 2 regarding determinations that a law is an 'aged care screening law' which will not be subject to disallowance;
> - item 9, schedule 3 regarding the inclusion of matters relating to the making of a code of conduct and compliance in delegated legislation; and
> - item 25, schedule 3 regarding the Commissioner's power to impose specified conditions on banning orders and the civil penalties for breaches of these conditions, and the inclusion of matters relating to the contents of the register of banning orders in delegated legislation.

Committee comment

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3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 43–45.

4 The minister responded to the committee's comments in a letter dated 1 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

2.4 The committee thanks the ministers for this response. The committee notes the ministers' advice that the justification provided in the explanatory memorandum for leaving key details relating to who may give informed consent to delegated legislation is not based on a desire for administrative flexibility but rather operational necessity. The committee also thanks the ministers for providing a copy of the draft Quality of Care Amendment (Restrictive Practices) Principles 2021 (the draft instrument).

2.5 The committee welcomes the ministers' advice that the draft instrument will contain a schedule which will repeal the arrangements established within the instrument for substituted decision making from 1 July 2023. The committee also welcomes the ministers' undertaking to table an addendum to the revised explanatory memorandum in relation to scrutiny issues raised in *Scrutiny Digest 16 of 2021*.

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

2.7 In light of the information provided, the explanation set out in the supplementary explanatory memorandum and the ministers' undertaking, the committee makes no further comment on this matter.

Immunity from civil and criminal liability[5]

2.8 Proposed Schedule 9 to the bill seeks to insert proposed section 54-11 into the *Aged Care Act 1997* to provide civil and criminal immunity in relation to the use of restrictive practices in certain circumstances. Proposed subsection 54-11(1) provides that the section will apply if an approved provider provides aged care of a kind specified in the Quality of Care Principles and a restrictive practice is used in relation to an aged care recipient who lacked capacity to give informed consent.

2.9 Proposed subsection 54-11(2) provides that a protected entity is not subject to any civil or criminal liability for, or in relation to, the use of the restrictive practice in relation to the care recipient if informed consent to the use of the restrictive practice was given by a person or body specified in the Quality of Care Principles and the restrictive practice was used in the circumstances set out in the Quality of Care Principles.

2.10 The committee expects that if a bill seeks to provide immunity from civil or criminal liability, particularly where such immunity could affect individual rights, this

5 Schedule 9, item 3, proposed section 54-11. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

should be soundly justified. In this instance, the supplementary explanatory memorandum states:

> The purpose of new section 54-11 is to ensure that approved providers and relevant individuals are not liable to any civil or criminal action when they are adhering to the obligations on the use of restrictive practices under aged care law. This is because the proposed consent arrangements may result in an approved provider, or relevant individual, relying on consent by a person who is authorised to give that consent under the Commonwealth's aged care laws, but who may not have the requisite authority under the relevant State or Territory laws.
>
> This immunity will only apply where restrictive practices have been used in a way that is consistent with the requirements under the Quality of Care Principles. For example, the Quality of Care Principles require that restrictive practices must only be used as a last resort, only to the extent that is necessary, for the shortest time and in the least restrictive form, and to prevent harm to the care recipient. The immunity afforded by this provision will not apply to the use of restrictive practices that does not comply with these and any other requirements relating to the use of restrictive practices in the Quality of Care Principles.[6]

2.11 In light of the explanation set out in the explanatory memorandum, the committee leaves to the Senate as a whole the appropriateness of providing immunity to aged care providers and their staff from any civil and criminal liability in circumstances where informed consent has been provided by a person specified in the Quality of Care Principles and the restrictive practice was used in the circumstances set out in the Quality of Care Principle.

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6 Supplementary explanatory memorandum, pp. 18-19.

Customs Amendment (Controlled Trials) Bill 2021

Purpose	This bill seeks to amend the *Customs Act 1901* to facilitate time-limited trials with approved entities in a controlled regulatory environment.
Portfolio	Home Affairs
Introduced	House of Representatives on 24 November 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[7]

2.12 In *Scrutiny Digest 18 of 2022* the committee requested the minister's more detailed advice regarding:

- why it is considered necessary and appropriate to leave the qualification criteria for participation in controlled trials to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[8]

Minister's response[9]

2.13 The minister advised:

> Administering the controlled trials framework in delegated legislation enables controlled trials to be undertaken with a greater degree of certainty and administered in a timely manner. Due to the short timeframes for each of the trials, it is critical to the success of the program that there is flexibility to refine those elements in a timely manner before the next phase commences.
>
> While qualification criteria apply generically, the Australian Border Force (ABF) will also require the flexibility to update the qualification criteria as the types of trials conducted and customs practices evolve. While initial trials may be small and the qualification criteria would be basic, as the types of trials conducted evolve and become more complex, so would the base requirements for participants to ensure as much consistency as possible across the suitability of participants. Placing qualification criteria in

7 Schedule 1, item 4, proposed section 179K. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 15-16.

9 The minister responded to the committee's comments in a letter dated 14 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> delegated legislation provides a degree of consistency across all participants in any trial, while allowing for the fact that appropriate qualification criteria at one point would not necessarily be sufficient in later trials.
>
> If the *Customs Act 1901* (Customs Act) needed to be amended each time the qualification criteria for trials needed to change, this could delay new trials relying on the amended criteria to potentially lengthy legislative change processes. This would frustrate the ABF's ability to conduct future controlled trials, which may require revised base level requirements for participation to meet emerging risks in international supply chain security.
>
> This approach to the use of delegated legislation is not unprecedented in this space. The Australian Trusted Trader (ATT) Programme also utilises qualification criteria in delegated legislation, which is similarly required to allow for expedient updates to meet emerging risks in international supply chain security.
>
> The regulatory framework for controlled trials has been designed to balance stability and transparency of the program, allowing reasonable flexibility to take account of the dynamic international trade environment and ensure the continued relevance of the program to traders.
>
> I note that as the qualification criteria are determined in a legislative instrument, they will be subject to parliamentary scrutiny and disallowance. The Comptroller-General of Customs' powers to make rules with respect to controlled trials, including qualification criteria, cannot be delegated.
>
> The ABF is separately developing the Regulatory Sandbox Guidelines which will contain specific details of how to propose and manage trials, and will consult with industry on these in coming months.

Committee comment

2.14 The committee thanks the minister for this response. The committee notes the minister's advice that administering the controlled trials framework in delegated legislation enables controlled trials to be undertaken with a greater degree of certainty and administered in a timely manner. The committee also notes the minister's advice that while initial trials may be small and the qualification criteria would be basic, as the types of trials conducted evolve and become more complex, so would the base requirements for participants to ensure as much consistency as possible across the suitability of participants.

2.15 The committee further notes the minister's advice that the Australian Border Force is separately developing the Regulatory Sandbox Guidelines which will contain specific details of how to propose and manage trials. The minister advised that the Australian Border Force will consult with industry on these guidelines in the coming months.

2.16 While noting the minister's advice, the committee reiterates its consistent scrutiny view that significant matters, such as the qualification criteria for participation in controlled trials, should be included in primary legislation unless a sound

justification is provided for the use of delegated legislation. The committee has generally not accepted a desire for administrative flexibility or a reliance on non-legislative policy guidance to be sufficient justifications for leaving significant matters to delegated legislation. As such, it remains unclear to the committee why at least high-level guidance in relation to these matters could not be included on the face of the primary legislation.

2.17 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the qualification criteria for participation in controlled trials to delegated legislation.

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

Electoral Legislation Amendment (Assurance of Senate Counting) Bill 2021

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to strengthen the integrity of Australia's electoral system by increasing the transparency and assurance of Senate counting, including independent assurances of the computer systems and processes used to capture and count votes.
Portfolio	Special Minister of State
Introduced	House of Representatives on 28 October 2021
Bill status	Received the Royal Assent on 13 December 2021

Tabling of documents in Parliament[10]

2.19 In *Scrutiny Digest 17 of 2021* the committee requested the minister's advice as to whether the bill can be amended to provide that:

- statements published by the Electoral Commissioner under proposed subsections 273AA(4), 273AC(6) and (7) and 273AB(4), (5) and (6) are tabled in the Parliament; and
- reports given to the Electoral Commissioner under proposed subsections 273AA(3) and 273AB(3) are published on the Electoral Commission's website and tabled in the Parliament, subject to any redactions genuinely required to ensure that sensitive information is not inappropriately disclosed.[11]

Minister's response[12]

2.20 The minister advised:

> The Government introduced the Bill in the House of Representatives on 28 October 2021. This Bill will strengthen the integrity of Australia's electoral system by increasing the transparency and assurance of Senate

10 Schedule 1, item 1, proposed sections 273AA and 273AC; Schedule 2, item 1, proposed section 273AB. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 6-8.

12 The minister responded to the committee's comments in a letter dated 1 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> counting, as recommended by the Joint Standing Committee on Electoral Matters' (JSCEM) report on the conduct of the 2016 federal election.
>
> The Bill will require the Electoral Commissioner to arrange independent assessments of the security of the computer systems and the accuracy of counting software used to scrutinise votes in a Senate election. It will also require the Electoral Commissioner to arrange for statistically significant sampling of ballot papers throughout the scrutiny.
>
> The Bill also requires the Electoral Commissioner to publish on the Australian Electoral Commission's (AEC) website statements attesting to the completion of the security assessment, the completion and outcome of the accuracy assessment, and the methodology and outcome of the ballot sampling process, as well as the process for reconciling preferences.
>
> These public statements by the AEC will enable appropriate public scrutiny of the security and accuracy assessments and ballot sampling process, without exposing sensitive information relating to potential security risks and vulnerabilities which could be used by malicious actors to attempt to compromise a federal election.
>
> I therefore respectfully submit to the Committee that it would not be appropriate to amend the Bill to require assessment reports provided to the AEC to be published or tabled in the Parliament.
>
> While this Bill does not require the tabling of these reports, the Bill also does not preclude this occurring if necessary. As such, it remains at the discretion of the Parliament as to whether these documents should be tabled in appropriate circumstances and in accordance with usual Parliamentary procedures.

Committee comment

2.21 The committee thanks the minister for this response. The committee notes the minister's advice that the public statements by the Australian Electoral Commission will enable appropriate public scrutiny of the security and accuracy assessments and ballot sampling process, without exposing sensitive information relating to potential security risks and vulnerabilities which could be used by malicious actors to attempt to compromise a federal election.

2.22 The committee also notes the minister's advice that while the bill does not require the tabling of these reports, the bill also does not preclude this occurring if necessary and that, as such, it remains at the discretion of the Parliament as to whether these documents should be tabled in appropriate circumstances and in accordance with usual Parliamentary procedures.

2.23 The committee reiterates its consistent scrutiny view that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. The committee does not consider the minister's advice has adequately justified why

statements published by the Electoral Commissioner or reports given to the Electoral Commissioner cannot be tabled in the Parliament, subject to any redactions genuinely required to ensure that sensitive information is not inappropriately disclosed.

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

Electoral Legislation Amendment (Contingency Measures) Bill 2021

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to enable the Electoral Commissioner to modify the operation of certain aspects of the conduct of elections when a Commonwealth emergency law is in force. These amendments implement recommendations from the Joint Standing Committee on Electoral Matters' *Report of the inquiry on the future conduct of elections operating during times of emergency situations.*
Portfolio	Special Minister of State
Introduced	House of Representatives on 28 October 2021
Bill status	Received the Royal Assent on 13 December 2021

Broad discretionary power

Significant matters in delegated legislation[13]

2.25 In *Scrutiny Digest 17 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to provide the minister with a broad discretionary power to add legislation to the definition of Commonwealth emergency law by delegated legislation; and
- whether the bill can be amended to provide at least high-level guidance on the face of the bill as to the circumstances when the power in proposed subsection 396(9) should be exercised.[14]

Minister's response[15]

2.26 The minister advised:

> The Government introduced the Bill to allow the Electoral Commissioner to make limited modifications to the *Commonwealth Electoral Act 1918* (Electoral Act) where an emergency declaration has been issued under a

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13 Schedule 1, item 1, proposed subsections 396(8) and (9). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 10-11.

15 The minister responded to the committee's comments in a letter dated 1 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Commonwealth law, and the Electoral Commissioner is satisfied on reasonable grounds that the emergency would interfere with the due conduct of the election in a geographical area.

The Bill implements recommendations from the Joint Standing Committee on Electoral Matters' (JSCEM) *Report of the inquiry on the future conduct of elections operating during times of emergency situations* to ensure that the Australian Electoral Commission can successfully deliver a federal election in emergency situations.

The Bill enables the Minister to make a legislative instrument specifying further laws of the Commonwealth as a ***'Commonwealth emergency law'*** for the purpose of the Bill. Importantly, notwithstanding a specification of a further law through this instrument an emergency must still be declared in accordance with that law to enliven the Electoral Commissioner's modification powers in proposed section 396(2).

The legislative instrument would be subject to disallowance in accordance with the *Legislation Act 2003*, and may be disallowed by either House within a certain time after the instrument is tabled in the Parliament. Additionally, any legislative instrument made by the Minister, unless exempt from Parliamentary oversight, would be subject to scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

I also note that such an instrument would be subject to review and consideration by JSCEM which holds an inquiry into all aspects of the conduct of the election after each federal election.

As there is often great uncertainty during times of emergency situations, and noting the expiry or dissolution of Parliament shortly before a writ is issued for an election, it is necessary and appropriate to provide the Minister with a discretionary power to add further Commonwealth legislation to the definition of Commonwealth emergency law by delegated legislation to support the successful operation of federal elections in emergency situations.

The Government's view is that further guidance is not required as to the circumstances when the power in proposed subsection 396(9) should be exercised, noting that such specification would only be effective for Commonwealth laws that enable the declaration of an emergency and that this legislative instrument will be subject to Parliamentary scrutiny.

The use of delegated legislation in this instance ensures a timely response to unforeseen emergency situations so that Australians can exercise their franchise. As such, I consider it appropriate for delegated legislation to modify the operation of this Bill.

Committee comment

2.27 The committee thanks the minister for this response. The committee notes the minister's advice that, as there is often great uncertainty during times of emergency situations, and noting the expiry or dissolution of Parliament shortly before a writ is issued for an election, it is necessary and appropriate to provide the minister with a discretionary power to add further Commonwealth legislation to the definition of Commonwealth emergency law by delegated legislation to support the successful operation of federal elections in emergency situations.

2.28 The committee also notes the minister's advice that further guidance is not required as to the circumstances when the power in proposed subsection 396(9) should be exercised, noting that such specification would only be effective for Commonwealth laws that enable the declaration of an emergency and that this legislative instrument will be subject to parliamentary scrutiny.

2.29 The committee reiterates its scrutiny view that significant matters relating to the conduct of elections should be included in primary legislation, unless a sound justification is provided for the use of delegated legislation. In this instance, while the committee acknowledges the minister's advice in relation the appropriateness of utilising delegated legislation, it remains unclear to the committee why at least high-level guidance as to when additional legislation can be specified by legislative instrument cannot be included in the primary legislation.

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

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

Migration Amendment (Protecting Migrant Workers) Bill 2021

Purpose	This bill seeks to the *Migration Act 1958* to introduce new offences and related civil penalty provisions for employers, labour hire intermediaries and other persons in the employment chain who coerce or exert undue influence or undue pressure on a non-citizen to accept or agree to an arrangement in relation to work: • involving a breach of a work-related condition applying to the non-citizen; or • to satisfy a work-related visa requirement; or • to avoid an adverse effect on the non-citizen's immigration status.
Portfolio	Home Affairs
Introduced	House of Representatives on 24 November 2021
Bill status	Before the House of Representatives

Procedural fairness—right to a fair hearing[16]

2.32 In *Scrutiny Digest 18 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to provide that proposed Subdivision E of Division 12 of Part 2 of the *Migration Act 1958* (Migration Act) and sections 494A and 494D of that Act, in so far as they relate to proposed Subdivision E, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with, including why the level of flexibility traditionally applied by the courts in relation to natural justice is not sufficient in this instance.[17]

Minister's response[18]

2.33 The minister advised:

16 Schedule 1, item 9, proposed section 245AYK. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 18-20.

18 The minister responded to the committee's comments in a letter dated 14 December 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

The Migration Amendment (Protecting Migrant Workers) Bill 2021 has been introduced to give effect to the Government's response to recommendations made by the Migrant Workers' Taskforce. The amendments in the Bill will strengthen the legislative framework in the *Migration Act 1958* (the Migration Act) to protect non- citizen workers from unscrupulous practices in the workplace.

The amendments in Part 2 of the Schedule to the Bill will insert new Subdivision E at the end of Division 12 of Part 2 of the Migration Act. New Subdivision E establishes a power for the Minister to declare a person to be a prohibited employer. A person can only be declared a prohibited employer if they are subject to a 'migrant worker sanction' - that is, where they are:

- convicted of a work-related offence under the Migration Act;
- the subject of a court order for contravention of either a work-related provision of the Migration Act, or certain remuneration-related civil remedy provisions of the *Fair Work Act 2009*; or
- the subject of a bar, as an approved work sponsor, under the Migration Act's Sponsorship Framework.

Given the consequences of being declared a prohibited employer, it is appropriate that new Subdivision E includes provisions to ensure that procedural fairness is afforded consistently in all cases.

New Subdivision E balances the rights and interests of the person being considered for declaration as a prohibited employer (including the right to be heard before a declaration is made) and the need to ensure serious matters concerning the mistreatment of migrant workers are dealt with promptly. The statutory processes in Subdivision E do not abrogate the affected person's access to procedural fairness and a fair hearing. Instead, Subdivision E - and particularly new sections 245AYG and 245AYK - will guarantee that when a person is being considered for declaration as a prohibited employer, standard processes will be followed, and standard timeframes will apply.

If a person is being considered for declaration as a prohibited employer, new section 245AYG will require the Minister to give that person written notice that the Minister proposes to make a declaration. This notice must include the reasons for the proposed declaration. Section 245AYG does not seek to exclude the disclosure of adverse information from this requirement, where it is necessary to assure fairness to the affected person.

Section 245AYG also requires the Minister to invite the person to make a written submission, setting out reasons why the Minister should not make the declaration. The provision sets a minimum period of 28 days for the affected person to respond, and flexibility for the Minister to specify a longer period. This ensures that the affected person has an opportunity, and a reasonable period of time, to consider and respond to the Minister. Section 245AYG clearly establishes a requirement for the Minister to

> consider any written submission made by the affected person under this section.
>
> The inclusion of new section 245AYK is appropriate and necessary as part of this framework to support section 245AYG. New section 245AYK is modelled on existing provisions in the Migration Act, such as sections 51A, 97A and 118A, which support similar statutory procedural fairness processes. More broadly, the inclusion of section 245AYK in Subdivision E aligns with the approach adopted in other Commonwealth Acts.
>
> New subsection 245AYK(1) makes clear that where provisions in new Subdivision E set out processes that deal with procedural fairness, those processes must be followed. The express reference in new subsection 245AYK(2) to current sections 494A to 494D makes clear that those sections are relevant in considering how the Minister may provide documents under Subdivision E to a person or their authorised recipient, and when a person is taken to have received a document from the Minister. While sections 494A to 494D would apply in relation to new Subdivision E even without new subsection 245AYK(2), this provision puts it beyond doubt.
>
> Relevantly, Subdivision E also provides for independent merits review through the Administrative Appeals Tribunal of a decision to make a declaration. Judicial review is also available; in which case, it would be open to the court to consider matters relating to procedural fairness and the natural justice hearing rule more broadly.
>
> The processes in Subdivision E will ensure fairness is at the centre of any decision-making before a person is declared to be a prohibited employer, while also addressing the uncertainties that may flow from continually evolving common law conceptions of natural justice. This clarity is important for both the affected person and the decision-maker.

Committee comment

2.34 The committee thanks the minister for this response. The committee notes the minister's advice that proposed Subdivision E does not abrogate a person's right to procedural fairness and a fair hearing. Rather, the minister advised that proposed Subdivision E will guarantee that when a person is being considered for declaration as a prohibited employer, standard processes will be followed and standard timeframes will apply. The minister advised that, given the consequences of being declared a prohibited employer, it is appropriate that proposed Subdivision E includes provisions to ensure that procedural fairness is afforded consistently in all cases. The minister advised that proposed Subdivision E will ensure fair decision-making is maintained, while also addressing the uncertainties that may flow from continually evolving common law conceptions of natural justice.

2.35 In this regard, the minister advised that several elements of procedural fairness are retained under proposed Subdivision E. For example, the minister advised that when it is proposed to declare a person to be a prohibited employer the minister

is required to give that person written notice that the minister proposes to make the declaration, including reasons for the proposed decision. The minister advised that proposed section 245AYG does not seek to exclude the disclosure of adverse information from this requirement where it is necessary to assure fairness to the affected person. In addition, the minister advised that affected persons will be invited to make a written submission setting out why the minister should not make a decision and that the minister is required to consider such a submission.

2.36 The minister further advised that proposed section 245AYK is modelled on existing provisions within the Migration Act and that independent merits review and judicial review is available in relation to a decision made under proposed Subdivision E.

2.37 While acknowledging this advice, the committee remains of the view that proposed Subdivision E does, at least to some extent, abrogates a person's right to procedural fairness and a fair hearing because proposed section 245AYK limits the scope of the natural justice hearing rule to the matters set out within proposed Subdivision E and to sections 494A and 494D of the Migration Act, in so far as they relate to proposed Subdivision E. The committee reiterates its consistent scrutiny view that procedural fairness is a fundamental common law right that should only be abrogated in limited circumstances.

2.38 The committee does not consider that consistency with existing legislation is a sufficient justification for limiting a person's right to procedural fairness. In addition, a desire for administrative certainty is generally not a sufficient justification for limiting fundamental common law rights. It is not clear to the committee from the minister's explanation how or why it is important to ensure clarity for an affected person by limiting their right to procedural fairness. The committee notes in particular that the principles of procedural fairness are well-established and that the matters raised by the minister as to consistency of the application of procedural fairness are matters that could be appropriately considered by the courts without limiting a person's right to procedural fairness within the bill.

2.39 The committee also notes that the minister's response does not comprehensively address why it is necessary to exclude certain aspects of the natural justice hearing rule beyond stating a general desire for prompt decision-making and administrative certainty. The committee therefore does not consider that the minister has adequately addressed the committee's scrutiny concerns.

2.40 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that proposed Subdivision E of Division 12 of Part 2 of the *Migration Act 1958* and sections 494A and 494D of that Act, in so far as they relate to proposed Subdivision E, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *National Disability Insurance Scheme Act 2013* to implement significant improvements for participants, their families and carers by reducing red tape, increasing flexibility and clarifying timeframes for decision-making by providing for the Participant Service Guarantee.
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives on 28 October 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[19]

2.41 In *Scrutiny Digest 17 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave key details in relation to the implementation of the Participant Service Guarantee to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.[20]

Minister's response[21]

2.42 The minister advised:

Joint governance of the National Disability Insurance Scheme

The funding and governance of the National Disability Insurance Scheme (NDIS) is shared among the Commonwealth and all state and territory governments. Delegating certain details of the measures contained in the Bill to NDIS Rules ensures that state and territory governments are appropriately involved in determining the operation of those measures, in

19 Schedule 1, items 23, 24, 30, 50, 55 and 56, proposed sections 47A, 48, 50J, 204A and paragraphs 209(2A)(c) and (d). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 27-30.

21 The minister responded to the committee's comments in a letter dated 15 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

accordance with the consultation and agreement requirements set out in the *National Disability Insurance Scheme Act 2013* (the Act).

Section 209 of the Act prescribes requirements that must be met in order for all NDIS Rules to be made. Specifically, section 209 categorises NDIS Rules as either A, B, C or D, requiring various levels of consultation and agreement with states and territories. For example, Category D Rules require that the Minister consult with states and territories before making the NDIS Rules, whilst Category A Rules require unanimous agreement with all states and territories.

As set out in the explanatory memorandum to the Bill that led to the NDIS Act, the intention was that Category A Rules are those that relate to significant policy matters with financial implications for the Commonwealth and states and territories, or which interact closely with relevant state and territory laws.

Implementation of the Tune Review

It is both necessary and appropriate to implement key aspects of the Participant Service Guarantee (the Guarantee), and certain other measures contained in the Bill, through NDIS Rules. The Bill, and associated Rules, implement a number of recommendations of the 2019 Review of the Act conducted by Mr David Tune AO PSM (the Tune Review). The recommendations of the Tune review specifically included that the Guarantee and the circumstances for variations be legislated through NDIS Rules.

As the Tune Review stated (at paragraph 10.45) 'the NDIS as a system will be subject to continuous evolution. As a result, the Guarantee needs to be sufficiently flexible and responsive to prevailing circumstances as they evolve.' Accordingly significant aspects of the Guarantee are appropriately implemented through Rules.

The NDIS is still evolving, and itis crucial that the operation of certain aspects of the NDIS, such as reassessments and variations, be able to evolve in response. Prescribing certain matters in the NDIS Rules will enable changes to be made more readily, for example in response to recommendations made by the Commonwealth Ombudsman or on the basis of operational experience or feedback on the implementation of measures contained in the Bill.

High-level guidance

As noted above, the Committee has also sought my advice whether the bill can be amended to include at least high-level guidance in relation to these matters. High level guidance already exists in the Act and has been modified by the Bill to address matters raised through consultation. Section 4 of the Act already provides general principles guiding actions under the Act. Further, section 31 of the Act sets out principles relating to the plans that must be complied with so far as reasonably practicable. These overarching

> guiding principles will be complied with in relation to the matters identified by the Committee.
>
> As such, the Government believes that it is not desirable nor appropriate to provide other high-level guidance in the Bill.

Committee comment

2.43 The committee thanks the minister for this response. The committee notes the minister's advice that the funding and governance of the National Disability Insurance Scheme is shared among the Commonwealth and all state and territory governments and that delegating certain details to the NDIS Rules ensures that state and territory governments are appropriately involved in determining the operation of those measures, in accordance with the consultation and agreement requirements set out in the *National Disability Insurance Scheme Act 2013*.

2.44 The committee also notes the minster's advice that prescribing certain matters in the NDIS Rules will enable changes to be made more readily, for example in response to recommendations made by the Commonwealth Ombudsman or on the basis of operational experience or feedback on the implementation of measures contained in the bill.

2.45 While noting this advice, the committee reiterates that it has consistently drawn attention to framework provisions, 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. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's consistent scrutiny view is that significant matters, such as key details in relation to the implementation of the Participant Service Guarantee, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided.

2.46 The committee does not consider that the minister's advice has adequately justified why additional guidance regarding the implementation of the Participant Service Guarantee cannot be included on the face of the primary legislation. The committee has generally not considered a desire for administrative flexibility to be a sufficient justification of itself for leaving significant matters to delegated legislation.

2.47 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key details in relation to the implementation of the Participant Service Guarantee to delegated legislation.

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

National Health Amendment (Enhancing the Pharmaceutical Benefits Scheme) Bill 2021

Purpose	This bill seeks to amend Part VII of the *National Health Act 1953* to implement a range of measures, including changes to the operation of Statutory Price Reductions, changed price disclosure arrangements and a new stockholding requirement for certain medicines that are more susceptible to global medicines shortages.
Portfolio	Health
Introduced	House of Representatives on 28 October 2021
Bill status	Received the Royal Assent on 13 December 2021

Broad discretionary power

Instruments not subject to parliamentary disallowance[22]

2.49 In *Scrutiny Digest 17 of 2021* the committee requested the minister's advice as to why the bill proposes to provide the minister with a broad discretionary power to apply statutory price reductions and amend minimum stockholding obligations and to do so by way of written or notifiable instrument (noting that such instruments are not subject to disallowance).[23]

Minister's response[24]

2.50 The minister advised:

> The Bill provides for the continuation of statutory price reductions to Pharmaceutical Benefits Scheme (PBS) medicines under the *National Health Act 1953* (Act) which would otherwise cease on 30 June 2022 and amends their operation to close loopholes that have enabled some medicines to avoid statutory price reductions when others in the same circumstances have taken them. The Bill also provides for new price protections and

22 Schedule 1, item 28, proposed subsection 99ACB(6A); item 33, proposed subsection 99ACC(5C); item 51, proposed subsection 99ACD(7A); item 76, proposed subsection 99ACR(6); item 80, proposed subsection 99ADHB(6); item 82, proposed subsection 99ADHC(2); item 85, proposed subsection 104B(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 32-33.

24 The minister responded to the committee's comments in a letter dated 30 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

stockholding requirements for certain PB medicines that have, in recent years, been more susceptible to global medicines shortages.

Minimum stockholding obligations

I note that the Digest states that power to amend the minimum stockholding obligation is by way of written or notifiable instrument. I respectfully submit that the proposed power to alter the minimum stockholding obligation provided at subsection 99AEKC(2) of the Bill is by way of determination by legislative instrument.

Statutory price reductions

The Bill proposes to amend existing provisions in the Act that provide the Minister with discretion to determine that the approved ex-manufacturer price of a brand of a medicine is not to be reduced by a statutory price reduction, or is to be reduced by a lower amount than would otherwise apply, so that instead of being made by written instrument (as is the case now), they would be made by notifiable instrument. The Bill also proposes to introduce these discretions for statutory price reductions where it was previously not available (e.g. for combination flow-on statutory price reductions under section 99ACC of the Act). The Bill also proposes to continue the existing requirement that the Minister, when making such a determination, must take into account what the approved ex-manufacturer price would otherwise be if a determination were not made.

These are important powers to ensure that there is the ability to intervene in particular cases where a statutory price reduction would not be appropriate in the circumstances - such as where a statutory price reduction would result in the approved ex-manufacturer price of an important medicine being below an amount needed for a pharmaceutical company to secure supply. Under the Act currently, these decisions are not disallowable and, for the reasons outlined below, the Bill does not propose to make them disallowable.

In response to the Committees query as to why these determinations would be made by notifiable instrument, as opposed to a legislative instrument that would be subject to disallowance, the proposed instruments do not meet the test set out in subsection 8(4) of the *Legislation Act 2003* (the Legislation Act).

Subsection 8(4) provides that an instrument is a legislative instrument if:

(a) the instrument is made under a power delegated by the Parliament; and

(b) any provision of the instrument:

i. determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and

> ii. has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.
>
> Decisions to make a determination will be made on a case by case basis in relation to individual brands, or potentially small numbers of related brands, of a pharmaceutical company. In practice, consideration is given to exercising a Ministerial discretion on request from the pharmaceutical company for a brand about to take a reduction.
>
> The proposed determinations in the Bill would merely give effect to a legislative and policy outcome that is already provided for in legislation. The determinations would not seek to determine or alter rights, but ascertain how to fulfil those rights in a given circumstance and would not determine or alter the content of the law. They would instead determine, for particular brands of PBS medicines, that the approved ex-manufacturer price should not be reduced by a statutory price reduction, or should be reduced by a lesser amount than would otherwise apply.
>
> In deciding whether to exercise discretion for a particular brand, under both current and proposed arrangements, the Minister must consider what the approved ex-manufacturer price of the brand would otherwise be if the discretion were not exercised. This requirement is to ensure that, in deciding whether to make a determination, the Minister is aware of the impact that the statutory price reduction would otherwise have on the approved ex-manufacturer price of the brand.
>
> Under current and proposed arrangements, the Minister may also consider any other matters the Minister considers relevant. This is because consideration of requests from pharmaceutical companies to exercise Ministerial discretion can involve consideration of a broad range of matters including the impact on government expenditure on the PBS, broad issues of the sustainability of supply of PBS listed medicines, cost of goods for the medicine at the time the statutory price reduction is due to apply, and potential impacts on access to medicines by the public. In particular cases, advice on the exercise of the discretion may be referred for expert advice from the Pharmaceutical Benefits Advisory Committee due to the highly technical nature of the subject matter. The matters that are relevant to a decision to make a determination are broad and can vary significantly depending on the circumstances. The drafting of this provision is to ensure that legislation does not exclude any matters that should be relevant, or place inappropriate weight on matters that are not relevant, to a decision to make a determination in a given circumstance.
>
> The information considered can be highly technical and includes commercially sensitive information supplied by pharmaceutical companies on the basis that it is treated confidentially.
>
> For this and the above reasons, the determinations under the Act are not currently open to disallowance. If they were, it would risk statutory price reductions applying where important commercial and technical information

> that the Parliament would not be privy to would indicate that the reduction would not be appropriate - resulting in the approved ex-manufacturer prices of important medicines being reduced below an amount needed to secure supply. This could negatively impact patient access to necessary and life-saving treatments.

Committee comment

2.51 The committee thanks the minister for this response. The committee acknowledges the minister's advice that the power to amend the minimum stockholding obligation is by legislative, rather than notifiable, instrument. This power is therefore subject to parliamentary disallowance.

2.52 In relation to statutory price reductions, the minister advised that it is appropriate that determinations to vary a statutory price reduction are exercisable by notifiable instrument as the determinations are not legislative in nature. The minister advised that these determinations do not seek to determine or alter rights or determine or alter the content of the law. Rather, the minister advised that the determinations give expression to rights already included within the primary legislation. The minister advised that determinations are made in relation to individual brands, or to small groups of related brands of a pharmaceutical corporation.

2.53 The minister also advised that the matters that are relevant to a decision about whether or not to make a determination are broad and vary significantly depending on the circumstances. The minister advised that, as a result, the power to make the determinations is drafted intentionally broadly so as to capture these varying circumstances.

2.54 The minister further advised that the relevant considerations in making a determination to vary a statutory price reduction can be highly technical and include commercially sensitive information. The minister advised that, as a result, it is appropriate that these determinations not be subject to parliamentary disallowance. The minister advised that should these determinations be subject to parliamentary disallowance, statutory price reductions may apply in circumstances where commercial and technical information would indicate that such a reduction is in fact not appropriate. The minister advised that this could negatively impact patient access to necessary and life-saving treatments.

2.55 The committee thanks the minister for this detailed advice and notes that it would have been useful had the information provided by the minister been included in the explanatory memorandum to the bill.

2.56 At a general level, the committee notes that mere fact that a decision may be underpinned by scientific, technical, or commercially sensitive considerations is not a sufficient justification for exempting an instrument from the usual parliamentary disallowance process. Rather, exemptions from disallowance are only justified in exceptional circumstances. The committee expects the explanatory memorandum to a bill which includes instruments that are not subject to the usual disallowance process

to address the exceptional circumstances that justify that individual exemption. This issue has been highlighted recently in the committee's review into the *Biosecurity Act 2015*,[25] the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[26] and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.[27]

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

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25 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-44.

26 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

27 *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

Religious Discrimination Bill 2021

Religious Discrimination (Consequential Amendments) Bill 2021

Purpose	The Religious Discrimination Bill 2021 seeks to introduce federal protections to prohibit discrimination on the basis of a person's religious belief or activity in a wide range of areas of public life, including in relation to employment, education, access to premises, goods, services and facilities, and accommodation. The Religious Discrimination (Consequential Amendments) Bill 2021 seeks to amend the *Australian Human Rights Commission Act 1986* and other existing federal legislation to ensure that discrimination on the basis of religious belief or activity under the Religious Discrimination Bill is treated in the same manner as discrimination under the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1986*.
Portfolio	Attorney-General
Introduced	House of Representatives on 24 November 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation—publicly available policies[28]

2.58 In *Scrutiny Digest 18 of 2022* the committee requested the Attorney-General's advice as to:

- why the requirements for certain policies relevant to the application of discrimination law, including how the policies are to be made publicly available, have been left to delegated legislation; and
- whether the bill could be amended to include at least high-level guidance in relation to this matter on the face of the primary legislation.[29]

28 Subclauses 7(7), 9(7), 40(3) and 40(6) of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 25-27.

Attorney-General's response[30]

2.59 The Attorney-General advised:

> Under clauses 7, 9 and 40, entities that wish to use certain exceptions must have a publicly available policy. The Bill provides that regulations can be made to set out requirements with which a policy must comply. The purpose of the regulation making power is to ensure that guidance can be provided if necessary to address specific concerns or issues identified by stakeholders or the community when either developing policies or accessing or using policies prepared by a religious body.
>
> The requirements for a publicly available policy are based on the recommendations of the Religious Freedom Review. Relevantly, recommendation 5 provided that the Government should consider legislative amendments to ensure that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, in certain circumstances, provided that:
>
> - the discrimination is founded in the precepts of the religion;
> - the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced; and
> - the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.
>
> The Government considers that these are the kinds of matters that should be addressed in a publicly available policy required under clauses 7, 9 and 40.
>
> Noting the diversity of religious bodies that exist (including bodies that may be very small and not have a significant internet presence), the manner in which the policy is required to be made public has not been specified in the Bill. A policy may be made public through any appropriate means, such as being provided online at the point of application, or as part of a package of relevant material associated with a job advertisement, or by a printed copy being provided to a person who requests the policy.
>
> The requirement to have a written, publicly available policy increases certainty and transparency and ensures that prospective or existing employees as well as the general public would be able to ascertain and understand the position of a religious body in relation to the particular matter dealt with in the relevant provision of the Bill (ie employment, partnerships, or accommodation facilities).

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30 The minister responded to the committee's comments in a letter dated 20 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> Any guidance issued by regulations would be intended to assist religious bodies to achieve this goal.
>
> I do not consider that amendments to the Bill are necessary to provide further guidance. However, I will give consideration to updating the Explanatory Memorandum of the Bill to include further guidance consistent with the advice I have provided above.

Committee comment

2.60 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the purpose of the regulation-making powers provided for under clauses 7, 9 and 40 is to ensure that guidance can be provided in relation to the development, access and use of publicly available policies. The Attorney-General advised that this guidance would be intended to address specific concerns or issues identified by stakeholders or the community. The Attorney-General advised that the kinds of matters that should be addressed in such a policy are set out at recommendation 5 of the Religious Freedom Review. Recommendation 5 of that review states that the government should consider legislative amendments to ensure that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, in certain circumstances, provided that:

- the discrimination is founded in the precepts of the religion;
- the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced; and
- the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.

2.61 The Attorney-General further advised that any guidance issued by regulation would be intended to assist religious bodies to produce policies that increase certainty and transparency, and which assist future or current employees in understanding the position of religious bodies on a relevant matter.

2.62 The Attorney-General advised that the manner in which a policy is required to be made public has not been specified in the bill due to the diversity of religious bodies that exist within Australia.

2.63 While acknowledging the Attorney-General's advice in relation to the diversity of religious bodies in Australia, the committee has generally not taken a desire for administrative flexibility to be, of itself, a sufficient justification for the inclusion of significant matters in delegated legislation. It is not clear from the Attorney-General's explanation why at least high-level, inclusive guidance in relation to the requirements for publicly available policies that may be determined by regulation, including in relation to their availability, could not be included within the bill.

2.64 The committee's scrutiny concerns are heightened in this case given that, as the Attorney-General advised, the requirement to have a written, publicly available policy is an integral part of the new framework established by the bill, with such

policies intended to increase certainty and transparency and to ensure that prospective or existing employees as well as the general public would be able to ascertain and understand the position of a religious body in relation to the particular matters dealt with in the relevant provision of the bill, such as employment, partnerships, or accommodation facilities.

2.65 The committee thanks the Attorney-General for indicating that she would give consideration to the best manner of updating the explanatory memorandum to reflect the advice provided to the committee. In this regard, the committee requests that an addendum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable.

2.66 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the requirements for certain policies relevant to the application of discrimination law, including how the policies are to be made publicly available, to delegated legislation.

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

Significant matters in delegated legislation—overriding state or territory laws in relation to employment by religious educational institutions[31]

2.68 In *Scrutiny Digest 18 of 2022* the committee requested the Attorney-General's advice as to:

- why the power to prescribe certain state and territory laws under clause 11 is left to delegated legislation; and
- which state or territory laws, if any, are currently intended to be prescribed within regulations made under subclause 11(3).[32]

Attorney-General's response[33]

2.69 The Attorney-General advised:

> Article 13(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the liberty of parents to choose schools for their children in conformity with their own religious and moral convictions.

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31 Clause 11 of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, p. 27.

33 The minister responded to the committee's comments in a letter dated 20 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Article 18(4) of the International Covenant on Civil and Political Rights (ICCPR) provides that States Parties undertake to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Consistent with paragraphs 73 and 74 of the Statement of Compatibility of Human Rights for this Bill, the Government has given consideration to these Articles in drafting clause 11.

The Government considers that ensuring religious schools can continue to make employment choices that maintain the religious ethos of the school enables parents of faith to confidently make choices for the education of their children. Accordingly, clause 11 would allow religious educational institutions to make employment decisions that preference people of faith, but only in the circumstance where a State or Territory law was prescribed that was inconsistent with this provision. Specifically, subclause 11(2) gives the Minister the ability to make a legislative instrument to prescribe a state or territory law that:

- prohibits discrimination on the ground of religious belief or activity (see paragraph 11(3)(a)); and
- prevents religious bodies that are educational institutions from giving preference, in good faith, to persons who hold or engage in a particular religious belief or activity when engaging in conduct described in section 19 (about employment)(see paragraph 11(3)(b)).

At the time the Religious Discrimination Bill was introduced, all jurisdictions permitted religious educational institutions to preference in employment. The purpose of clause 11 is to preserve these exemptions, as provided in state and territory laws. The Government considered that it would only be necessary to prescribe a state or territory law if a jurisdiction enacted a law that removed or limited an existing religious exception that permits religious educational institutions to preference in employment. The Government does not consider that future amendment of the Religious Discrimination Bill to insert additional laws, if any, would be an effective mechanism to provide a timely response to any future laws enacted by jurisdictions. The criteria by which the power to prescribe a state or territory law would be exercised is clearly laid out in clause 11(3) of the Bill.

With the exception of the law noted below (which had not commenced at the time of the Bill's introduction to Parliament), the Government is not aware of any state or territory law that would satisfy the criteria set out in clause 11(3) of the Bill and does not propose to prescribe any state or territory laws by delegated legislation at this time.

Schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021 contains contingent amendments to insert a Victorian law, the *Equal Opportunity Act 2010*, into clause 11. As outlined in the commencement provisions in clause 2, the contingent amendments will only take effect

when both the Religious Discrimination Bill commences and the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (which amends the Victorian *Equal Opportunity Act 2010*) is enacted by the Victorian Parliament and commences.

Committee comment

2.70 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that, at the time the bill was introduced into Parliament, all states and territories permitted religious educational institutions to preference people of faith in employment. The Attorney-General advised that the purpose of clause 11 is to preserve this state of affairs. Accordingly, the Attorney-General advised that there is currently no intention to prescribe any state or territory laws under clause 11. The Attorney-General advised that it would only be necessary to prescribe a state or territory law if a jurisdiction enacted a law that removed or limited an existing religious exception that permits religious educational institutions to preference in employment. The Attorney-General advised that not including a delegated legislation-making power within clause 11 would prevent timely action from being taken in the event that a state or territory did enact such a law.

2.71 While noting this advice, the committee reiterates its scrutiny concerns regarding the inclusion of a power to prescribe state or territory laws for the purposes of clause 11. The committee maintains its consistent scrutiny view that significant matters, such as key details relating to the application of discrimination law should be included in primary legislation.

2.72 Additionally, the committee notes that clause 12 of the bill provides that a statement of belief is not discrimination for the purposes of the Acts listed at paragraph 12(1)(a) and that a statement of belief does not contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas). Paragraph 12(1)(c) provides that a statement of belief does not, in and of itself, contravene a provision of a law prescribed by the regulations. Noting the significance of the power to prescribe additional laws for the purposes of clause 12, the committee has scrutiny concerns regarding the inclusion of the regulation-making power at paragraph 12(1)(c) of the bill.

2.73 The committee considers that overriding or altering the effect of a law duly passed by a state parliament is a particularly significant matter that should not be dealt with by way of executive-made law.

2.74 Moreover, in this instance, the committee's concerns are further heightened given that the operation of clauses 11 and 12 appear to be uncertain. Clause 11 appears to alter the application of a prescribed state or territory law by providing that a religious body that is an educational institution does not contravene a state or territory law in certain circumstances. Clause 12 appears to alter the application of Commonwealth, state and territory laws by providing that a statement of belief, in and of itself, does not:

- constitute discrimination for the purposes of the laws listed at proposed paragraph 12(1)(a); or
- contravene a provision of a law prescribed by the regulations for the purposes of proposed paragraph 12(1)(c) (which may include state laws).

2.75 The committee notes that evidence presented to other parliamentary committees has demonstrated that it is unclear whether the Commonwealth Parliament has the power to alter the application or effect of a state law in this manner.[34]

2.76 The committee thanks the Attorney-General for indicating that she would give consideration to the best manner of updating the explanatory memorandum to reflect the advice provided to the committee. In this regard, the committee requests that an addendum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable.

2.77 In relation to clause 11, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving to delegated legislation the prescription of which state and territory laws relating to employment by religious educational institutions will be overridden by Commonwealth law.

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

2.79 In addition, the committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to leave the power to prescribe additional laws for the purpose of clause 12 (statements of belief) to delegated legislation.

Significant matters in delegated legislation—general exception for acts done in direct compliance with certain Commonwealth, state and territory laws[35]

2.80 In *Scrutiny Digest 18 of 2022* the committee requested the Attorney-General's advice as to:

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34 Professor Anne Twomey, Parliamentary Joint Committee on Human Rights, Inquiry into the Religious Discrimination Bill 2021 and related bills, Submission 47, December 2021, pp. 4-5; Professor Nicolas Aroney, Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Religious Discrimination Bill 2021, Religious Discrimination (Consequential Amendments) Bill 2021 and Human Rights Legislation Amendment Bill 2021 [Provisions], Submission 145, pp. 3-4.

35 Clause 37 of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- why the power to exclude certain Commonwealth, state and territory laws from being exempt from the provisions of the bill is left to delegated legislation; and
- whether the bill could be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.[36]

Attorney-General's response[37]

2.81 The Attorney-General advised:

> As noted by the Committee, clause 37 provides a general exception from the prohibition on discrimination for acts done in compliance with certain Commonwealth, state and territory legislation, provided those laws are not prescribed by the regulations.
>
> The Bill does not generally intend to override or interfere with state or territory legislation. Clause 68 explicitly provides that this Bill is not intended to exclude or limit the operation of a state or territory law, to the extent that the law is capable of operating concurrently with this Bill.
>
> The Government is not currently aware of any further areas in Commonwealth, state and territory laws under which a particular issue would arise that should be addressed in this legislative package, beyond those laws already expressly dealt with by Religious Discrimination (Consequential Amendments) Bill 2021.
>
> Nonetheless, it is important to ensure that a person acting in compliance with a Commonwealth, state or territory law does not inadvertently, and through no fault of their own, engage in conduct that may be unlawful discrimination under this Bill. Accordingly, clause 37 provides a general exception from the prohibition on discrimination for acts done in direct compliance with certain Commonwealth, state and territory legislation.
>
> However, should such a law become apparent, it is important for the Bill to include an avenue to continue to ensure individuals are adequately protected from discrimination on the basis of religious belief or activity (for example, in the event that a law was passed which authorised or required such discriminatory conduct). Accordingly, the Bill provides a regulation-making power to prescribe a Commonwealth law under paragraph 37(1)(b), or a state or territory law under paragraph 37(3)(b), to resolve any conflicts that may arise by excluding those laws from the general exemption under clause 37.

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36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 28-29.

37 The minister responded to the committee's comments in a letter dated 20 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> Although it would technically be possible to address such conflicts through amendments to the primary legislation as they arise, it is my view that these matters are more appropriately dealt with through regulations. This will ensure a timely response to resolving issues that are consistent with the established purposes of the Bill, noting any regulations will still be open to Parliamentary scrutiny and disallowance, as appropriate.
>
> This is consistent with the approach in existing Commonwealth anti-discrimination law, being:
>
> - *Disability Discrimination Act 1992*, section 47
> - *Age Discrimination Act 2004*, section 39
> - *Sex Discrimination Act 1984*, section 40.
>
> I will give consideration to the best manner of clarifying these issues by amending the Explanatory Memorandum of the Bill to include further guidance, consistent with this advice.

Committee comment

2.82 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that there is currently no intention to prescribe any Commonwealth, state or territory laws under clause 37. The Attorney-General advised that paragraphs 37(1)(b) and 37(3)(b) are intended to resolve any conflicts that may arise in the future, by providing an avenue to exclude future laws from the general exemption that is provided under clause 37. The Attorney-General advised that addressing this issue through delegated legislation is appropriate as it ensures that conflicts can be dealt with in a timely manner. The Attorney-General advised that this approach is consistent with other delegated legislation-making powers within existing Commonwealth anti-discrimination law.

2.83 While acknowledging this advice, the committee notes that it does not generally consider either a desire for administrative flexibility or consistency with existing legislation to be a sufficient justification for including significant matters in delegated legislation. Moreover, as noted above, the committee considers that overriding or altering the effect of a state law is a significant matter which is more appropriately dealt with in primary legislation.

2.84 The committee thanks the Attorney-General for indicating that she would give consideration to the best manner of updating the explanatory memorandum to reflect the advice provided to the committee. In this regard, the committee requests that an addendum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable.

2.85 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving a broad power to exclude certain Commonwealth, state and territory laws from being exempt from the provisions of the bill to delegated legislation.

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

Broad discretionary power[38]

2.87 In *Scrutiny Digest 18 of 2022* the committee requested the Attorney-General's advice as to:

- why it is considered necessary and appropriate to provide the Commission with a broad power to grant, vary or revoke exemptions to Divisions 2 or 3 of the bill under clauses 44 and 47;
- why it is considered necessary and appropriate to provide the Minister with a broad power to vary or revoke exemptions to Divisions 2 or 3 of the bill under clause 47; and
- whether the bill can be amended to include guidance on the exercise of the power on the face of the primary legislation, noting the potential for a broad, unconstrained exemption power to undermine the religious discrimination framework.[39]

Attorney-General's response[40]

2.88 The Attorney-General advised:

> Part 7 of the Religious Discrimination Bill 2021 confers functions on the Australian Human Rights Commission in relation to discrimination on the ground of religious belief or activity. I note the Committee's observations regarding the granting of temporary exemptions by the Commission (clause 44) and the power for the Commission or Minister to vary or revoke such an exemption (clause 47). As the Committee is aware, these functions are consistent with the functions conferred on the Commission by existing Commonwealth anti-discrimination law - see:
>
> - *Disability Discrimination Act 1992*, section 55.
> - *Age Discrimination Act 2004*, section 44.
> - *Sex Discrimination Act 1984*, section 44.

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38 Clauses 44 and 47 of the Religious Discrimination Bill 2021. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 29-30.

40 The minister responded to the committee's comments in a letter dated 20 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

These Acts have not set out in detail the criteria or procedures that the Commission should use in considering applications for temporary exemption. These provisions are instead drafted to provide flexibility and recognise that, in particular circumstances, conduct which would otherwise be unlawful discrimination should be permitted on a temporary basis. This may occur in the course of making temporary, reasonable adjustments. For example, an exemption might be given in circumstances where there is uncertainty about whether a beneficial measure falls within the positive discrimination exemption.

Any such exemptions under the Religious Discrimination Bill 2021 must be made publicly available on the Federal Register of Legislation, and are intentionally time-limited – accordingly, it would not be fitting for such measures to be addressed through the primary legislation.

Subclause 47(1) specifies that the variation or revocation of a temporary exemption by the Commission or the Minister must be done by notifiable instrument. This ensures that the public is aware of any amendments to, or revocations of, existing temporary exemptions. As outlined in the Explanatory Memorandum, it is intended that such an instrument detail the reasons for revoking or varying the exemption. The ability of the Commission or the Minister to revoke or vary an exemption is an additional safeguard to ensure exemptions are not used inappropriately, beyond a necessary time limit, or in circumstances where other measures should be used (for example, a subsequent amendment to the primary legislation the renders the temporary exemption obsolete).

Additionally, clause 48 provides that a person affected by a decision under subdivision C (relating to exemptions granted by the Commission) may seek a review of that decision by the Administrative Appeals Tribunal – this includes the granting of an exemption under clause 44 and the variation or revocation of an exemption under clause 47.

These conditions ensure that the Commission's discretion is appropriately limited, transparent, subject to review and governed by legality and due process.

The Australian Human Rights Commission currently maintains public guidance on temporary exemptions provisions under the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004*. This guidance material notes that, in granting relevant exemptions in response to an application, the Commission will consider matters including:

- whether the circumstances are covered by the relevant Act
- whether any of the permanent exemptions in the relevant Act apply;
- whether the circumstances can be brought within any 'positive discrimination' or 'special measures' provision of the relevant Act; and

> - (currently in relation to the Disability Discrimination Act only) whether any defences to the Act apply.
>
> Upon enactment of the Religious Discrimination Bill, my Department will support the Australian Human Rights Commission in the development of similar guidance material as appropriate.
>
> I will also give consideration to the best manner of updating the Explanatory Memorandum of the Bill to include further guidance, consistent with the above advice.

Committee comment

2.89 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the exemption powers conferred on the Commission under clauses 44 and 47 of the bill are consistent with existing Commonwealth anti-discrimination law. The Attorney-General advised that the criteria or procedures that the Commission should use in considering applications for these other exemption powers are also not set out in detail in the primary legislation.

2.90 In addition, the Attorney-General advised that it would not be appropriate to include guidance within the bill as to the use of the powers under clauses 44 and 47 because exemptions are time-limited and must be made publicly available on the Federal Register of Legislation once granted. Finally, the Attorney-General advised that a decision to grant, vary or revoke an exemption is subject to review by the Administrative Appeals Tribunal and that, where appropriate, guidance material will be developed in relation to the use of the exemptions powers provided under the bill, consistent with the approach taken in other Commonwealth anti-discrimination law.

2.91 While acknowledging this advice, the committee has not generally considered consistency with existing legislation to be a sufficient justification for the inclusion of broad discretionary powers within a bill. It is not clear to the committee from the Attorney-General's explanation why further criteria as to the use of the exemptions powers under clause 44 and 47 could not be included within the bill.

2.92 Moreover, while welcoming the time-limited nature of exemptions granted under the bill, the committee notes that it appears that there is no restriction on the ability of the Commission to renew an exemption indefinitely and there is no restriction on the period of the exemption being varied by the Commission or the Minister under clause 47 of the bill. In addition, the committee notes that the broad ministerial power to vary or revoke exemptions at clause 47 is unique to the bill and is not included within existing Commonwealth anti-discrimination law.

2.93 Finally, the committee notes that notification requirements included within existing Commonwealth anti-discrimination law are not found in the bill. Comparable exemptions powers require the Commission to publish a notice after it makes a decision in relation to an application for an exemption setting out the Commission's findings on material questions of fact, the evidence relied upon in coming to a decision,

the reasons for the decision and a statement outlining the possibility of AAT review.[41] While the committee acknowledges that some level of transparency is provided by the requirement that exemptions under clause 44 and variations and revocations under clause 47 be by notifiable instrument, the committee does not consider that this level of transparency is equivalent to that provided within existing Commonwealth anti-discrimination law. The committee also acknowledges the Attorney-General's advice that it is intended that relevant notifiable instruments will detail the reasons for revoking or varying an exemption; however, the committee notes that this requirement is not set out on the face of the bill.

2.94 The committee thanks the Attorney-General for indicating that she would give consideration to the best manner of updating the explanatory memorandum to reflect the advice provided to the committee. In this regard, the committee requests that an addendum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable.

2.95 The committee requests the Attorney-General's further advice as to whether the bill could be amended to:

- **provide high-level guidance in relation to the circumstances in which the ministerial variation and revocation power at clause 47 may be invoked;**
- **clarify whether the variation power may be utilised to extend the period of an exemption beyond 5 years; and**
- **include a requirement that the Commission or minister must, consistent with section 46 of the *Age Discrimination Act 2004,* section 57 of the *Disability Discrimination Act 1992* and section 46 of the *Sex Discrimination Act 1984,* publish within a month of an exemption decision, or a variation or revocation decision, a notice setting out:**
  - **the Commission or minister's findings on material questions of facts in relation to the decision;**
  - **the evidence on which those findings were based;**
  - **the reasons for the decision; and**
  - **the fact that an application may be made to the Administrative Appeal Tribunal for a review of the decision; or**
- **alternatively, specify that the above information must be included within the relevant notifiable instrument made under subclause 44(1) or 47(1).**

41 *Age Discrimination Act 2004,* section 46; *Disability Discrimination Act 1992,* section 57; *Sex Discrimination Act 1984,* section 46.

Broad delegation of administrative power[42]

2.96 In *Scrutiny Digest 18 of 2022* the committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of allowing the powers and functions of the Commission or the Commissioner to be delegated to any staff member of the Commission or to any other person or body of persons.[43]

Attorney-General's response[44]

2.97 The Attorney-General advised:

> As noted above, the Religious Discrimination Bill 2021 confers functions on the Australian Human Rights Commission in relation to discrimination on the ground of religious belief or activity.
>
> These functions are conferred on the Commission, rather than the Religious Discrimination Commissioner. This reflects the approach in existing anti-discrimination legislation. The purpose of the delegation power is to ensure that the Commission may delegate such functions to the as necessary to best enable the Commission to carry out the wide range of functions conferred on it.
>
> It is anticipated that powers would be delegated to appropriate senior officers in the Commission. However, there are circumstances where the Commission may consider it necessary to delegate certain functions to a person or body external to the Commission, such as a barrister, where there may be a conflict of interest within the Commission.
>
> This power is consistent with delegation powers in existing federal anti-discrimination legislation - see:
>
> - *Disability Discrimination Act 1992*, section 121.
> - *Racial Discrimination Act 1975*, section 40.
> - *Age Discrimination Act 2004*, section 55.
> - *Sex Discrimination Act 1984*, section 104.

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42 Subclause 69(1), and 69(2) of the Religious Discrimination Bill 2021; Schedule 1, item 4, proposed paragraph 8(1)(h) of the Religious Discrimination (Consequential Amendments) Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 30-31.

44 The minister responded to the committee's comments in a letter dated 20 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

- *Australian Human Rights Act 1986*, section 19.

I will give consideration to the best manner of updating the Explanatory Memorandum of the Bill to include further guidance on this provision – in particular, in relation to the kinds of persons to whom authority may be delegated.

Committee comment

2.98 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the purpose of the delegation power is to ensure that the Commission may delegate such functions as necessary to best enable the Commission to carry out the wide range of functions conferred on it. The Attorney-General advised that the provision is consistent with delegation powers in existing Commonwealth anti-discrimination legislation.

2.99 While noting this explanation, the committee has generally not accepted consistency with existing legislation to be a sufficient justification for allowing a broad delegation of administrative powers to a large class of persons. The committee therefore continues to have scrutiny concerns given the breadth of the power conferred by clause 69 of the bill and existing section 19 of the *Australian Human Rights Act 1986,* including providing the Commission or the Commissioner with the power to confer functions or powers on *any* staff member or other person or body of persons.

2.100 The committee thanks the Attorney-General for indicating that she would give consideration to the best manner of updating the explanatory memorandum to reflect the advice provided to the committee. In this regard, the committee requests that an addendum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable.

2.101 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the powers and functions of the Commission or the Commissioner to be delegated to any staff member of the Commission or to any other person or body of persons.

Immunity from civil liability[45]

2.102 In *Scrutiny Digest 18 of 2022* the committee requested the Attorney-General's advice as to why it is considered necessary and appropriate to provide the

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45 Subclause 72(2) of the Religious Discrimination Bill 2021; Schedule 1, item 4, proposed paragraph 8(1)(h) of the Religious Discrimination (Consequential Amendments) Bill 2021. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Commission, the Commissioner, or another member of the Commission with civil immunity under clause 72 of the Religious Discrimination Bill 2021 and the Commissioner, or a person acting on their behalf, with civil immunity under section 48 of the *Australian Human Rights Commission Act 1986* so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.[46]

Attorney-General's response[47]

The Attorney-General advised:

> As noted by the Committee, section 48 of the *Australian Human Rights Act 1986* currently provides protection to the Commission, members of the Commission, and persons acting on its behalf, from civil actions in relation to conduct engaged in in good faith in the performance or exercise of their duties, functions or powers. This type of protection is common for independent statutory authorities. Many of these provisions in other Commonwealth legislation also contain an explicit 'good faith' limitation – however, others do not (for example, section 34(1) of the *Australian Postal Corporation Act 1989* (Cth)). Furthermore, some statutes expressly provide an immunity from certain criminal proceedings, in addition to civil proceedings.
>
> Clause 72 of the Religious Discrimination Bill will ensure that the Religious Discrimination Commissioner – like other Commissioners – is not liable for damages for the performance of their functions, or exercise of their powers, in good faith - see:
>
> - *Disability Discrimination Act 1992*, section 126.
> - *Racial Discrimination Act 1975*, section 45.
> - *Age Discrimination Act 2004*, section 58.
> - *Sex Discrimination Act 1984*, section 111.
>
> The Government considers it appropriate for the provision to be limited to civil liability, and only applicable when the duties, functions or powers of the Commission or the Commissioner are exercised in good faith. This is a necessary and appropriate protection to ensure that the Australian Human Rights Commission is able to confidently and effectively discharge its duties.

Committee comment

46 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 31-32.

47 The minister responded to the committee's comments in a letter dated 20 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

2.103 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the protection from civil liability afforded by clause 72 is only applicable when the duties, functions or powers of the Commission or the Commissioner are exercised in good faith, in order to ensure that the Commission is able to confidently and effectively discharge its duties. The Attorney-General advised that clause 72 of the bill and section 48 of the *Australian Human Rights Commission Act 1986* are consistent with other civil immunity provisions within Commonwealth legislation, including within existing Commonwealth anti-discrimination law. Finally, the Attorney-General advised that the relevant provisions are limited to civil liability.

2.104 The committee thanks the Attorney-General for indicating that she would give consideration to the best manner of updating the explanatory memorandum to reflect the advice provided to the committee. In this regard, the committee requests that an addendum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable.

2.105 In light of the detailed information provided the committee makes no further comment on this matter.

Reversal of the evidential burden of proof[48]

2.106 In *Scrutiny Digest 18 of 2022* the committee requested the Attorney-General'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*.[49]

Attorney-General's response[50]

2.107 The Attorney-General advised:

> Clause 74 makes it an offence for persons to disclose protected information obtained through the performance or exercise of functions or powers of the Commission.

48 Subclause 74(2) of the Religious Discrimination Bill 2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 32-33.

50 The minister responded to the committee's comments in a letter dated 20 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> This is to ensure the confidentiality of personal information provided to the Commission by prohibiting the disclosure of such information by Commission officials. This protects the privacy of individuals who make, or who are the subject of, complaints to the Commission and ensures that the complaints handling process is safe for individuals making complaints regarding sensitive personal matters.
>
> The note under subclause 74(2) clarifies that a defendant bears an evidential burden in relation to a matter in this subclause. This is consistent with 4.3.2 of the Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide), which provides that a defendant will usually only bear an evidential burden (rather than a legal burden) in relation to proof of a defence for particular offences. In particular, the Guide provides that offence-specific defences are appropriate in circumstances where an element of the offence is: 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 (4.3.1 of the Guide).
>
> In my view, this appropriately applies to issues established in subclause 74(2)(b), which establishes the particular evidential burden of proof involved in this defence – specifically, this provides that protected information may be disclosed in the performance of functions or exercise of powers under or in connection with this Bill or in accordance with an intergovernmental arrangement between the Commonwealth and a state body under section 16 of the AHRC Act. In my view, these are evidentiary matters that are uniquely suited to be addressed by the defendant.

Committee comment

2.108 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that that subclause 74(2) is consistent with the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The Attorney-General further advised that reversal of the evidential burden is appropriate as the relevant evidentiary matters are uniquely suited to be addressed by the defendant.

2.109 While noting this explanation, the committee does not consider that the explanation provided adequately justifies why it is proposed to use offence-specific defences in relation to the offence set out under clause 74 of the bill. The committee reiterates that the *Guide to Framing Commonwealth Offences*[51] 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:

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

- 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.[52]

2.110 From the justification provided, it is unclear to the committee that the defences in subclause 74(2) are matters that would be peculiarly within the knowledge of the defendant, noting that the elements of the defence seem to relate to questions of law. For example, whether disclosure of information is authorised by another Commonwealth law would appear to be a matter that the prosecution could readily ascertain.

2.111 Moreover, the committee does not consider it sufficient that the relevant matters are 'uniquely suited to be addressed by the defendant'. Rather, the committee considers that the matter must be, as a matter of course, *peculiarly* within the defendant's knowledge and not available to the prosecution.

2.112 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 subclause 74(2) in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

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

Veterans' Affairs Legislation Amendment (Exempting Disability Payments from Income Testing and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *Social Security Act 1991* to exempt certain Department of Veterans' Affairs payments known collectively as Adjusted Disability Pension (ADP) from the social security income test. This bill also seeks to repeal the collective definition of ADP from the *Veterans' Entitlements Act 1986* and as a result of the social security income test exemption removes the need for the Defence Force Income Support Allowance as social security payments will increase as a result of the exemption. This bill also repeals the operation and definition of the DFISA and DFISA Bonus from the *Veterans' Entitlements Act 1986* and consequentially removes all references to it from Commonwealth primary legislation.
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 21 October 2021
Bill status	Received the Royal Assent on 13 December 2021

Significant matters in delegated legislation[53]

2.113 In *Scrutiny Digest 17 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the key details of the non-liability rehabilitation pilot program to delegated legislation; and
- whether the bill could be amended to:
  - include at least high-level guidance regarding these matters on the face of the primary legislation; and
  - provide that proposed Part 2A of Chapter 3 is repealed after two years.[54]

53 Schedule 5, item 5, proposed section 53D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

54 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 40-41.

Minister's response[55]

2.114 The minister advised:

> *Why it is considered necessary and appropriate to leave the key details of the non-liability rehabilitation Pilot program to delegated legislation?*
>
> The Pilot will assist veterans by providing early access to a specified range of rehabilitation support and services. Currently, access to rehabilitation services funded by the Department of Veterans' Affairs is only available once the Australian Government has accepted liability for an injury or disease as being related to the person's military service, or while a claim for certain medical conditions is being determined.
>
> The Pilot will extend access to rehabilitation support without the requirement to have lodged a compensation claim. This would allow a new access pathway to be trialled, to help determine the effects of 'un-coupling' a compensation claim and undertaking rehabilitation on crucial matters such as veteran participation, their rehabilitation outcomes, and compensation claiming behaviours. The outcomes of the Pilot will inform future program design and service options not just on rehabilitation support, but in relation to other relevant veteran support and assistance.
>
> The Pilot is a voluntary program that will provide short-term psychosocial and vocational rehabilitation assistance to a veteran cohort who do not currently have access to this support. It has been funded for up to 100 participants per year.
>
> The intention is to test and evaluate this delivery approach, and build an evidence base on which program features would be beneficial and sustainable. As a previous Pilot resulted in less uptake than anticipated, I am conscious there may be a need to vary the administrative parameters of this Pilot to enable services to be refined and provided in a timely manner, and to ensure that they are directed at those most in need, and most likely to benefit from the Pilot.
>
> Flexibility in fine tuning the details of the Pilot as more information becomes available about the uptake of the program, accessibility, and suitability of rehabilitation support would allow the Military Rehabilitation and Compensation Commission to provide relevant, timely and much needed rehabilitation support to specified veterans.
>
> The proposed amendments specify the key features of the new rehabilitation support program such as a compensation claim not being required, and the categories of services that will be available under the Pilot. It is necessary the legislation provides appropriate flexibility to enable the Military Rehabilitation and Compensation Commission to respond to the

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55 The minister responded to the committee's comments in a letter dated 2 December 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> evidence and feedback that is gathered during the Pilot, and allow administrative matters to be amended if necessary.
>
> Delegated legislation would provide the necessary flexibility. The instrument is expected to provide for administrative matters, such as the duration of a program of support, the packaging of pre-approved services for streamlined delivery, and the financial limits. If these details were to be included in the primary legislation, the time necessary to amend the legislation would severely limit the ability of the Pilot to respond in a timely manner to such evidence and feedback.
>
> *Whether the Bill could be amended to include at least high-level guidance regarding these matters on the face of the primary legislation*
>
> In light of the comments above, I am of the view the Bill contains sufficient details of the persons who are entitled to the provision of rehabilitation under the Pilot, and the types of rehabilitation assistance that can be provided. I do not consider it appropriate for the Bill to be amended to include further guidance that could constrain the operation of the Pilot.
>
> The provisions included in the Bill contain limitations that are relevant to the authority and approved expenditure for the Pilot, and any further additions would restrict the flexibility required to ensure that the Pilot provides the best information to guide any future programs.
>
> *Whether the Bill could provide that proposed Part 2A of Chapter 3 is repealed after two years*
>
> I do not consider it necessary to amend the Bill to provide the part be repealed after two years. If the results of the Pilot indicate further evidence is required, or indicate ongoing provision of early rehabilitation is effective, the Department has the flexibility to continue to provide relevant and robust rehabilitation support to specified veterans beyond the two years. Thus, the primary legislation need not be amended to extend, if appropriate, the operation of the rehabilitation program support to the specified veterans beyond the two years.

Committee comment

2.115 The committee thanks the minister for this response. The committee notes the minister's advice that the non-liability rehabilitation pilot program is a voluntary program that will provide short-term psychosocial and vocational rehabilitation assistance to a veteran cohort who do not currently have access to this support. The minister advised that flexibility in fine tuning the details of the pilot as more information becomes available about the uptake of the program, accessibility, and suitability of rehabilitation support would allow the Military Rehabilitation and Compensation Commission to provide relevant, timely and much needed rehabilitation support to specified veterans.

2.116 The committee also notes the minister's advice that the proposed amendments specify the key features of the new rehabilitation support program such

as a compensation claim not being required, and the categories of services that will be available under the pilot. The minister further advised that it is necessary for the legislation to provide appropriate flexibility to enable the Military Rehabilitation and Compensation Commission to respond to the evidence and feedback that is gathered during the pilot, and to allow administrative matters to be amended if necessary.

2.117 The committee also notes the minister's advice that if the results of the pilot indicate further evidence is required, or indicate ongoing provision of early rehabilitation is effective, the department has the flexibility to continue to provide relevant and robust rehabilitation support to specified veterans beyond the two years.

2.118 The committee reiterates that it has generally not accepted a desire for administrative flexibility as a sufficient justification, of itself, for leaving significant matters to delegated legislation. 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. It remains unclear to the committee why further high-level guidance regarding the scope of the non-liability rehabilitation pilot program could not be provided on the face of the primary legislation.

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

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[2]

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

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*.

Chapter 4

Review of exemption from disallowance provisions in the *Biosecurity Act 2015*

Purpose of this chapter and background

4.1 This chapter comprises commentary on the appropriateness of provisions within the *Biosecurity Act 2015* (**Biosecurity Act**) that allow for delegated legislation to be exempt from parliamentary disallowance. This follows the committee's initial commentary on this issue, published in *Scrutiny Digest 7 of 2021*. As part of those initial comments, the committee requested advice from both the Minister for Agriculture and Northern Australia and the Minister for Health and Aged Care in relation to the committee's scrutiny concerns.[1] The committee has since received responses from both ministers.[2]

The committee subsequently held a private briefing with senior officials from the Department of Agriculture, Water and the Environment (**DAWE**) and the Department of Health (**DoH**), to discuss the committee's ongoing scrutiny concerns in relation to exemption from disallowance provisions within the Biosecurity Act. Questions on notice put to each department are published on the committee's website.[3]

4.2 This review was undertaken following a recommendation from the Senate Standing Committee for the Scrutiny of Delegated Legislation (**Delegated Legislation Committee**) in its *Interim report: Exemption of delegated legislation from parliamentary oversight*.[4]

The committee's default position on exemptions from disallowance

4.3 The committee's default position on exemptions from disallowance is set out in Chapter 4 of *Scrutiny Digest 7 of 2021*. A relevant extract is set out below:

> Section 1 of the Constitution vests legislative power in the Federal Parliament. Legislative scrutiny, including scrutiny of delegated legislation made by the Executive, is a core component of this central law-making role

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1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, p. 44, para 4.42.

2 Senate Standing Committee for the Scrutiny of Bills, Ministerial responses to the committee's review in Scrutiny Digest 7 of 2021, December 2021.

3 Senate Standing Committee for the Scrutiny of Bills, Private briefings.

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020.

of Parliament. Moreover, the system of responsible and representative government established by the Constitution requires the Parliament, as the representative branch of government, to hold the Executive to account. Exemptions from disallowance undermine the ability of Parliament to properly undertake its scrutiny functions and, therefore, have significant implications for both the system of responsible and representative government established by the Constitution and for the maintenance of Parliament's constitutionally conferred law-making functions. While it is well-established that Parliament may delegate its legislative functions to the Executive, and that this delegated legislation may be exempt from disallowance in certain exceptional cases, any exemption from disallowance should be considered in the context of its interaction with these twin considerations.

As a result, and in accordance with the committee's remit set out in standing order 24, the committee has consistently drawn attention to bills that seek to limit or remove appropriate parliamentary scrutiny. The committee considers that the default position should be that parliamentary oversight remains available for all delegated legislation unless there is a very strong reason for exempting a particular instrument or class of instruments from scrutiny.

The usual parliamentary disallowance process allows a House of the Parliament to disallow delegated legislation within 15 sitting days of it being tabled in that House. As this process is one of the primary means by which Parliament exercises control of its delegated legislative power, the committee expects the explanatory memorandum to a bill which includes an exemption from the usual disallowance process to address the exceptional circumstances that justify that exemption.[5]

4.4 The committee's scrutiny concerns will be heightened when an exempt instrument deals with significant matters, such as impacting upon an individual's personal rights or liberties, or confers a broad discretion on the decision-maker. Where there is an absence of alternative parliamentary scrutiny mechanisms or an absence of protections of individual rights, such as access to merits review or judicial review, the committee's significant concerns in relation to exemptions from disallowance will be further heightened.

4.5 The committee's scrutiny concerns will not be as acute when an instrument which is exempt from disallowance is subject to alternate parliamentary scrutiny processes, such as a requirement that the instrument does not come into effect until it has been approved by resolution of each House of the Parliament,[6] or is subject to other safeguards which limit discretion or protect against undue trespass to individual rights or liberties. Whether these alternative mechanisms or safeguards are sufficient

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, p. 34.

6 See, for example, subsection 10B(2) of the *Health Insurance Act 1973*.

will depend upon the individual circumstances of the case at hand, taking into account the appropriateness of the justification that is provided for the exemption, the type and scope of alternative mechanisms, and the extent of the limitation on Parliament's constitutional scrutiny role.

Exemptions from disallowance within the Biosecurity Act

4.6 A full list of provisions within the Biosecurity Act which exempt instruments from parliamentary disallowance is set out in Chapter 4 of *Scrutiny Digest 7 of 2021*.[7] The committee draws these provisions to the attention of senators pursuant to Senate standing orders 24(1)(a)(iv) and (v).

4.7 Several justifications have been provided for the exemption of instruments made under the Biosecurity Act from the usual parliamentary disallowance process. These justifications are found in the explanatory memorandum to the Biosecurity Bill 2014 (Biosecurity Bill), in other explanatory material prepared for amending bills and instruments made under the Biosecurity Act,[8] in correspondence provided to the committee, and during discussions at the committee's private briefing held on 17 November 2021.

4.8 This chapter addresses the following interrelated justifications for exempting instruments from the usual disallowance process:

> ***Justification 1:*** *Disallowance would be inappropriate because the relevant considerations are scientific and technical and should be shielded from the political process.*
>
> ***Justification 2:*** *Disallowance would be inappropriate because it would prevent the Commonwealth from taking fast and urgent action to manage biosecurity risks and to prevent significant consequences from occurring.*

4.9 The committee's response to each of these justifications is set out below.

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7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021,* Chapter 4, para 4.9.

8 See, for example, the explanatory memorandum for the Biosecurity Amendment (Clarifying Conditionally Non-prohibited Goods) Bill 2021; the explanatory statement for the Biosecurity (Conditionally Non-prohibited Goods) Determination 2021; the explanatory statement for the Biosecurity (First Point of Entry—Port of Brisbane) Amendment (2021 Measures No. 1) Determination 2021.

The committee's response to Justification 1—scientific and technical considerations

4.10 A distinction must be drawn between the appropriateness of delegating Parliament's legislative power to the executive and the appropriateness of further limiting parliamentary scrutiny over executive-made law once it has been made. Both departments advised that it was appropriate to delegate legislative power in relation to biosecurity instruments due to their scientific and technical nature. For example, the Minister for Agriculture and Northern Australia advised that:

> It is appropriate for Parliament to delegate the power to make instruments that are required to be based on technical and scientific decisions about the management of human biosecurity risk and biosecurity risk to the Director of Human Biosecurity or the Director of Biosecurity, respectively.[9]

4.11 While acknowledging this advice, the committee notes that the issue at hand is not whether it is appropriate for Parliament to delegate its law-making power to make instruments that contain scientific or technical subject matter. But, rather, whether Parliament should be precluded from disallowing an instrument on that basis.

4.12 The committee accepts that it may be appropriate to delegate law-making powers to the executive on the basis that the subject matter is technical and that the rule-making process should therefore involve a considerable level of input from experts within the executive. However, it is not clear to the committee from the justifications provided why instruments made by technical experts should subsequently be exempt from parliamentary oversight as a matter of course.

4.13 The committee acknowledges the Minister for Agriculture and Northern Australia's advice that it is appropriate to delegate law-making power to the executive in relation to these matters.

4.14 In relation to exemptions from disallowance, the explanatory memorandum to the Biosecurity Bill repeatedly justifies exemptions on the basis that instruments made under the Act are scientific and technical in nature and should be insulated from political considerations. This argument has subsequently been made in correspondence sent to the committee. For example, in relation to emergency declarations made under sections 443 and 475 of the Act, the Minister for Agriculture and Northern Australia advised that:

> Emergency declarations often also rely on technical and scientific assessment and are proportionate to the relevant biosecurity risks posed. Pests and diseases can spread rapidly and the ability to respond quickly to an emerging human biosecurity or biosecurity risk is a critical part of Australia's biosecurity framework. These instruments play a crucial role in that response and the potential for disallowance could lead to inadequate

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9 Senate Standing Committee for the Scrutiny of Bills, Ministerial responses to the committee's review in Scrutiny Digest 7 of 2021, December 2021, p. 2.

management of biosecurity risks. It is necessary and appropriate that these instruments be exempt from disallowance and should not be vulnerable to political considerations.[10]

4.15 While acknowledging this advice, the committee notes that 'political considerations' undertaken by Parliament are the basis upon which the constitutional system of representative government is upheld. Parliamentarians are the directly elected representatives of the people and political oversight of executive-made law is an important process by which a multiplicity of community views are reflected in Australian law, improving accountability and often the quality of the instrument itself. That the democratic process can improve, rather than detract from, decision-making is demonstrated by the Delegated Legislation Committee's observation that, through debate in the Senate, the disallowance process in recent years has resulted in multiple amendments to instruments or else in significant administrative changes.[11] These improvements include changes to technical aspects of instruments as a result of the scrutiny processes undertaken by the Delegated Legislation Committee. Meanwhile, instances of disallowance remain rare.[12]

4.16 It is also not clear to the committee why parliamentarians would be incapable of taking into account scientific and technical evidence when considering the appropriateness of an instrument. As noted above, it is often appropriate to delegate the making of technical instruments to the executive. However, it does not follow that such an instrument should subsequently be removed from parliamentary oversight through exemption to the usual disallowance process. Parliament and parliamentarians have access to considerable specialist expertise and parliamentarians regularly deal with legal, scientific and technical complexity while undertaking their law-making functions. In addition, parliamentarians are accountable to their electors in relation to how they exercise their law-making functions, including the power to disallow a legislative instrument and any resulting outcomes that flow from that disallowance. The committee considers that disallowance of an instrument that was well-supported by scientific and technical evidence is unlikely.

4.17 In addition, although the committee does not consider that scientific or technical decisions should be exempt from disallowance on that basis alone, the committee notes that decisions that can be said to be of a purely scientific or technical nature are rare. More typically, decisions grounded in scientific or technical evidence will also be made based on other factors. This is particularly the case in a law-making context where, even when a decision is purely scientific or technical in nature, the

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10 Senate Standing Committee for the Scrutiny of Bills, Ministerial responses to the committee's review in Scrutiny Digest 7 of 2021, December 2021, p. 3.

11 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report: Exemption of delegated legislation from parliamentary oversight*, March 2021, p. 44.

12 Between 2010 and 2019, of the thousands of pieces of delegated legislation tabled in the Parliament, only 17 were disallowed.

consequences of that decision may have much wider implications. In cases in which reasonable minds may differ as to the implications of a decision based on scientific or technical advice, it may be inappropriate to label the decision as merely scientific or technical in nature. The breadth contained in the terms 'scientific' and 'technical' demonstrates the ubiquitous nature of political considerations in law-making. 'Technical' in particular is an imprecise term which could be taken to include a wide variety of topics that are appropriate for parliamentary oversight and deliberation. For example, macro-economic considerations are highly technical and yet this is an area which is surely appropriate for parliamentary oversight and scrutiny. When an exemption is justified on the basis that the relevant considerations are scientific and technical in nature it is therefore necessary to examine the extent to which other considerations may be relevant.

4.18 Turning to the Biosecurity Act, the committee notes that in many cases it is not clear that the relevant decisions can be said to be of a purely scientific or technical nature. For example, the Minister for Agriculture and Northern Australia has advised that a determination under subsection 174(1) of the Biosecurity Act relating to conditionally non-prohibited goods relies on a technical and scientific assessment.[13] The explanatory memorandum similarly states that "the decision to determine … conditionally non-prohibited goods is a technical and scientific decision based on whether the biosecurity risk is able to be satisfactorily managed."[14] However, while such a decision may be based on scientific or technical evidence, there is nothing on the face of the Act to indicate that these decisions must be made on this basis alone.

4.19 When deciding whether to make a determination under subsection 174(1) the Director of Biosecurity and the Director of Human Biosecurity must conduct a risk assessment. When conducting this risk assessment, the appropriate level of protection (**ALOP**) for Australia must be applied. The ALOP for Australia is defined under section 5 as a "high level of sanitary and phytosanitary protection aimed at reducing biosecurity risks to a very low level, but not to zero".

4.20 In practice, the drafting of subsection 174(1) is such that a risk assessment conducted in relation to a conditionally non-prohibited goods determination may take into account a number of considerations over and above a merely scientific assessment of sanitary and phytosanitary risk. Moreover, a determination as to the appropriate risk level within the spectrum encompassed by the words "high level of sanitary and phytosanitary protection aimed at reducing biosecurity risks to a very low level, but not to zero" is one upon which reasonable minds may differ and, as such, is the kind of decision which should appropriately be exposed to parliamentary scrutiny. Indeed, explanatory statements to instruments amending the Biosecurity

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13 Senate Standing Committee for the Scrutiny of Bills, Ministerial responses to the committee's review in Scrutiny Digest 7 of 2021, December 2021, p. 3.

14 Explanatory memorandum, p. 151.

(Conditionally Non-prohibited Goods) Determination 2021 indicate that feedback received as part of consultation undertaken in relation to a determination made under subsection 174(1) is incorporated into the final form of the instrument, demonstrating that scientific and technical considerations may be as contested as other forms of consideration.[15]

4.21 When exercising their powers under subsection 174(1), the Director of Biosecurity, themselves not of necessity a technical expert, must have regard to the objects of the Biosecurity Act and must comply with directions given by the Agriculture Minister.[16] The objects of the Biosecurity Act, set out at section 4, comprise a variety of matters including to give effect to Australia's international obligations.[17] As with the application of the ALOP to a subsection 174(1) risk assessment, there is considerable scope within this requirement to encompass purely technical and scientific considerations alongside other considerations. Moreover, the Act does not provide any constraints limiting a ministerial direction to scientific or technical matters. Notably, the minister's broad discretionary power to give a direction is itself a non-disallowable instrument.[18]

4.22 In light of the above, the committee reiterates its comments that the mere fact that a decision may be based on scientific and technical grounds is not, of itself, a sufficient justification for an exemption from the usual disallowance process. The committee does not consider that the argument that an instrument should be shielded from political considerations is a convincing one.

The committee's response to Justification 2—fast and urgent action

4.23 Justification 2 is predicated on two main points of contention: that disallowance prevents urgent action from being taken and that permitting the usual disallowance process to apply to an instrument is not appropriate when disallowance may lead to significant consequences. The committee disagrees on both counts.

4.24 The explanatory memorandum to the Biosecurity Bill and subsequent arguments put to the committee focus extensively on the significant consequences that may occur should certain instruments made under the Biosecurity Act be disallowed. For example, in relation to the Governor-General's power to extend a

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15 See, for example, the explanatory statement for the Biosecurity (Conditionally Non-prohibited Goods) Amendment (Hitchhiker Pests) Determination 2021.

16 *Biosecurity Act 2015*, subsection 541(4).

17 *Biosecurity Act 2015*, paragraph 4(b).

18 *Biosecurity Act 2015*, section 543; Legislation (Exemptions and Other Matters) Regulation 2015, regulation 9, table item 2.

biosecurity emergency under section 444 of the Biosecurity Act, the explanatory memorandum to the Biosecurity Bill 2014 states:

> If an emergency declaration to extend the emergency period was disallowed, nationally significant biosecurity risks could go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's local industries, economy and the environment.[19]

4.25 As previously noted, the committee acknowledges the crucial role played by the Biosecurity Act in regulating significant threats to Australia's human, animal, plant, and environmental health.[20] However, the committee does not consider that the significance of these threats or their emergency nature is a sufficient justification for exempting an instrument from disallowance as a matter of course.

4.26 Should disallowance of a particular instrument be likely to lead to a particular 'threat or harm' to Australian interests, this is something that the Parliament could take into account in its deliberations. This is particularly so as parliamentarians are directly accountable to their electors in relation to how they exercise their law-making functions. The committee considers that it is unlikely that an instrument would be disallowed by the Parliament in circumstances where doing so would increase biosecurity threats to an unacceptable level. However, by guarding against this unlikely outcome, an exemption from disallowance is also removing the extrinsic benefits attached to the disallowance process and increased parliamentary scrutiny.

4.27 As a general principle, the committee considers that Parliament's oversight of Commonwealth law should be greater, not lesser, when the consequences of that law are significant. This is particularly so when the law will impact on individual rights or liberties as is the case in relation a number of exempt instruments made under the Biosecurity Act.[21] The committee notes that emergency-related instruments such as these are more likely to impact upon individual rights and liberties than instruments dealing with more 'routine' regulatory matters.

4.28 The risk that disallowance of an instrument may lead to significant consequences is in many ways a risk associated with lawmaking within Australia's system of representative government and applies equally to primary legislation which is subject at any time to amendment or repeal by the Parliament. The committee notes that if this justification was accepted as a general proposition, then any matter which could be considered to be of an emergency nature, or any measure designed to protect against significant consequences, could be routinely exempt from parliamentary scrutiny. This could conceivably include, for example, all legislation relating to matters

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19 Explanatory memorandum, p. 275.

20 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, p. 42.

21 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, pp. 36-38.

of national defence, customs, intelligence, and emergency services. Parliament's position as lawmaker-in-chief implies that not only is it appropriate for Parliament to deal with these significant matters, but that it is Parliament's fundamental constitutional role to do so.

4.29 In relation to the effect of the disallowance process on urgency, the committee reiterates its comments that the disallowable status of an instrument does not prevent urgent action being taken.[22] In particular, the committee notes that legislative instruments can commence immediately after they are registered, and that the disallowance of an instrument does not invalidate actions that were taken prior to the time of disallowance.

4.30 DAWE indicated that the disallowance period increases uncertainty for industry and government and that, as a result, an unresolved disallowance notice prevents urgent action being taken regardless of the fact that an instrument may commence immediately after registration. A notice of disallowance must be given within 15 sitting days of an instrument being tabled. The notice must then be resolved or withdrawn within 15 sitting days after the notice was given. In practice, this period may cover several months. DAWE has indicated that the uncertainty as to whether an instrument will be disallowed during this extended period prevents the government from acting decisively while the future of the legislative instrument remains in doubt.

4.31 The committee notes that there are ways of improving certainty over the status of a legislative instrument other than exempting that instrument from disallowance. For example, an instrument may specify that it does not come into effect until:

- it has been approved by resolution of each House of the Parliament; or
- the day immediately after the last day upon which a disallowance resolution could have been passed by a House of the Parliament; or
- a later day specified in the instrument.

4.32 DAWE stated that these alternative approaches are inappropriate in the context of the Biosecurity Act due to the emergency-nature of many of the legislative instruments made under the Act. For example, in response to questions on notice put to the department, DAWE stated that:

> … a delay in having certain instruments come into effect until the next parliamentary sitting or the expiry of the disallowance period would significantly impair the Commonwealth’s ability to respond quickly to biosecurity threats and events, as pests and diseases can spread and establish themselves within a very short period of time. For example, if foot-and-mouth disease (FMD) entered Australia, it could spread rapidly within the susceptible livestock population to multiple jurisdictions in a matter of

22 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, p. 41.

> weeks. Establishment could occur if the outbreak is not appropriately addressed. The cost of a FMD outbreak in Australia has been estimated at $51.8 billion over 10 years.[23]

4.33 The committee accepts that the alternative methods of preventing regulatory uncertainty outlined above may not be appropriate in some circumstances. As stated by DAWE, where immediate action is required to prevent the direct threat of a biosecurity risk, it is appropriate that the executive is able to take such immediate action. However, the committee notes that in such pressing circumstances it is unlikely that the government would not take immediate action under an instrument simply because the possibility of disallowance would lead to some measure of uncertainty about the future of the instrument. Where immediate action is not necessary the committee considers that the alternative methods outlined above are an appropriate way to ensure regulatory certainty while still maintaining parliamentary scrutiny over an instrument. Where immediate action is necessary then in most cases it is appropriate for the usual disallowance process to proceed with the degree of uncertainty that this entails.

4.34 While the committee acknowledges that the possibility of disallowance presents some degree of uncertainty for industry and government, the committee considers that this level of uncertainty is in many ways inherent to lawmaking within Australia's system of representative government. Both government and industry regularly deal with legislative and regulatory uncertainty in a multitude of contexts, including those of an emergency nature. In the context of industry, it is difficult to conceive of any legislative measure that does not impact upon commercial certainty in some way. While some degree of uncertainty exists in relation to the disallowance process, it is important not to overstate its significance. In this context the committee reiterates that it is unlikely that the Parliament would disallow an instrument well supported by scientific and technical evidence where the effect of disallowance would be immediate harmful consequences. The number of instruments to which a disallowance notice is attached is low and instances of disallowance themselves are rare. The committee reiterates the view of the Delegated Legislation Committee that:

> In practice, the disallowance procedure serves to focus the Parliament's attention on a small number of legislative instruments by providing opportunities for parliamentary debate, and promoting dialogue between the executive and legislative branches of government about the manner in which legislative powers delegated to the executive have been exercised.[24]

4.35 A balance must be struck between protecting against uncertainty and allowing parliamentary scrutiny over executive made law. As a general principle, the committee

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23 Senate Standing Committee for the Scrutiny of Bills, Responses to Questions on Notice from the Department of Agriculture, Water and the Environment, December 2021, pp. 2-3.

24 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 62.

does not consider that the difficulties associated with the small degree of uncertainty inherent in the disallowance process outweigh the significance of abrogating or limiting parliamentary oversight of executive made law by exempting an instrument from disallowance.

4.36 Finally, the committee notes that many of the non-disallowable instruments that may be made under the Biosecurity Act could not be reasonably classified as relating to emergency situations or requiring the taking of fast and urgent action. For example, section 524A of the Act provides that the Director of Biosecurity may determine a list of goods, or classes of goods, for the purposes of infringement notices. The effect of such a determination is that different payment periods or penalty units may be able to be included on an infringement notice in relation to those goods. While section 524A must relate to goods for which the Director of Biosecurity is satisfied there is a high level of biosecurity risk, it is not clear to the committee why the prescription of penalty unit amounts on infringement notice is of such an urgent nature that it justifies limiting democratic oversight of a law of the Commonwealth.

Concluding remarks

4.37 The committee reiterates its view that exemptions from disallowance are only justified in exceptional and limited circumstances. When an instrument-making power confers a broad discretion on the decision-maker, or where an instrument will, or may, deal with significant matters, such as impacting on an individual's rights or liberties, the committee's concerns in relation to an exemption from disallowance will be heightened.

4.38 This view is longstanding and is also reflected in a recent resolution of the Senate which emphasised the importance of the disallowance process to parliamentary scrutiny, including noting that exemptions from disallowance should be limited to cases where exceptional circumstances can be demonstrated and that any claim that circumstances justify exemption from disallowance will be subjected to rigorous scrutiny.[25]

4.39 The committee does not consider that the justifications provided in relation to provisions exempting delegated legislation made under the Biosecurity Act from disallowance adequately address the committee's scrutiny concerns.

4.40 Noting the continued emphasis and commitment of this committee, and the Senate as a whole, to ensuring that delegated legislation made by the executive is subject to appropriate parliamentary oversight, the committee's scrutiny view is that the Biosecurity Act should be amended to provide that instruments made under the Act are subject to disallowance.

25 *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

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Chair